

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 December 2022

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information concerning the business case for the creation of the Government Commercial Organisation (GCO). The Cabinet Office originally withheld all the requested information under section 36(2)(b)(i) and (ii)(prejudice to effective conduct of public affairs) of the FOIA, with section 40(2) (third party personal data) also being applied to a small amount of the information.
2. During the Commissioner's investigation the Cabinet Office additionally applied sections 35(1)(a)(formulation or development of government policy), 42(1)(legal professional privilege) and 43(2)(prejudice to commercial interests) to different parts of Annex B of the withheld information.
3. The Commissioner's decision is that the Cabinet Office correctly applied sections 35(1)(a), 42(1) and 43(2) to the relevant information and that the balance of the public interest favours maintaining each respective exemption. The Commissioner finds that the Cabinet Office failed to correctly apply section 36(2)(b)(ii) to the relevant information but that the same information is exempt under section 36(2)(b)(i). The Commissioner considers that the balance of the public interest favours maintaining section 36(2)(b)(i) to most of the relevant information with the exceptions of paragraphs 12 and 13 of the main briefing paper, where the Commissioner finds that the public interest balance favours disclosure of this information.

4. The Commissioner has also found that the Cabinet Office breached section 10(1) of the FOIA in that they failed to provide a valid response to the request within the statutory time frame of 20 working days.
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose paragraphs 12 and 13 of the main briefing paper to the complainant.
6. The Cabinet Office 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 the FOIA and may be dealt with as a contempt of court.

Request and response

7. On 13 July 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

'Please could you provide me with a copy of the business case for the creation of the Government Commercial Organisation (GCO)¹ which the Cabinet Office/CGF submitted to (and which was approved) by HMT, which shows how the uplift in the salaries and bonuses of commercial staff in the GCO was to be funded. This will most likely have been submitted in 2016'.

8. The Cabinet Office acknowledged receipt of the request on 23 July 2020 and advised that they would aim to provide a substantive response by 11 August 2020 at the latest. Having not received a response from the Cabinet Office by this date, the complainant complained to the Commissioner on 12 August 2020. Following the intervention of the Commissioner via a letter to the Cabinet Office on 11 September 2020, the Cabinet Office provided the complainant with their substantive response to the request on 15 September 2020.
9. The Cabinet Office confirmed that they held the information requested but that it was being withheld under section 36(2)(b)(i) and (ii) of the

¹ The Government Commercial Organisation (GCO) was established in early 2017 to bring together the best commercial talent across government. It provides commercial specialists with centralised commercial accreditation, targeted development and access to a network of commercial leaders.

FOIA because, in the opinion of the qualified person, its disclosure would, or would be likely to, inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

10. With regard to the public interest test, the Cabinet Office stated that they appreciated *'that there is a general public interest in disclosure of public information'* and recognised that *'openness in government may increase public trust in and engagement with the government'*. More specifically, the Cabinet Office noted that the information requested *'might deepen public understanding and therefore lead to more informed public consideration of the Government's handling of issues relating to the Government Commercial Organisation and its funding'*.
11. However, weighed against these public interests was *'the strong public interest in preserving a 'safe space' to allow the free and frank provision of advice and exchange of views'*. The Cabinet Office contended that Ministers and senior officials must be able to discuss policy candidly and openly, receive free and frank advice from departmental colleagues and colleagues across government, and fully understand the possible implications. The Cabinet Office advised that if discussions were *'routinely made public'* there is a risk that Ministers and senior officials may feel inhibited from being frank, candid and completely honest. Consequently, the Cabinet Office contended, *'the quality of debate underlying collective decision making would decline, leading to poorer decision making'*.
12. The Cabinet Office also asserted that *'the Minister must also have confidence that in proffering advice, the adviser has not been inhibited by extraneous concerns'* and these necessarily include the concern that the advice would be exposed prematurely to public scrutiny or comment. Taking into account all the circumstances of the case, the Cabinet Office concluded that the balance of the public interest favoured withholding the requested information.
13. The Cabinet Office also advised that some of the information requested was being withheld under section 40(2) of the FOIA as it comprised third party personal data.
14. The complainant requested an internal review of the decision a day later on 16 September 2020. He expressed his disappointment that it had taken the Cabinet Office two months and the intervention of the Commissioner to provide him with a response to his request. The complainant told the Cabinet Office that it was *'equally disappointing that you have chosen to invoke a qualified exemption under section 36(2)(b)(i) and (ii) of the FOI Act with no offer of partial or alternative disclosure'*.

