

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 March 2022

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested all documents sent to the Prime Minister from 1 December 2019 to 31 March 2020, recommending the country be put into lockdown due to the Covid-19 pandemic. The Commissioner's decision is that the Cabinet Office has appropriately applied the exemptions at section 35(1)(a) and (b) – Formulation or development of government policy and Ministerial communications. However, the public interest favours disclosure of most of the information. The Commissioner requires the public authority to disclose the requested information to ensure compliance with the legislation. The Commissioner has also found that the Cabinet Office failed to issue their refusal notice to the complainant within the required timescale. The Cabinet Office therefore breached sections 10(1) and 17(1) of the FOIA.
2. The public authority must disclose the requested information, with the exception of the information contained in paragraph 14 of the withheld information, which can be redacted, 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 Act and may be dealt with as a contempt of court.

Request and response

3. On 30 May 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

'Please kindly provide all documents sent to the PM from 1st December 2019 to 31st March 2020, recommending the country is put into lockdown due to Covid-19. We're looking for clues as to when the PM was first advised to lock the country down because of the virus'.

4. The Cabinet Office acknowledged receipt of the request on the same date and provided the complainant with a request reference number.
5. Having not received a substantive response to her request, the complainant wrote to the Cabinet Office on 28 July 2020 to request an internal review. She advised that, *'you have failed to supply a valid response to our request so you now have a final opportunity to find out what went wrong and provide this information before we put this matter into the hands of the Information Commissioner'.*
6. The Cabinet Office did not respond to the complainant's chaser correspondence and so she complained to the Commissioner about the non-response on 9 September 2020. On 28 September 2020 the Commissioner wrote to the Cabinet Office and asked that they provided a response to the request within 10 working days.
7. Not having had a response to the request, the complainant contacted the Commissioner again on 13 October 2020. Following intervention from the Commissioner, the Cabinet Office finally provided their substantive response to the request on 12 November 2020. The response included a sincere apology but no explanation for the delay in over five months in providing the response.
8. The Cabinet Office confirmed that they held 'some' of the information requested but that it was exempt from disclosure under section 35(1)(a)(formulation or development of government policy) and 35(1)(b)(Ministerial communications) of the FOIA. The response did not specify which policy or policies the held information related to and contained a generic discussion of the public interest test only. The Cabinet Office stated that:

'There is a general public interest in disclosure of information and they recognised that openness may increase public trust in and engagement with government'.

9. However, the Cabinet Office advised that these (generic) public interests had to be weighed against a strong public interest that policy-making and its implementation are of the highest quality and fully informed. The response stated that:

'Ministers and officials must be able to discuss policy freely and frankly, consider views on available options and understand their possible implications in a safe space to allow for the most informed and high quality policy outcomes. Disclosure of the information in question would

harm this safe space. If discussions were routinely made public there is a risk that Ministers and officials may feel inhibited from being frank and candid in their recorded communications. Harming this safe space would lead to poorer policy outcomes and decision making. This is particularly true when policy is in a 'live' stage of consideration'.

10. Taking into account all the circumstances of the case, the Cabinet Office concluded that the balance of the public interest favoured withholding the information held.

Scope of the case

11. The complainant contacted the Commissioner on 13 November 2020 to complain about the way her request for information had been handled.
12. Due to the lengthy delay in the Cabinet Office providing a substantive response to the request, the Commissioner waived his usual requirement for the completion of an internal review in this case.
13. In her complaint to the ICO the complainant advised that, *'we would challenge anyone who believes there is a greater interest than the preservation of life'*, and contended that, *'the public need to know when the Prime Minister was advised to lock the country down before he finally acted on 23rd March 2020'*.
14. The complainant also advised that they would like to focus on the final sentence of their request, *'We're looking for clues as to when the PM was first advised to lock the country down because of the virus'*. The complainant advised that they would like the Cabinet Office to carry out a search for such documents within the specified time period, and then when a document recommended a lockdown they would like to know the date of the document and when the lockdown should happen, according to the said document. The complainant advised that they were not interested in anything else, such as the identity of the person giving the advice.
15. The complainant advised the Commissioner that:

'We already know that one party advised the Prime Minister to lock down two weeks before he acted and that is rather damning in our view. If it turns out he was advised prior to March 2020 then more lives could have been saved. Since the public are expected to trust the Prime Minister with their lives, the very least this department can do, especially for the relatives of those who died of Covid 19 in March 2020, is to let them know when lockdowns were recommended. We accept that some general advice needs to be kept from the public, but not this, given the lives lost'.

