

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2024

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

Decision (including any steps ordered)

1. The complainant has requested from the Cabinet Office a copy of the official document issued to ban the Tik-Tok application on government electronic devices.
2. The Cabinet Office refused to provide the requested information citing section 35(1)(b) (Ministerial communications) of FOIA.
3. The Commissioner's decision is that the withheld information is exempt under section 35(1)(b) but that the public interest balance favours disclosure of this information. He has also found the Cabinet Office in breach of section 17(1).
4. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the letter from the Chancellor of the Duchy of Lancaster to the Cabinet members.
5. The public authority must take these steps within 30 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 the Act and may be dealt with as a contempt of court.

Request and response

6. On 18 March 2023 the complainant wrote to the Cabinet Office and made the following request for information under FOIA:

“I am requesting the official document issued to ban the app TikTok on government electronic devices. The Cabinet Office announced that this ban has been made, and thus there must be an official document (howsoever called, eg. order, regulation, instruction, decision, etc.) by which the ban has been made. See the Cabinet Office's announcement: <https://www.gov.uk/government/news/tiktok-banned-on-uk-governmentdevices-as-part-of-wider-app-review>”
7. The Cabinet Office responded on 18 April 2023 confirming that it held the requested information and provided a link¹ to an official policy announcement by the Chancellor of the Duchy of Lancaster.
8. The complainant requested an internal review on 23 April 2023 contending that the information provided by the Cabinet Office was not the information he asked for.
9. The Cabinet Office provided its internal review on 24 July 2023 where it confirmed that it did hold the requested information but refused to provide it citing section 35(1)(b) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 21 August 2023 as he disagreed with the Cabinet Office's refusal to provide information he requested. He contended that in the first instance, the Cabinet Office provided him with a link to information which, although directly relevant, was not the information the complainant asked for and only in its internal review response, the Cabinet Office applied section 35(1)(b) to withhold the requested information.
11. The complainant therefore argued that the Cabinet Office's response cannot be deemed proper and valid which consequently means that the Cabinet Office failed to comply with section 10 of FOIA by not providing a timely response within 20 working days.

¹ <https://hansard.parliament.uk/commons/2023-03-16/debates/11814277-E4F7-4B0E-8D78-1C6881994F9E/SecurityOfGovernmentDevices>

12. The complainant is also dissatisfied with the length of time taken by the Cabinet Office to respond to his internal review request.
13. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office was correct to withhold the requested information under section 35(1)(b) and the time taken to process the request.

Background

14. TikTok is a video platform owned by ByteDance Ltd, a company incorporated in the Cayman Islands with the headquarter in Beijing in the People's Republic of China.
15. On 16 March 2023, the Chancellor of the Duchy of Lancaster, Rt Hon Oliver Dowden CBE MP, announced that the use of TikTok would be banned on the government electronic devices² following a security review ordered by the Cabinet Office Ministers.

Reasons for decision

Section 35(1)(b): Ministerial communications

16. Section 35(1)(b) provides that information held by a government department is exempt information if it relates to ministerial communications. Section 35(5) defines 'ministerial communications' as any communication between a Minister of the Crown and; "includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive committee of the Northern Ireland Assembly, and proceedings of the Cabinet or any committee of the Cabinet of the Welsh Assembly Government".
17. The concept of a communication is broad. It includes written communications such as letters, memos, emails and any other documents written to convey information between ministers, and it also includes meetings and telephone conversations between ministers. Section 35(5) specifically includes meetings of the Cabinet or Cabinet committees.
18. The exemption covers information which 'relates to' ministerial communications. This is interpreted broadly. This means that information does not have to be a ministerial communication itself; it

² [TikTok banned on UK government devices as part of wider app review - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/tiktok-banned-on-uk-government-devices-as-part-of-wider-app-review)

will also be covered if it recounts or refers to a ministerial communication. For example, letters between civil servants which refer to a previous letter between ministers will relate to that previous ministerial communication, and will be covered.

19. In this case the Cabinet Office provided submissions explaining why the withheld information falls within the class of ministerial communications.
20. The information in question is a letter in which the Chancellor of the Duchy of Lancaster, Oliver Dowden, informs his Cabinet colleagues about the ban of the TikTok application on the government devices.
21. Having reviewed the withheld information, the Commissioner is satisfied that the withheld information engages section 35(1)(b). Section 35(1)(b) is a class-based exemption which means that the information only has to fall within the class of information described. The Cabinet Office does not have to demonstrate any prejudice due to disclosure.
22. Section 35(1)(b) is, however, a qualified exemption which means that it is subject to the balance of the public interest. The Commissioner must therefore consider whether public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest test

The complainant's arguments

23. The complainant disagreed with the decision of the Cabinet Office to withhold the requested information.
24. He argued that the reasons given by the Cabinet Office to withhold information were vague and general. He also contended that the reason of 'premature public scrutiny' in the event of disclosure, has no basis since the decision, i.e., the ban of TikTok from the government devices, had been already made and publicly announced.
25. The complainant further argued that the Cabinet Office's approach when responding to the initial request could have been less drastic and redact any specific sensitive information within the document(s), instead of withholding the information in its entirety.