15. Referring to the need for the qualified person to give a reasonable opinion about the likelihood of prejudice or inhibition under the limbs of the exemption cited by the Cabinet Office, the complainant contended that:

'The request relates to a business case which has already been approved some 4-5 years ago, specifically for the purpose of improving commercial capability across government. As you have suggested, I also believe that there is a very strong public interest in understanding how commercial capability was intended to be improved and it is difficult to see how the retrospective disclosure of this historical content could reasonably inhibit the free and frank provision of advice or exchange of views on this subject in the future. Indeed, your explanation for invoking the exemption appears to merely restate the wording of the exemption and to apply it generally, and such generality may not therefore be reasonable'.

16. In respect of section 40(2), the complainant accepted that the Cabinet Office could redact the relevant section(s) but noted that as his request was for a business case, he would have thought that any personal data content would have been minimal.
17. On 21 October 2020, having not received the requested internal review, the complainant contacted the Commissioner and asked him to intervene once again. On 30 October 2020 the Commissioner confirmed that he would accept the complainant's complaint without the need for an internal review. The Cabinet Office provided the complainant with their internal review on the same date.
18. The internal review found that the exemptions had been properly applied and that the balance of the public interest was *'fully considered for the reasons set out in our letter of 15 September'*. The Cabinet Office advised the complainant that the points which he had made about their decision to apply the exemptions had been considered but that they were not persuaded that he had provided any new information which would lead them to change their view. The Cabinet Office stated that the application of section 36(2)(b)(i) and (ii) were *'particularly relevant in the context of ongoing and future pay negotiations'*.

Scope of the case

19. The complainant contacted the Commissioner on 21 October 2020 to complain about the way his request for information had been handled.
20. In his complaint to the Commissioner the complainant observed that:

'The use of Section 40(2) as a reason for withholding information is no longer mentioned. However, they do now state that their particular concern relates to 'the context of ongoing and future pay negotiations'. I am not convinced that this reply constitutes a 'reasonable opinion about the likelihood of prejudice or inhibition' or that this particular concern merits the withholding of the whole case, especially as it is now 4-5 years old. How the government proposed to improve its commercial capability is still, I believe, a matter of significant public interest'.

21. The withheld information in this case comprises a three page briefing to the Chief Secretary to the Treasury, dated 12 July 2016, with accompanying Annexes A and B of one and 10 pages respectively.
22. In submissions to the Commissioner, the Cabinet Office advised that in addition to the information contained in the three page briefing paper that was exempt under section 36(2)(b)(i) and (ii), some of the information contained in Annex B was exempt under sections 35(1)(a)(formulation or development of government policy), 42(1)(legal professional privilege) and 43(2)(prejudice to commercial interests).
23. During the course of the Commissioner's investigation, the Cabinet Office reviewed the information within scope of the request and disclosed some of the information, providing the complainant with redacted copies of the documents.
24. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office have correctly applied the exemptions to the residual withheld information.

Reasons for decision

Section 42(1) – Legal Professional Privilege

25. Section 42(1) of the FOIA provides an exemption from disclosure if the information in question is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
26. The Cabinet Office applied section 42(1) to a small part of the information within scope of the request, specifically, paragraph 10 of Annex B.

27. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI*² as:

'A set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation'.

28. There are two categories of LPP: litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose or providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
29. In submissions to the Commissioner, the Cabinet Office stated that the specific information within scope of the request constituted advice privilege in view of the fact that it consists of confidential communications between a client (the Cabinet Office) and a legal adviser (the Cabinet Office Legal Advisers) and was made for the purpose of seeking or giving legal advice. The Cabinet Office noted that the legal advice was contained in a submission to the Chief Secretary to the Treasury and it follows that the legal advice provided would be expected to have a confidential quality. The Cabinet Office confirmed that the submission would not have been shared beyond the Cabinet Office and so the legal advice privilege to which the information is subject, would not have been waived. Having seen the withheld information to which this exemption has been applied, the Commissioner is satisfied that it constitutes legal advice and therefore section 42(1) is engaged in respect of the same.