16. Towards the end of the Commissioner's investigation the complainant advised the Commissioner in submissions that they felt that their request conveyed that *'although we would prefer all the documents (redacted or otherwise – as long as the date remains visible) we would settle for the first date in which the Prime Minister was advised to lock the country down'*. The complainant correctly noted that the Commissioner encourages public authorities and complainants to work together and make compromises where necessary, and stated that, *'we effectively had the request and our compromise all in one'*.
17. The complainant contended that if the Cabinet Office had engaged with them and advised that they could not provide the documents, *'they SHOULD have asked us to refine the request, to which we would have asked specifically for the date the PM was first advised to lock the country down'*. The complainant advised that, *'if they (Cabinet Office) had conducted themselves in a proper way we would know what they absolutely do not want to release and then work down to what they are willing to release'*. The complainant stated that they could not accept that there are any compelling arguments within section 35 to not provide them with the date of that first document, and that at no time had they asked for the identity of those providing the advice.
18. In correspondence with the complainant the Commissioner acknowledged their point that they would have been satisfied with being provided with the date on which the Prime Minister was first advised to put the country into lockdown, but this was not apparent from the wording of the request. If the complainant had just wanted the date itself and nothing more, this could have been specified in the request. As it was, although the request did make clear that the complainant was looking for clues as to when the lockdown advice was first given, this was worded as a contextualised addendum to the actual stated request for recorded information, which was for the documents.
19. The Commissioner explained that unlike in a section 12 (costs limit) case, the Cabinet Office were under no duty or obligation to ask the complainant to refine their request, particularly as the Cabinet Office were of the view that all of the relevant information held was sensitive and therefore exempt from disclosure. Whilst the Commissioner appreciates that the complainant was open to compromise in this case, this was not possible as the Cabinet Office position was that they were withholding the information held in its entirety.
20. In submissions to the Commissioner the Cabinet Office advised that they interpreted the request as asking for documents seeking a Ministerial decision, that is, a document(s) containing a clear recommendation, formally put to the Prime Minister, to put the country into lockdown. They also confirmed that their definition of 'lockdown' was the comprehensive 'stay at home' restrictions announced on the evening of

23 March 2020 by the Prime Minister in his television address to the nation. The Commissioner considers that this interpretation and definition are objectively reasonable and correct.

21. The Cabinet Office advised the Commissioner that there was one piece of information held in scope of the request, and the Commissioner has had sight of this withheld information.
22. The Commissioner therefore considers that the scope of his investigation to be the application of the section 35 exemptions to the content of the withheld information, in the circumstances of this case.

Reasons for decision

23. Section 35 FOIA states:

'(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to –

- (a) The formulation or development of government policy*
- (b) Ministerial communications'.*

24. Section 35 is a class based exemption. Therefore, if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for a public authority to demonstrate prejudice to these purposes.
25. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process, where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. '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.
26. It is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged. In accordance with the Information Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
27. 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 content of the information in question and its context.

28. 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.
29. Having had sight of the withheld information, the Commissioner is satisfied that the information clearly relates to the formulation and development of the Government's policy towards responding to the COVID-19 pandemic, specifically its lockdown policy. Section 35(1)(a) therefore applies to the withheld information.
30. 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;
31. *'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 executive committee of the National Assembly for Wales'.*
32. Having seen the withheld information and submissions from the Cabinet Office, the Commissioner is satisfied that the withheld information relates to a meeting of a Committee of Cabinet and therefore falls within the description set out at section 35(1)(b) above. Therefore the exemption is engaged.

Public interest test

33. Sections 35(1)(a) and 35(1)(b) are qualified exemptions and therefore subject to the public interest test. The Cabinet Office provided separate public interest arguments for the two exemptions. The Commissioner will therefore set out each below and has considered whether the public interest in favour of maintaining either or both of the exemptions outweighs the public interest in favour of disclosure of the information.

Public interest in favour of disclosing the withheld information

34. In submissions to the Commissioner the complainant contended that:

'We need to see when the Prime Minister was first advised to lock down. It is in the public interest to see it because we know there have been a large number of UK deaths in March 2020 solely due to Covid and deaths where Covid had played a factor'.