The Cabinet Office's arguments

26. In its submission to the Commissioner, the Cabinet Office referred to the internal review response it provided to the complainant, where it acknowledged that there is a general public interest in disclosure of information recognising that openness would increase the public trust and engagement with the government.

27. The Cabinet Office further noted how ministerial decisions may have a significant impact on the lives of the public and that there is a public interest in deliberations on such decisions being transparent.
28. However, the Cabinet Office contended that the public interest in withholding the requested information outweighs the public interest in disclosure.
29. To elaborate, the Cabinet Office argued that the disclosure of the information would weaken the ability of ministers to discuss controversial and sensitive matters free from premature public scrutiny.
30. The Cabinet Office explained that protecting the confidentiality of free and frank deliberations between ministers is an important principle which would be undermined by the disclosure of information. It said that this "*is fundamental for the continued effectiveness of ministerial decision making, and its continued existence is therefore in the public interest*". The Cabinet Office further contended that without such assurances as for the confidentiality of deliberations, this could have an inhibiting effect on what the ministers chose to say and this in turn would complicate the policy making process and undermine how matters are communicated to ministers and the taking of decisions with cross-government implications.
31. In its internal review response to the complainant, the Cabinet Office argued that "*If discussions were routinely made public there is a risk that Ministers may feel inhibited from being frank and candid with one another*".
32. In its submission to the Commissioner, when referring to the particular circumstances of this case, the Cabinet Office asserted that "*the fact that the communication concerned a sensitive subject [security of government devices in this case] should not be ignored in determining where the public interest lies. Ministers ought to have a very considerable degree of freedom afforded to them in addressing such issues with their colleagues*".
33. To emphasise the sensitivity of the information in question, the Cabinet Office said that the letter was sent by the Chancellor of the Duchy of Lancaster to his Cabinet colleagues prior to the announcement and that the '*letter was intended for the attention of the Ministers and was written with that purpose in mind*', it also added that '*the letter was sent by the Chancellor to his Cabinet colleagues prior to an announcement being made in the House of Commons*'.
34. It further argued that the banning of TikTok from official devices is still a very live and important matter, pointing out that this step has been

taken by several other states. What is more the possibility of the ban in the US nation-wide for the reason of security of the devices used by the public, fuelled speculation about the same happening in the UK which makes the matter even more salient and therefore the disclosure in those circumstances would be unwelcome.

35. The Cabinet Office also pointed out that the content of the document requested by the complainant is largely reproduced in the announcement of 16 March 2023 in the House of Commons (see footnote 1) and on the GOV.UK (see footnote 2) and therefore the disclosure of the withheld document would add little to what is already in the public domain.
36. Moreover, despite the availability of such information, the Cabinet Office emphasised that disclosure would still undermine the principle of confidentiality of ministerial communications. It highlighted that the principle protected not only the substance of information communicated between ministers but also the phrasing and points of emphasis contained in the letter, as well as the ordering of letter. The Cabinet Office also argued that the timing and manner chosen by the minister to communicate with his colleagues are also relevant characteristics deserving of protection.

The Commissioner's decision

37. As per the Commissioner's guidance on section 35³, there is no inherent or automatic public interest in withholding all information falling within this exemption. The relevance and weight of the public interest arguments depends entirely on the content and sensitivity of the particular information in question and the effect its disclosure would have on ministerial discussions and the collective decision-making processes.
38. With this in mind, the Commissioner carefully considered arguments put forward by the complainant and the public authority. He has also viewed the withheld information.
39. The Commissioner recognises the importance of the principle of the Cabinet collective responsibility, the longstanding convention that all ministers are bound by Cabinet decisions and carry joint responsibility for all government policy and decisions. This principle requires that ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a

³ [Section 35 - Government policy | ICO](#)

united front when decisions have been reached. Where requested information would reveal or indicate the views of an individual minister on a government position, then the Commissioner considers that arguments about maintaining collective responsibility carry significant public interest weight.