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https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i28/bellamy_v_information_commissioner1.pdf

Public interest in maintaining the exemption

30. As a qualified exemption, information withheld under section 42(1) can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.
31. In submissions to the Commissioner, the Cabinet Office acknowledged that there was a public interest in knowing that the Government seeks legal advice before implementing new terms and conditions for employees. They also acknowledged the general public interest in transparency and openness in government and in particular, the legal justification that underpins decisions taken by the Government.
32. However, the Cabinet Office considered that the public interest in favour of maintaining the exemption was '*much stronger*'. They stated that there is an inherent public interest in protecting the confidentiality of communications between lawyers and their clients. Such confidentiality encourages clients to seek legal advice and allow for full and frank exchanges between clients and their lawyers. The Cabinet Office contended that '*it is particularly important for the Government to be able to seek legal advice on sensitive matters or in respect of difficult decisions and for such advice to be both fully informed and reasoned*'.
33. Without the assurance that legal advice would be confidential, the Government would have a legitimate concern that anything it informs its legal advisers (even if sensitive or damaging) could be subsequently disclosed. If the Government could not rely upon legal advice privilege then it might be selective in what it discloses to its legal advisers. The outcome of this, contended the Cabinet Office, would be to render any legal advice to be less full and frank as it has to be in order to fully inform the Government about the correct legal position. The Cabinet Office contended that '*undermining the principle of legal advice privilege would have an inhibiting effect on Government officials having the necessary space to devise proposals for implementing policy and to have such proposals rigorously tested to ensure that they are legally robust*'.
34. The Commissioner addresses these public interest arguments later in this notice.

Section 43(2) – Prejudice to Commercial Interests

35. Section 43(2) of the FOIA provides that information is exempt if its disclosure under the Act 'would, or would be likely, to prejudice the commercial interests of any person (including the public authority holding it).
36. In order for the prejudice based exemption, such as section 43(2) to be engaged, the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely to occur if the withheld information was disclosed, has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view, this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
37. The Cabinet Office applied section 43(2) to a small amount of some of the information contained in some paragraphs of Annex B, specifically paragraphs 9, 11, 12 and 13. In submissions to the Commissioner, the Cabinet Office contended that disclosure of the identified information would be likely to prejudice the commercial interests of the Cabinet Office. The Commissioner has not included in this notice the Cabinet Office's explanation for this likely prejudice as this is sensitive and would likely cause the prejudice which the exemption is designed to prevent. However, the Commissioner has detailed the Cabinet Office explanation in a Confidential Annex to this notice.
38. The Commissioner is satisfied that the harm set out by the Cabinet Office relates to their commercial interests and he accepts that the causal relationship between disclosure of the relevant information and the likely prejudice to the Cabinet Office's commercial interests is real and of substance. The Commissioner also accepts that the Cabinet Office has demonstrated the application of the lower threshold of 'would be likely' to prejudice the commercial interests of the Cabinet Office.
39. The Commissioner therefore finds that the exemption at section 43(2) was correctly engaged by the Cabinet Office to the specific information redacted from Annex B. As a qualified exemption, information withheld under section 43(2) can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest in maintaining the exemption

40. In submissions to the Commissioner, the Cabinet Office acknowledged that whilst there is a public interest in the efficient use of public resources, the disclosure of information relating to the Cabinet Office's commercial modelling for the GCO, including market data that was secured under confidential agreements, would be likely to harm the department's commercial standing. This would be likely to lead to companies being deterred from sharing information with the Cabinet Office, which would impact upon the department's competitive position in the commercial field. Such an outcome would not be in the public interest.
41. The Commissioner addresses these public interest arguments later in this notice.

Section 35(1)(a) – formulation or development of government policy

42. Section 35(1)(a) of the FOIA states that:

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –

(a) The formulation or development of government policy'

43. Section 35 is a class based exemption. Therefore, if information falls within the description of a particular sub-section of 35(1) then such information will be exempt; there is no need for a public authority to demonstrate prejudice to these purposes.
44. The Commissioner is of the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
45. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
46. Ultimately, whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
47. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
48. In submissions to the Commissioner the Cabinet Office stated that some of the information contained in Annex B, specifically that in paragraphs 7, 22 and 24, was exempt under section 35(1)(a) as it related to *'the current formulation of the Government's pay policy'*. The Cabinet Office advised that *'as the information within scope remains in use for the purposes of that policy's development'* it was considered exempt.
49. The Commissioner accepts that the information withheld under this exemption falls within the scope of section 35(1)(a) of the FOIA as it relates to the formulation and development of the Government's pay policy.
50. Section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Public interest in maintaining the exemption