35. The complainant provided the Commissioner with details of recorded deaths produced by the Office for National Statistics (ONS) and stated that, *'we know 4,486 people died of Covid in March 2020. We maintain that UK Government must be held to account for those catching the virus pre-lockdown since it is their responsibility to protect UK citizens. Many of these people would still be alive if the government acted sooner'.*

36. The complainant advised the Commissioner that *'while we don't currently know when the Prime Minister was first advised to lock down (the information sought by the request) we do know he was advised to lock down two weeks before he implemented it. Thus, in the timeframe between 9th March 2020 right up to the point the lockdown commenced, some of those aforementioned 4,486 victims would have been first exposed to Covid-19'.*

37. The complainant informed the Commissioner that:

'We know the first death of Covid-19 occurred 9th January 2020 in Wuhan. We also know the first death of Covid-19 outside of China was on 1st February 2020 in the Philippines. The first Covid-19 death outside of Asia was in France on 14th February 2020. This information would have been available to our government at the time, so they could very clearly see back then not only that it kills but it's travelling to us very, very quickly. It was previously thought the first UK death of Covid-19 happened on 2nd March 2020 (although a report in September 2020¹ says the first UK death could have happened as early as January 2020)'.

38. The complainant contended that the information they were seeking:

'Will allow the public to see, for the first time, the earliest point at which the UK government could have locked down prior to 9th March 2020 (based on advice), and when cross referenced between UK Covid deaths prior to March 2020, will provide everyone with greater clarity of how many lives could have been saved if they had locked down sooner. The public have a right to know if the ones they lost could still be alive if the government acted sooner. Beyond that though, the government needs

¹ <https://www.standard.co.uk/news/health/first-uk-coronavirus-death-end-january-a4547606.html>

to acknowledge that every Covid-19 death in the UK between the point of first being advised to lock down and when they finally acted, is their responsibility. The information we seek will help reveal the extent of this mess'.

39. In submissions to the Commissioner the Cabinet Office recognised there is a strong public interest in disclosure, to ensure transparency in the way in which government works, *'especially where this relates to its response to a national emergency'*. The Cabinet Office stated that there is a clear public interest in assurance that the Government can respond to the challenges in a timely, proportionate and evidence based manner.
40. The Cabinet Office also recognised, in this specific case, *'the public interest in knowing when the Prime Minister was first advised (to put the country into lockdown), as this may inform public debate on the timing of the decision to put the UK into lockdown'*. The Cabinet Office noted that a statement on gov.uk *'makes clear that the first government advice on social distancing was published on 12 March 2020, before a formal "lockdown" was announced on 23 March 2020. The Cabinet Office recognised that 'it is natural that the public want to access official information to help them decide if the Government's actions could have been put in place at an earlier date. Disclosure of the requested information would also enable the public to see what recommendation the Prime Minister was given and when'*.

Public interest in favour of maintaining the exemptions

Section 35(1)(a)

41. Against the public interest arguments in favour of disclosure, the Cabinet Office stated that the Government has consistently said that it will look back and learn lessons from its response *'to this unprecedented pandemic'*. They noted that the Prime Minister had also confirmed that this would include an independent inquiry at the appropriate time². The Cabinet Office stated that further information is likely to be released, where appropriate, through the findings of the independent inquiry. The Cabinet Office stated that at the time of the request, and at the time of providing submissions to the Commissioner, *'as the situation is so volatile, the focus is rightly on protecting public health and the NHS, and saving lives'*. The Cabinet Office contended that disclosure of the requested information would be a distraction from that focussed activity *'and the ongoing policy response'*.

² The Commissioner notes that on 15 December 2021 the Government announced that the inquiry would be chaired by The Rt Hon Lady Justice Hallett

42. The Cabinet Office advised that the policy development process benefits from ministers and officials having the space to consider recommendations and advice in an environment that facilitates and encourages deliberation without undue external pressure. That safe space *'provides officials with the scope to consider what recommendations to put to ministers, and gives ministers space to think through the implications for the ongoing policy on which advice is given'*. The Cabinet Office contended that disclosure of the withheld information would not give officials or ministers those assurances that they require to work effectively on the development of policy. The Cabinet Office stated that they would be more mindful about public perception of the advice being developed, and the effect of this would be to undermine the efficacy of the policy development process.
43. The Cabinet Office stated that they recognised that the Government's position on the coronavirus pandemic has a significant impact on the lives of citizens and that there is a consequent public interest in transparency. However, the Cabinet Office also considered the strong public interest *'that policy development is of the highest quality'*. The Cabinet Office contended that how the Government communicates with the public around policy issues is an inherent component of the Government's overall policy stance on the pandemic. They submitted that premature disclosure of information relating to the development of that policy would be likely to damage future policy making and thus prevent good government.
44. The Cabinet Office advised that *'the Government is able to communicate to the public with clear and unambiguous messaging as a result of work which its officials conduct in an environment which encourages rigorous consideration of information of the kind in question here, free from undue and precipitate external pressure'*.
45. The Cabinet Office contended that there is a public interest in the Government being able to communicate messages to the public *'unfettered'*, and that if the advice subsequently acted upon were exposed to premature public scrutiny, it would undermine the free and frank deliberation that is conducted between ministers. Disclosure would be likely to impair the development of COVID-19 policy in a managed manner.
46. The Cabinet Office contended that the information within the scope of the request *'continues to relate to the development of the Government's policy towards COVID-19 and we consider that the risk of prejudicing the policy process by disclosing the withheld information remains high'*. In the view of the Cabinet Office, the public interest was strongly in favour of maintaining the exemption.