40. The Commissioner would agree with the Cabinet Office's submission that it is important, *'to protect the confidentiality of deliberations between Ministers'*. However, as already mentioned previously, the applicability of the exemption must be qualified based on the specific circumstances of the case.
41. Therefore, considering the Cabinet Office's above assertion in relation to this case, the Commissioner is not persuaded that the information in the letter can be described as 'deliberation'. Rather, it is simply a letter in which the Chancellor of the Duchy of Lancaster informs his colleagues about the decision to ban the TikTok application from government devices.
42. The Commissioner accepts that the letter could have been preceded by discussion on the subject but the content of the letter itself, which is the document relevant to this case, makes no reference to such discussions. What is more, the substance of it, by the Cabinet Office's own admission, had been largely reproduced in the subsequent announcement in the House of Commons and the statement on GOV.UK. The Commissioner, having reviewed the letter, concurs fully with the Cabinet Office's assessment of its content in respect of the information in the public domain.
43. Furthermore whilst the Commissioner accepts, in theory, the validity of the Cabinet Office's points at paragraph 36, he does not attribute such arguments any particular weight in this case taking into account the letter in question, i.e. its tone and structure. The Commissioner also notes that the Cabinet Office is content to confirm that the withheld information in scope consists of a letter from Chancellor of the Duchy of Lancaster to other members of the Cabinet dated 16 March 2023 and thus the timing and method of communication in this case is not an issue that appears to worthy of protection.
44. The Commissioner would like to refer to the Cabinet Office's argument summarised in paragraph 33 of this decision notice, supporting the sensitivity and confidentiality of the withheld information.
45. The Commissioner accepts that the letter was intended for the attention of ministers and that it was sent before the announcement in the House of Commons. However, he wishes to point out that the information contained in the letter was, prior to the request, proactively placed in

the public domain by the Government. This, in the Commissioner's view is an important factor which significantly reduces the sensitivity and confidentiality of the information.

46. Similarly, the Cabinet Office's assertion that because the content of the letter was largely reproduced in the public domain, it would add very little substance to what is already known and therefore lessen the public interest in disclosure, also, in the Commissioner's opinion, decreases the sensitivity of the information.
47. At the same time, the Commissioner wishes to comment further on the above point, which the Cabinet Office relied upon to demonstrate that the disclosure would not be in the public interest.
48. The Commissioner cannot disagree with the contention of the Cabinet Office that the disclosure of the information already in the public domain would add little to inform public debate, as it appears to be the case here, lessens the public interest in favour of disclosure. However, the Commissioner still considers there to be a public interest in seeing how the Chancellor actually communicated this message, concerning a high profile issue, to his Cabinet colleagues.
49. The Cabinet Office further argued that the topic is still live and therefore sensitive. The Commissioner is aware that there is some presence of the issue about a TikTok ban in the media, particularly in relation to the ban of the application in the US with the possibility of the ban being imposed nation-wide, but he is not convinced, having seen the withheld information that this would increase or decrease any possible speculations about whether the ban could also affect the UK society in the future.
50. The Commissioner considers that the Cabinet Office's concern, referred to in paragraph 31, as to discussions of ministers or officials being '*routinely made public*' is misplaced. As the Cabinet Office will be aware, each case is decided on its own facts and circumstances, and the disclosure of a type or class of information in one case does not act as precedent or encouragement for the routine disclosure of such information in future cases. The Commissioner accepts that ministers and officials might feel inhibited from being frank and candid in their recorded communications if such communications were subject to disclosure. However, in this case, as noted above, the Commissioner does not consider the withheld information to contain such recorded communications or views.
51. Therefore, although he recognises the significance of the Cabinet Office's arguments in principle, particularly when the space for free and frank discussions between ministers is concerned, he is not satisfied that the

evidence in this particular case carries significant weight to persuade him that maintaining the exemption is necessary.

52. Following his careful consideration, the Commissioner does not find the arguments provided by the Cabinet Office in support of maintaining the exemption sufficiently persuasive.
53. The Commissioner also accepts that the given the availability of information in the public domain on this matter, the public interest in favour of disclosure is arguably also not particularly strong. However, he considers that the public interest ultimately favours disclosure given the benefits of accountability and transparency which would be met by allowing the public to see how the minister in question had delivered news of the ban to his Cabinet colleagues.
54. For this reason and based on the Commissioner's consideration above, he decided that, albeit relatively marginally, that the balance of the public interest favours disclosure of the withheld information.

Procedural matters

Section 17- Refusal of a request

55. Under section 17(1) a public authority must issue a refusal notice in respect of any exempt information within the timescale set out in 10(1) of FOIA, namely 20 working days.
56. The Cabinet Office did not provide its refusal notice within the statutory 20 working days, stating the exemption it relied on and reasons why the exemption applied until the internal review stage, when it provided its response after three months of the request for review.
57. Consequently, the Commissioner considers that the Cabinet Office has breached its obligation under section 17(1), albeit that the late issuing of such a refusal notice has no bearing on the validity (or otherwise) of the exemption itself.

Other matters

Internal review response – time limit

58. As part of his complaint, the complainant expressed dissatisfaction with the length of time taken by the Cabinet Office to respond to his internal review request.

59. Although FOIA does not contain a time limit within which public authorities have to complete internal reviews, the Commissioner's guidance⁴ explains that an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
60. In this case, the complainant requested an internal review on 23 April 2023, however, the Cabinet Office did not respond until 24 July 2023, and therefore three months after the request was made.
61. The Commissioner finds the delay in this case to be excessive and wishes to point out that he will consider complaints where the internal review is delayed or remains outstanding.

⁴ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/#20>

Right of appeal

62. 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

63. 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.
64. 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
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