51. In submissions to the Commissioner the Cabinet Office acknowledged that *'there is a strong public interest in there being a robust policy making process around the subject of pay'*. They stated that process must be informed by a full consideration of options and benefit from full and frank exchanges of views on the available options. Ministers must be able to take decisions in respect of pay that are fully informed and debated. The Cabinet Office contended that if the information *'were to be disclosed prematurely'* it would undermine the policy making process by making officials more reluctant to express sensitive matters openly.
52. The Cabinet Office explained to the Commissioner why the specific information in question was sensitive and why its disclosure would undermine the development of the Government's current pay policy. The Commissioner has detailed this explanation in the Confidential Annex attached to this notice.
53. The Commissioner addresses these public interest arguments later in this notice.

Section 36(2)(b)(i) – prejudice to the effective conduct of public affairs

54. Section 36(2)(b) states that:

'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,

55. In deciding whether section 36(2)(b)(i) is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one.

56. 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 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 only 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.

57. In this case the Cabinet Office sought the reasonable opinion of the qualified person, Chloe Smith, the then Minister of State for the Constitution and Devolution, on 18 August 2020, and the Minister provided her reasonable opinion on 8 September 2020. The Minister was provided with a rationale as to why section 36(2)(b)(i) could apply and a copy of the withheld information. The Minister's reasonable opinion was that the exemption was engaged as disclosure of the information (at that time the whole information within scope of the request), would, or would be likely to inhibit the free and frank provision of advice. Details of the Minister's reasonable opinion which are sensitive (in that they would risk disclosing the withheld information) are contained in the Confidential Annex.

58. As noted above, during the Commissioner's investigation the Cabinet Office revised their original position (i.e. the withholding of all the information in scope of the complainant's request under section 36(2)(b)) and provided the complainant with a redacted copy of the

briefing paper for the Chief Secretary to the Treasury. This resulted in the complainant being provided with approximately 40% of the information contained in the paper. The specific paragraphs of this document to which the Cabinet Office maintain section 36(2)(b) are paragraphs 4, 5, 6, 7, 9, 11, 12 and 13.

59. The Commissioner notes that in their substantive request response, their internal review and their submissions to the Commissioner, the Cabinet Office stated that the information was being withheld under section 36(2)(b)(ii) (the free and frank exchange of views for the purposes of deliberation) as well as section 36(2)(b)(i). However, neither the submissions to Ms Smith seeking her reasonable opinion, nor the reasonable opinion of Ms Smith, both of which have been seen by the Commissioner, make any mention of section 36(2)(b)(ii), these being solely concerned with section 36(2)(b)(i). Consequently, the Commissioner does not consider it reasonable for the Cabinet Office to contend that section 36(2)(b)(ii) applies to the respective residually withheld information.
60. Having considered the parts of the information withheld under section 36(2)(b)(i), and taking into account the qualified person's reasonable opinion, the Commissioner is satisfied that section 36(2)(b)(i) is engaged to the relevant information.
61. Section 36(2)(b)(i) is a qualified exemption and in accordance with the requirements of section 2 of the 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 in maintaining the exemption

62. 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.
63. It is important to be clear that the exemptions contained in section 36 focus on the processes that may be inhibited, rather than what is in the withheld information. The issue is whether disclosure would, or would be likely to inhibit the process of providing advice. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank. On the other hand, if the information only consists of relatively neutral

statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice.