Section 35(1)(b)

47. As set out above, based on submissions provided by the Cabinet Office, the Commissioner is satisfied that the withheld information relates to a meeting of a Committee of Cabinet.
48. In submissions to the Commissioner the Cabinet Office advised that members of the Cabinet and Cabinet Committees expect the content of their discussions to remain private unless there is a very strong countervailing public interest in disclosure. The Cabinet Office advised that whilst they did not believe that disclosure in this case would prevent ministers' or their advisers' willingness or ability to fulfil their duties and responsibilities in the proper manner, they suggested that ministers and their advisers *'could be put in a position where they would be required to have an undue focus on presentational concerns'*.
49. The Cabinet Office suggested that ministers and their advisers may have to put undue weight to the consideration of how the public would or would be likely to react to the timing or content or forum of discussions leading up to a decision, placing an unnecessary burden on the most senior levels of decision-making. The Cabinet Office contended that *'it is essential to sound policy development for ministers to be able to discuss and debate issues freely and frankly, and organise themselves in a way to best facilitate such discussion, in order to maintain and deliver high quality outcomes for the public'*.
50. The Cabinet Office stated that disclosing information about where advice has been given or a decision taken, subjects the collective decision-making processes of government to undue early scrutiny. The Cabinet Office contended that in the case of the management of a crisis such as a pandemic, *'it is strongly in the public interest that ministers and their advisers are able to consider policy in confidence, allowing for a free and frank exchange of views, essential to decision making, particularly in the face of an emergency'*.
51. The Cabinet Office contended that there is a very strong public interest for ministers and their advisers to be able to consider and develop, in confidence, policy options in fast-moving situations, allowing for a free and frank exchange of views in a safe space, to ensure an effective UK response. The disclosure of the withheld information would, contended the Cabinet Office, *'severely limit the ability of the Government to effectively manage future emergencies'*.
52. The Cabinet Office maintained that there is a strong public interest in protecting the safe space at Cabinet Committees for ministers to debate policy, and noted that they had successfully defended that position at a

recent First-tier Tribunal appeal³. The Cabinet Office noted that whilst the circumstances of that case were different, the overall principle was upheld.

53. In addition to the public interest in maintaining a safe space, the Cabinet Office submitted that there is also a very strong public interest in protecting the sovereignty of the deliberative process itself at this level. They contended that, *'there is a specific public interest in preserving the confidentiality of Cabinet and Cabinet Committee and sub-Committee discussions in order to protect the convention of Cabinet collective responsibility which is a cornerstone of our constitution'*. The Cabinet Office stated that the principle underpins the accountability of governments to Parliament and is the foundation of Parliamentary sovereignty, noting that its reference in The Ministerial Code reinforces its importance. The Cabinet Office contended that:

'Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions are reached. This requires that the privacy of opinions expressed in Cabinet and Committees should be maintained. Disclosure would be contrary to good government; which requires ministers and their officials to engage in full, frank and uninhibited consideration of policy options'.

54. The Cabinet Office acknowledged that *'it may be argued that these concerns are too remote to be particularly pertinent in respect of this case'*, but contended that, *'the fact that these public interest considerations may apply across a number of different cases does not make them any less applicable in this case'*. The Cabinet Office stated that the protection of the safe space and Cabinet collective responsibility includes protection of the content of Cabinet and Cabinet Committee information, and that *'if the content of information discussed at Cabinet and Cabinet Committee meetings were disclosed, this would impinge upon the confidentiality of Cabinet discussions and undermine the convention of Cabinet Collective responsibility'*.

Balance of the Public Interest

55. Before proceeding to discuss the balancing of the respective public interest factors in this case, it is important to be clear that the Commissioner's assessment of the balance of the public interest has been made in the context of the facts and circumstances that were

³ Cabinet Office v Information Commissioner (Allowed) [2021] UKFTT 2020_0104 (GRC)

prevailing at or about the time that the complainant made her request (30 May 2020).