64. In their submissions to the Commissioner, the Cabinet Office acknowledged that the submission to the Chief Secretary to the Treasury is over five years old. In their substantive response of 15 September 2020 to the request the Cabinet Office also acknowledged that disclosure of the information *'might deepen public understanding and therefore lead to more informed public consideration of the Government's handling of issues relating to the Government Commercial Organisation and its funding'*.
65. However, the Cabinet Office advised that they consider it is important *'to uphold a principle of officials providing free and frank advice to Ministers on sensitive matters involving employment terms and conditions'*. The Cabinet Office advised that the information was contained in a submission put to the Chief Secretary for a significant decision to be made about the terms and conditions for staff joining the GCO. The Cabinet Office detailed a number of sensitivities contained within the submission, and these are set out in the Confidential Annex.
66. The Cabinet Office contended that the effect of disclosing the submission containing such information would be likely to make officials much more reticent in expressing their advice or opinions, *'particularly on the matter of government machinery reorganisations that involve a change in staffing terms and conditions'*. The Cabinet Office stated that:
- 'We consider that it is important that a Minister is given thoroughly informed advice on such matters. They should be made aware of the considerations that underpin recommendations which relate to staff terms and conditions, particularly in the context of a reorganisation. Also relevant is the urgency with which the Ministerial view was sought – in such circumstances, officials are under a stronger imperative to express themselves with clarity and finality'*.
67. The Cabinet Office considered that the disclosure of the specific information contained in the submission would have the effect of making officials more reticent in the expression of such important opinions in the future. They also considered that it may discourage Ministers from seeking views and advice on such matters as contained in the submission. The Cabinet Office maintained, as they had stated in their response to the request, that a consequence would be a decline in the quality of debate and poorer decision making. The Cabinet Office stated that a Minister must be able to have the confidence that, when providing advice, officials are not inhibited by extraneous factors such as the concern that their advice will be *'prematurely'* exposed to public scrutiny.

68. The Cabinet Office contended that the public interest is '*strongly in favour of officials being afforded the scope to properly express their advice to Ministers in an uninhibited manner on matters which are as sensitive*' as those contained in the briefing paper. The Cabinet Office considered that the potential consequences of '*prematurely disclosing*' the information would not be in the public interest.

Complainant's public interest arguments for disclosure of the information

69. In addition to the arguments provided to the Cabinet Office in his request for an internal review, the complainant provided the Commissioner with commendably clear and detailed submissions as to why he considered that, despite the additional transparency provided by the Cabinet Office disclosing most of the information contained in Annexes A and B and approximately 40% of the information contained in the main briefing paper, the public interest was in favour of disclosing the residual withheld information.
70. The complainant explained as follows:

'My understanding at the time of this business case was that HM Treasury required all new initiatives involving civil service pay to be cost neutral. The overall aim of this initiative was to improve commercial capability across government which it proposed to achieve via 2 new mechanisms: setting new commercial capability standards for existing civil servants with the offer of higher salary and performance related pay for those meeting the standards; and recruitment into the Civil Service of commercial specialists (subject to those same standards), for which higher pay rates were an essential part of the offer to compete in the external employment market.

The higher salaries and performance pay were argued primarily on the basis of reduced pension costs, as shown in the table at Annex A, the difference between the costs of the old terms and the new terms being approximately 20%. Whilst this would also apply in part to existing civil servants choosing to take up the new terms and conditions, such internal staff were also eligible for performance pay of 15-20%. The paper states that existing eligible civil servants (i.e. those passing the accreditation) choosing to move to the new terms would be offered a salary increase of 20%, plus eligibility for performance pay, the total additional cost of this arrangement being 'under £2m'. The visible parts of the paper do not show how this £2m was calculated, nor how it was to be funded. I would expect to see a statement showing the numbers of existing civil servants on which it was based.

The second part of the proposal was the aim to recruit new commercial specialists from the external market, however the total salary bill could

be no higher than before. This means that civil servants who had previously been part of the commercial cadre would have to reduce in number to accommodate the external recruits, most likely through the accreditation process. I would therefore expect to see the numbers of existing civil servants on which the £2m cost calculation was based and the balancing figure of external recruits to make the overall paybill cost neutral. I would then expect this total number of commercial staff in the future Commercial Organisation to be compared with the existing staff numbers'.

71. Following the reasoning set out above, the complainant advised the Commissioner that, in summary, he would therefore expect the residual withheld information to show:

- *'The total number of existing commercial staff in the eligible grades for the roles defined by the GCO to be in scope;*
- *The numbers of existing civil servants in those roles who were expected to join the GCO after taking the accreditation (with mention of the accreditation being the mechanism to control numbers);*
- *The number of new external staff who were expected to be recruited for an overall cost neutral paybill'.*

72. The complainant noted that no staffing numbers are visible at all from the information disclosed by the Cabinet Office, and without them, the business case cannot demonstrate that it is cost neutral to the taxpayer, which he considered to be *'the core of the public interest'*.

73. Correctly noting that all of the redacted (exempt) information in the main briefing paper relies on section 36(2)(b), the complainant stated that *'the purpose of the document is to show how commercial capability across government will be improved. Every benefit has an associated cost but given that the financial cost is designed in this case to be overall zero, I would argue that the document should show how this is to be achieved'*. The complainant advised that he believed the answer in this case was that *'1) salary and performance pay has been traded for pension and other employment benefits and 2) existing civil servants in commercial roles will be replaced by new recruits of (supposedly) higher capability'*. The complainant observed that whilst the first mechanism is partially addressed, the second is not addressed at all, and contended that *'if these are not the mechanisms which have been used to pay for the improvements, then the correct mechanisms should be stated'*.

74. The complainant observed that:

'Given the salary ranges stated in Table 1 of Annex B (which are higher than standard Civil Service salary scales for the same grades), I am

expecting that some of the redacted material will address the extent to which these scales are higher and the numbers of civil servants involved, in order to calculate the additional paybill to the Treasury. I am further expecting the submission to explain how this additional paybill will be funded, of which the reduction in cost of the different terms and conditions set out in Annex A will be a part. That, after all, is the nature of the business case being presented'.

75. In his submissions to the Commissioner, the complainant acknowledged that he could see a case which proposed the replacement of existing civil servants with new recruits would not want to be publicly disclosed and that section 36(2)(b) *'might be an appropriate mechanism for withholding disclosure'*. However, against that, the complainant contended that *'there is also a public interest in understanding how the displaced civil servants will be employed'*. The complainant noted that if new roles were created, there would be additional employment costs and if not, there may be a possibility of redundancy costs.
76. The complainant contended that, *'in fact, the only situation in which there are no long term additional costs is where the displaced civil servants find roles outside of the in-scope commercial roles through attrition or outside the civil service'*. The complainant contended that *'whether such process is in line with employment law and/or the civil service code of conduct should be addressed'*. Furthermore, the complainant submitted that *'such choices by a government department are equally in the public interest to know because 1) they concern job security for potential future recruits in general and 2) they illustrate a particular behaviour in terms of staff treatment'*.
77. The complainant submitted that *'how the government proposed to improve its commercial capability is still, I believe, a matter of significant public interest'*.

Balance of the public interest factors

78. In assessing the respective public interest factors which arise from the residual withheld information in this case, the Commissioner has not looked at such factors in the round, but rather, he has considered the specific public interest factors which are inherent to each exemption applied by the Cabinet Office.
79. In respect of the small amount of information (paragraph 10 of Annex B) which the Cabinet Office have withheld under section 42(1)(legal professional privilege), the Commissioner is satisfied that the public interest balance attached to this specific information favours maintaining the exemption. Whilst the specific information does carry some public interest weight and value in that it would provide some transparency and accountability as to the Government's approach to terms and

conditions of those staff joining the GCO, this public interest is outweighed by the strong and well-established public interest in protecting the confidentiality of communications between a client and a legal adviser. The Commissioner accepts the Cabinet Office contention that without the assurance that legal advice will be confidential, the Government would have a legitimate concern that any information imparted to its legal advisers (even if sensitive) could be subsequently disclosed.

80. It is important to note that section 42(1) is not an absolute exemption, and there may be cases whereby the public interest in the specific information could be sufficiently strong and compelling to outweigh the strong and well established public interest in protecting LPP. However, in this instance, the Commissioner is satisfied that the public interest balance lies comfortably in favour of maintaining the exemption to the respective information.
81. In respect of the very small amount of information (approximately one line) which the Cabinet Office have withheld under section 43(2)(prejudice to commercial interests), the Commissioner is satisfied that the public interest balance attached to this specific information favours maintaining the exemption. Disclosure of the relevant information would not appreciably further the public interest case made by the complainant. The Commissioner agrees that disclosure of information that was secured under confidential agreements would be likely to harm the Cabinet Office's commercial standing and deter third parties from sharing information with the department. This would not be in the public interest.
82. Section 35(1)(a)(formulation or development of government policy) has been applied to a small amount of information contained in Annex B, specifically paragraphs 7, 22 and most of paragraph 24. In his submissions to the Commissioner, the complainant noted that the GCO has been in existence for some years and the policy concerning its creation was no longer being formulated or developed.
83. The Commissioner notes that the GCO was established in early 2017 and so had been in existence for three years at the time that the complainant made his request to the Cabinet Office. The Commissioner therefore agrees that at the time of the request the policy formulation and development process as regards the creation of the GCO had passed into the implementation stage. However, as noted above, the Cabinet Office have stated that the policy formulation and development to which the information withheld under this exemption relates, is that of the Government's pay policy, which remains current and under development.