56. The Commissioner would note that some of the information provided by the Cabinet Office in their submissions is sensitive and its inclusion in this notice would risk revealing the content of the withheld information. Consequently, some of the Commissioner's analysis of the public interest balance is contained in a Confidential Annex attached to this notice. However, in view of the public interest weight and strength of the withheld information, the Commissioner has sought to include as much information and rationale as possible in the main body of this notice.
57. In submissions to the Commissioner, the Cabinet Office stated that the policy to which the withheld information relates, was the Government's response to the coronavirus pandemic in the UK. The Cabinet Office advised that this policy would be considered to be completed when the present COVID-19 situation subsides, and *'all the individual responses (for example, lockdown, testing, and vaccine rollout) are part of this ongoing policy to control the virus and form part of a single, continual Government response to the coronavirus pandemic that had developed since COVID-19 cases began to appear in the UK'*.
58. The Cabinet Office contended that *'Lockdown' is still an active and evolving element of the policy response. Even though we have moved on from March 2020, the UK population has, at various times since then, been subject to restrictions that could be termed as lockdowns. Therefore, the policy of controlling the virus was being developed at the time the complainant submitted her request on 30 May 2020 and continues to develop'*.
59. The Cabinet Office submitted that *'there is no particular point at which it could reasonably be said that the Government's policy-making process concluded when the UK went onto full lockdown. The policy making process continued as the Government did not cease to monitor infection rates, rates of hospitalisations, rates of death and, latterly, vaccination rollout'*. The Cabinet Office contended that it would be *'artificial and not reflective of how the Government has handled (and continues to handle) the response to COVID-19'* to say that *'simply because lockdown was imposed following the Prime Minister's statement on 23 March 2020 that the policy has been completed'*.
60. However, whilst the Commissioner recognises and accepts that the withheld information in this case relates to the Government's policy of responding to the coronavirus pandemic, and that overarching policy could reasonably be considered to be completed once the COVID-19 pandemic subsided (e.g. downgraded to endemic status) he does not consider that it is reasonable or reflective of the reality, to suggest that

all policy strands of the Government's overall policy response could only be considered to be implemented (i.e. to have passed beyond the formulation or development stages) at that future and indefinite point in time.

61. The Commissioner considers that some components of the Government's overall policy response to the pandemic, such as lockdown, Test and Trace and vaccine rollout, are major and discrete policies in themselves (though obviously feeding into each other), and the point at which they could be considered to have moved beyond the formulation or development stages and into implementation, will differ and depend upon the facts and circumstances of each policy area.
62. The Commissioner considers that the Covid-19 pandemic, and the Government's handling and management of the response to the same, is of a public interest weight and magnitude which can hardly be overstated.
63. It is therefore particularly disappointing and unsatisfactory, that the Cabinet Office's discussion of the public interest factors in their belated request response of 12 November 2020, was entirely generalised, with no specific reference to the actual information requested or the specific public interest which it carries. However, as evidenced above, the Cabinet Office subsequently rectified this shortcoming by providing the Commissioner with detailed submissions in this case.
64. The pandemic has presented the UK (and the world) with its biggest health and economic challenge and crisis since the Second World War, bringing with it even greater restrictions to civil liberties and personal freedoms than that global conflict. The measures put in place by the Government to try and control and contain the virus have affected all UK citizens, to varying degrees of severity, with restrictions on social and personal freedoms unprecedented in peacetime.
65. As widely reported in the media,⁴ the UK was the first country in Europe to exceed 80,000 Covid-19 related deaths, that toll having recently increased to 150,000 such deaths⁵. Despite being the fifth largest economy in the world, the UK has one of the worst Covid-19 health

⁴ [UK becomes first country in Europe to pass 80,000 Covid deaths \(telegraph.co.uk\)](https://www.telegraph.co.uk/news/2020/11/12/uk-becomes-first-country-in-europe-to-pass-80000-covid-deaths/)

⁵ [UK first country in Europe to pass 150,000 Covid deaths, figures show | Coronavirus | The Guardian](https://www.theguardian.com/world/2020/nov/12/uk-first-country-in-europe-to-pass-150000-covid-deaths-figures-show)

outcomes⁶. The effect of the pandemic on the nation as a whole, in terms of mortality, health, societal and economic damage, has been, and continues to be, seismic. Having lost more than 150,000 (at time of writing) citizens to Covid-19, a toll more than double that of UK citizens killed in World War II⁷, there has been much criticism and controversy as to the speed, consistency and effectiveness of the Government response to the pandemic.