84. In submissions to the Commissioner the Cabinet Office have contended that if the relevant information '*were to be disclosed prematurely*' it would undermine the policy making process by making officials more reluctant to express sensitive matters openly. Were the withheld information solely related to the creation of the GCO, with no wider relevance or application to the formulation or development of the Government's pay policy, then given the passage of time since the creation of the GCO, the Commissioner would not consider disclosure to be premature. However, having had sight of the information withheld under section 35(1)(a), the Commissioner is satisfied that it has a sufficient bearing on the development of the Government's current pay policy such that its disclosure would reveal sensitive information and undermine the policy development process. The Commissioner expands upon this further in the Confidential Annex.
85. The above being the case, whilst the Commissioner considers that the withheld information carries a significant and legitimate public interest in transparency and accountability as to the creation of the GCO and the terms and conditions of staff joining the same, he considers that the public interest balance more strongly favours, by a narrow margin, the maintenance of the exemption to the information.
86. Section 36(2)(b)(i) applies only to information contained in the main briefing paper. However, this comprises the bulk of the residual withheld information. The paper comprises 13 paragraphs, and the Cabinet Office have withheld paragraphs 4, 5, 6, 7, 9, 11, 12 and 13.
87. An important factor in this case is that the Cabinet Office, during the Commissioner's investigation, disclosed to the complainant the vast majority of the information contained in Annexes A and B. The information contained in Annex B in particular is more detailed than that provided in the main briefing paper and therefore provides considerable transparency and accountability as to the Government's plans for the creation of the GCO and the terms and conditions of its staff. The Commissioner considers that this largely and proportionately satisfies the specific public interest arguments which the complainant has clearly and cogently set out above.
88. Those arguments would equally apply to the residual withheld information contained in the main briefing paper but having had sight of the same, the Commissioner does not consider that some of the information would appreciably advance the public interest case made by the complainant. Specifically, the Commissioner does not consider that the information contained in paragraphs 4, 5, 6, 7, 9 and 11 would provide the sort of detailed information which the complainant states he would reasonably expect to see in a business case being presented. Nor does the Commissioner consider that the information would add much by way of transparency as to understanding how commercial capability

was to be improved, one of the main public interest points propounded by the complainant.

89. The Commissioner considers that the information in the above specified paragraphs would provide some additional transparency and accountability of the Government's approach to the creation of the GCO and the terms and conditions of its staff. To that extent the information carries some legitimate public interest weight and value. However, the Commissioner is satisfied that any additional public interest that would be served by disclosure is outweighed by the public interest in maintaining section 36(2)(b)(i) to this information.
90. The Commissioner recognises and accepts that there is an important and legitimate public interest in officials being able to, as the Cabinet Office have contended, '*properly express their advice to Ministers in an uninhibited manner on matters which are as sensitive as employee terms and conditions*'. Although the GCO had been in existence for three years at the time of the request, and therefore the Government's policy towards the creation of the organisation could be said to have been implemented, the sensitivity of the information in the aforementioned paragraphs is not restricted to the GCO as the considerations contained in the advice could have wider relevance and application to other organisational and staffing changes undertaken by government.
91. Section 36(2)(b)(i) is primarily concerned with protecting the *process* of officials providing advice or opinions to Ministers. The Commissioner accepts the Cabinet Office's contention that the disclosure of the specific information contained in the aforementioned paragraphs would be likely to make officials more reticent in expressing their advice or opinions in future, particularly on the matter of government machinery reorganisations that involve a change in staffing terms and conditions. An outcome of this reticence or inhibition would be a decline in the quality of debate and poorer decision making. This would not be in the public interest. Therefore, the Commissioner considers that the public interest value and weight of the information contained in paragraphs 4,5, 6, 7, 9 and 11 is outweighed by the stronger and wider public interest in maintaining the exemption to this specific information.
92. However, the Commissioner is satisfied that the public interest balance is different in respect of paragraphs 12 and 13 of the briefing paper.
93. Paragraph 14 of Annex B, which the Cabinet Office have disclosed, states:

'Recent modelling has indicated that only a small number of existing staff likely to gain accreditation and be offered a role within GCO would remain after 20% increase under the new pay range minimas. In this

situation, these staff would receive a further increase in year 2 to bring them up to the pay range minima. This increase is predicated to likely only be required for around 15 people, with an estimated cost of c£36k'.

94. Given that the Cabinet Office were happy to disclose the above information, the Commissioner is not persuaded that the withheld information contained in paragraphs 12 and 13 of the main briefing paper is sufficiently sensitive so as to outweigh the public interest in disclosure. The Commissioner provides further detail as to his reasoning for this view in the Confidential Annex.
95. Since the withheld information contained in paragraphs 12 and 13 of the main briefing paper is of most relevance to the public interest factors favouring disclosure advanced by the complainant, the Commissioner considers that the public interest in disclosure of this specific information outweighs the public interest in maintaining section 36(2)(b)(i) to the same. Consequently, the Commissioner orders the Cabinet Office to disclose this specific information to the complainant.
96. In his submissions to the Commissioner, the complainant clearly explained what information he would expect the residual withheld information in the main briefing paper to contain. These expectations were certainly not unreasonable. However, it is apparent from the redacted three page briefing paper disclosed to the complainant, that the information presented is not perhaps as detailed as the complainant had envisaged.
97. However, Annex B in particular, contains much more detail, and information relevant to the public interest case advanced by the complainant. That document was disclosed to the complainant, with the Cabinet Office making only very minor and proportionate redactions for information exempt under the other exemptions previously examined.
98. Given the information contained in the disclosed Annex B, it is not correct to contend, as the complainant has, that '*no staffing numbers are visible at all*' (see paragraph 93 above). Since the information in the disclosed Annex B covers the GCO pension scheme, implications for staff moving onto the new terms and conditions, implications for staying on existing terms and conditions and other matters, the Commissioner considers that the legitimate and proportionate public interest in transparency and accountability of the creation of the GCO is largely met by this disclosure.
99. The Commissioner recognises and accepts that the disclosed Annexes do not contain all the calculations and funding information which the complainant contends should be present. However, the Commissioner does not consider that the disclosure of the information in the briefing paper withheld under section 36(2)(b)(i) (with the exception of

paragraphs 12 and 13) would appreciably advance the public interest case made by the complainant.

100. As paragraphs 12 and 13 of the briefing paper do not contain any personal data, and as the Commissioner is satisfied that the remaining residual withheld information in the briefing paper is exempt under section 36(2)(b)(i), the Commissioner has not gone on to consider the application of section 40(2) to this same information.

Procedural matters

101. Section 1(1) of the FOIA states that:

'Any person making a request for information to a public authority is entitled –

(a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) If that is the case, to have that information communicated to him'.

102. Section 10(1) of the FOIA states that a public authority must respond to a request promptly and *'not later than the twentieth working day following the date of receipt'*.

103. In this case the complainant made his request to the Cabinet Office on 13 July 2020 but did not receive a substantive response to his request (and then only due to intervention from the Commissioner) until 15 September 2020. The Commissioner finds that the Cabinet Office therefore breached section 10(1) of the FOIA by failing to provide a response to the request within 20 working days. However, the Commissioner is mindful that the Cabinet Office received this request during the height of the Covid-19 pandemic, when all public authorities were subject to unprecedented resource and staffing pressures. The Commissioner considers that this contextual background provides some mitigation for the Cabinet Office breach in this instance.

Other matters

104. It was unhelpful and disappointing for the Cabinet Office to have originally adopted a blanket approach to this request and withheld all of the information within scope under section 36(2)(b). Such a position was not tenable and highly likely to lead to a complaint to the Commissioner. However, the Commissioner would commend the Cabinet Office for their willingness to reappraise the withheld information during his investigation, and for their voluntary disclosures of much of the information within scope to the complainant.

105. The Commissioner would impress upon the Cabinet Office the importance of not adopting an unhelpful and inappropriate blanket approach to the application of exemptions such as section 36(2)(b) but rather the measured and proportionate redacted approach which the Cabinet Office subsequently undertook during the Commissioner's investigation in this matter.

Right of appeal

106. 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

107. 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.

108. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**