66. A consistent and central issue of the public debate has been concern about the timing and speed of the first lockdown in March 2020, as propounded by the complainant in this case. Events leading up to the first national lockdown, as announced by the Prime Minister in his televised address to the nation on the evening of 23 March 2020, would appear to show that arguably there were grounds for taking such drastic action sooner than the Government did. On 12 March 2020, the UK Chief Medical Officers raised the risk to the UK from Moderate to High, and on the same day Public Health England stopped performing contact tracing, as widespread infections were overwhelming capacity. On 14 March 2020, the number of confirmed Covid-19 cases in the UK was 1,140.
67. At the time of the complainant's request (30 May 2020), the UK was in what turned out to be the first lockdown, with the Prime Minister having issued his 'stay at home' instruction in his televised address over two months earlier. As noted above, whilst the Commissioner recognises that the withheld information in this case relates to the Government's overarching policy of responding to the coronavirus pandemic, and that overarching policy could reasonably be considered to be completed once the Covid-19 pandemic subsided (e.g. was downgraded to endemic status), he does not consider that it necessarily follows that all discrete policy strands of the overall policy, could only be considered to be implemented (completed) at that point in time.
68. With the policy area concerned in the present case, that of lockdown, the Commissioner recognises and accepts that the withheld information relates to the formulation or development of that policy, since it was provided to the Prime Minister before his announcement of the lockdown on the evening of 23 March 2020. However, at the time of the complainant's request the lockdown had been in effect for more than two months and the Commissioner considers that in practice the policy

⁶ [Why is England doing worse against Covid than its European neighbours? | Christina Pagel and Martin McKee | The Guardian](#)

⁷ [Unwanted virus milestone: UK's civilian dead now tops WWII's | AP News](#)

had clearly been implemented. Whilst the policy could clearly be subject to some change or modification at some indeterminate time in the future, e.g. through the cessation of the national lockdown and downgrading to regional or local lockdowns, the Commissioner does not consider the contention that the lockdown policy had not yet, at the time of the request, been implemented, to reflect the reality of the situation and the massive impact of this extreme policy decision upon the public.

69. In addition to the above, the withheld information is centred on the Government's policy of a national lockdown. The withheld information does not concern other areas of the Government's overarching policy of pandemic response (e.g. vaccine development). For this reason the Commissioner does not agree with the Cabinet Office contention that the disclosure of the information would be likely to damage future policy making and prevent good government. The Commissioner did consider, in line with his guidance on section 35, whether the need for a safe space remained for a short time after the decision had been made, he concluded that more than 2 months after the lockdown announcement had been made and the policy implemented, it did not. In May 2020 the Government did not still require a safe space for the purpose of formulating or developing a policy which it had implemented more than two months earlier. Had the lockdown policy still been at the formulation or development stage at the time of the complainant's request then the Commissioner would agree that the disclosure of the withheld information may have been premature and could have damaged the policy making process.
70. With regard to the Cabinet Office's arguments on collective responsibility, the Commissioner recognises and entirely accepts that there is a strong and well established public interest in preserving the confidentiality of Cabinet and Cabinet Committee (or sub-Committee) discussions in order to protect the convention of Cabinet collective responsibility.
71. The withheld information in this case comprises a paper for a Cabinet Committee '*in advance*' of a discussion there. Crucially, since the document was provided in advance of the Cabinet Committee discussion, it self-evidently contains no record or details of that discussion. The Commissioner would entirely agree with the Cabinet Office that there is a very important and strong public interest in preserving and protecting the privacy of ministerial discussions in these forums. However, the disclosure of the specific information in this particular case could not possibly breach such privacy, since it contains no record or reference to the ministerial discussion which had yet to take place. Its disclosure would not reveal or even indicate what view or contribution was made by any member of the Cabinet Committee during that subsequent discussion.

72. The Commissioner recognises and accepts, as the Cabinet Office has argued, that such papers prepared for Cabinet Committees fall within the class of information protected by section 35(1)(b) as they relate to Ministerial communications. However, the strength and weight of the public interest which the convention of collective responsibility carries, will clearly depend on the degree to which that convention would be breached or undermined by the information in question. Since the withheld information in this case does not record or reveal what was actually subsequently discussed at the Cabinet Committee by ministers, the Commissioner does not consider that its disclosure would, or would significantly, damage or undermine collective responsibility.
73. The Commissioner considers that the Cabinet Office acknowledgement in submissions that such a concern (as regards collective responsibility) may be argued as being *'too remote to be particularly pertinent in respect of this case'* is significant, as it indicates that the withheld information in this case, and the strength of the collective responsibility arguments surrounding the same, can be differentiated and distinguished from the withheld information in *Cabinet Office v Information Commissioner (Allowed) [2021] UKFTT 2020_0104 (GRC)* (which concerned correspondence and communications in 2003 between Tony Blair, Gordon Brown and Alastair Campbell on the possibility of the UK holding a referendum on whether the UK should join the Euro and/or the rights and wrongs of such a referendum).
74. The Commissioner considers that the Cabinet Office concern as to discussions of Ministers or officials being *'routinely made public'* is similarly 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 (at least premature disclosure). However, in this case, as noted above, the withheld information contains no such recorded communications or views.
75. The Commissioner also notes that the purpose of section 35(1)(b), to which the Cabinet Office have attached much of their safe space arguments in this case⁸, is to protect the operation of government at ministerial level and to prevent disclosures which *'would significantly undermine ministerial unity and effectiveness or result in less robust,*

⁸ [section-35-government-policy.pdf \(ico.org.uk\)](https://ico.org.uk/section-35-government-policy.pdf)

well-considered or effective ministerial debates and decisions'. It is difficult, however, to see how disclosure of the withheld information in this specific instance could possibly undermine ministerial unity, given that it makes no reference to ministerial views or opinions, and could not possibly do so since it was, as noted, provided in advance of the Cabinet Committee discussion.

76. The Commissioner is mindful that the issue underpinning the complainant's request, i.e. was the Government too slow to impose a national lockdown in response to the unfolding Covid-19 emergency, is one which is likely to attract significant scrutiny and investigation by the public inquiry which is scheduled to begin this year. However, at the time of the complainant's request, the independent public inquiry had not been announced (it was confirmed by the Prime Minister on 12 May 2021 that such an inquiry would be established) and so the potential transparency and accountability afforded by an inquiry was not in prospect. In any event, the Commissioner does not consider that the disclosure of the withheld information would pre-empt or adversely affect the work of the inquiry. Rather, it would simply place a further piece of information into the public domain which the inquiry could consider as part of its terms of reference, if appropriate.
77. Furthermore, the Commissioner considers that the disclosure of the withheld information would serve a valuable public interest in that it would confirm **exactly when** the Prime Minister was first advised to put the country into national lockdown and thus show whether or not the Government were, as they have claimed throughout the pandemic, following the science.
78. The Commissioner notes that, at the time of the request, there was information in the public domain which provided some pertinent context on this key point. In a detailed Reuters special report dated 7 April 2020, titled, *'Johnson listened to his scientists about coronavirus – but they were slow to sound the alarm'*⁹, Stephen Grey and Andrew MacAskill noted that:

'Interviews with more than 20 British scientists, key officials and senior sources in Johnson's Conservative Party, and a study of minutes of advisory committee meetings and public testimony and documents, show how these scientific advisers concluded early the virus could be devastating.

⁹ <https://www.reuters.com/article/us-health-coronavirus-britain-path-specidUSKBN21P1VF>

*But the interviews and documents also reveal that for more than two months, the scientists whose advice guided Downing Street did not clearly signal their worsening fears to the public or the government. Until March 12, the risk level, set by the government's top medical advisers on the recommendation of the scientists, remained at "moderate", suggesting only the possibility of a wider outbreak. Interviews and records published so far suggest that the scientific committees that advised Johnson didn't study, **until mid-March** (Commissioner's emboldening), the option of the kind of stringent lockdown adopted early on in China, where the disease arose in December, and then followed by much of Europe and finally by Britain itself. The scientists' reasoning: Britons, many of them assumed, simply wouldn't accept such restrictions'.*

As they watched China impose its lockdown, the British scientists assumed that such drastic actions would never be acceptable in a democracy like the UK. Among those modelling the outbreak, such stringent counter-measures were not, at first, examined'.

79. The report went on to quote Professor John Edmunds, Professor of Infectious Disease Modelling and a key adviser to the Government:

"We had milder interventions in place", said Edmunds, because no one thought it would be acceptable politically to shut the country down". He added, "We didn't model it because it didn't seem to be on the agenda. And Imperial (College) didn't look at it either". The NERVTAG committee agreed, noting in its minutes that tough measures in the short term would be pointless, as they "would only delay the UK outbreak, not prevent it".

80. The authors went on to record how:

*'Johnson held out against stringent measures, saying he was following the advice of the government's scientists. He asserted on March 9: "We are doing everything we can to combat this outbreak, based on the very latest scientific and medical advice". Indeed, the government's Scientific Advisory Group for Emergencies (SAGE), had recommended that day, with no dissension recorded in its summary, **that the UK reject a China-style lockdown** (Commissioner's emboldening). SAGE decided that "implementing a subset of measures would be ideal", according to a record of its conclusions. Tougher measures could create a "large second epidemic wave once the measures were lifted", SAGE said'.*

81. The report explained that:

'The catalyst for a policy reversal came on March 16 with the publication of a report by Neil Ferguson's Imperial College team¹⁰. It predicted that, unconstrained, the virus could kill 510,000 people. Even the government's "mitigation" approach could lead to 250,000 deaths and intensive care units being overwhelmed at least eight times over. Imperial's prediction of over half a million deaths was no different from the report by the government's own pandemic modelling committee two weeks earlier. Yet it helped trigger a policy turnaround, both in London and in Washington, culminating seven days later in Johnson announcing a full lockdown of Britain'.

82. The Commissioner does not accept that, at the time of the request, the disclosure of the withheld information would have distracted from the Government's ongoing response to the pandemic emergency. On the contrary, it is arguable that more distraction was caused by the ceaseless speculation resulting from this information *not* being in the public domain. The Commissioner considers that the withheld information would provide valuable clarity and transparency to an issue (i.e. was the Government too slow in implementing a national lockdown) which, at the time of the request, was of the very highest concern to the public, and which has prompted endless speculation and accusation since. Given how much reliance the Government placed on their insistence that, in responding to the pandemic, they had, at all times, followed the science, and the trust and confidence which the public were expected to have in such assurances, the Commissioner considers that the withheld information carries a particularly strong and compelling public interest weight in transparency and accountability.
83. The Commissioner recognises and entirely accepts that the public interest in protecting the safe space for the formulation and development of government policy is strong and well established. It is one to which the Commissioner always ascribes due and appropriate weight. However, at the time of the request, the Government's lockdown policy had been implemented, and the withheld information necessarily relates to that particular policy, rather than other policies concerning the Government's response to, and management of, the pandemic (e.g. development of vaccines), which remained in the process of formulation and development at the time of the request. Consequently, the Commissioner does not consider or accept that it would have been '*premature*' for the withheld information to have been disclosed at the time of the request.

¹⁰ This is presumably what the complainant referred to when advising the Commissioner that, '*We already know that one party advised the Prime Minister to lock down two weeks before he acted and that is rather damning in our view*'.

84. Given that at the time of the request the need for the safe space in respect of the Government's lockdown policy was greatly diminished (that policy having been implemented) and that the withheld information contains no record or indication of the views of individual Ministers (and therefore does not prejudice or does not significantly prejudice collective responsibility) the Commissioner considers that the public interest in maintaining the exemptions at section 35(1)(a) and section 35 (1)(b) does not outweigh the particularly powerful and paramount public interest in disclosure of the information.
85. This is subject to one caveat. A small part of the withheld information (specifically paragraph 14) relates to aspects of policy formulation or development which remained ongoing at the time of the request. In respect of this information only, the Commissioner therefore considers that the public interest in maintaining section 35(1)(a) outweighs the public interest in disclosure of the information.

Procedural matters

Section 10 – Timeliness

Section 17- Refusal of a request

86. Section 10 of FOIA states that responses to requests made under the legislation must be provided *'promptly and in any event not later than the twentieth working day following the date of receipt'*.
87. The complainant made her request on 30 May 2020 and did not receive a substantive response until 12 November 2020, more than five months later. The Cabinet Office failed to comply with section 1(1)(a) in not confirming to the complainant, within 20 working days, that they held the requested information. The Cabinet Office is therefore in serious breach of section 10(1) of the FOIA.
88. Section 17(1) of FOIA states:
- 'A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information, must, within the time for complying with section 1(1), give the applicant a notice which –*
- (a) States that fact,*
 - (b) Specifies the exemption in question, and*
 - (c) States (if that would not otherwise be apparent) why the exemption applies'.*

89. Therefore a public authority that is relying on a claim that the requested information is exempt information must provide the applicant with an appropriate refusal notice within the time for complying with section 1(1) i.e. within 20 working days.
90. The Commissioner acknowledges and recognises that this request was received during a time of national lockdown and that all public authorities struggled to adapt to new ways of working and the resource challenges that the COVID-19 pandemic posed. However, as the Cabinet Office accepted in submissions to the Commissioner, the delay of over five months in providing a response was excessive, even in these circumstances. The Commissioner therefore also finds that this was a serious breach of section 17(1).

Right of appeal

91. 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

92. 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.
93. 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
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Wycliffe House
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SK9 5AF