

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 April 2023

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

Decision (including any steps ordered)

1. The complainant has requested information relating to a blogpost. The above public authority ("the public authority") relied on section 36 of FOIA (prejudice to the effective conduct of public affairs) to withhold the information.
2. The Commissioner's decision is that the public authority has correctly relied on section 36 of FOIA and that the balance of the public interest favours maintaining the exemption. The public authority breached section 17 of FOIA as it took an unreasonable amount of time to provide its substantive response.
3. The Commissioner does not require further steps to be taken.

Background

4. On 8 February 2021, OpenDemocracy published an open letter to the Chairs of the House of Commons Select Committees on Digital, Culture, Media & Sport and on Public Administration & Constitutional Affairs. The letter was co-signed by several current and former national newspaper editors and was published in a longer blog piece. The blog asserted that a unit within the Cabinet Office, known as the "Clearing House" had

“blocked” disclosure of information about contaminated blood and about buildings containing cladding similar to that used on Grenfell Tower.¹

5. The following day, the public authority published its own blog post, which rebutted some of the claims.²
6. On 25 August 2022, Cabinet Office minister Lord True announced that the Clearing House would be:

“redesigned to more clearly operate as an advisory function. We accept that the title ‘FOI Clearing House’ is confusing, suggesting a level of direction and control over other departments’ FOI requests which in reality does not exist. We will work to reconfigure the function to provide advice as efficiently to departments to enable them to meet their statutory obligations in a timely manner and to a high quality.”³

Request and response

7. On 12 February 2021, the complainant wrote to the public authority and, referring to the public authority’s blog post, requested information in the following terms:

“From 1st February to the day this request is processed, I would like to request the following information:

All drafts of this blogpost, including track changes, comments and feedback on the blog post

All internal correspondence and communications in which the blogpost - and/or the idea of the blogpost - is mentioned and/or referred to

All external correspondence and communications in which the blogpost - and/or the idea of the blogpost - is mentioned and/or referred to

¹ <https://www.opendemocracy.net/en/freedom-of-information/fleet-street-editors-demand-urgent-action-to-protect-freedom-of-information/>

² <https://www.gov.uk/government/news/response-to-points-raised-in-opendemocracy-article-080221>

³ <https://www.gov.uk/government/publications/cabinet-office-and-freedom-of-information/freedom-of-information-foi-clearing-house-review-html>

Copies of all correspondence and communications between the Cabinet Office and internal and external stakeholders which were consulted during the process of creating the blogpost.”

8. The public authority responded on 17 June 2021. It confirmed that it held information, but relied on section 36 of FOIA in order to withhold that information. It upheld this position following an internal review.

Reasons for decision

9. Section 36 of FOIA allows a public authority to withhold information whose disclosure could prejudice the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or could otherwise prejudice the effective conduct of public affairs.
10. For a government department, the exemption will be engaged if, in the reasonable opinion of a minister of the Crown, disclosure could have these effects.
11. The public authority provided the Commissioner with a copy of a submission it had prepared for one of its ministers, setting out the arguments both for and against engaging the exemption. It also provided a copy of an email, dated 7 June 2021, confirming that Julia Lopez MP (then Parliamentary Secretary for the Cabinet Office) had issued an opinion. The Commissioner is satisfied that Ms Lopez was entitled to provide such an opinion and that she did so on 7 June 2021.
12. Ms Lopez’s opinion was that:

“disclosure of the information in scope would inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation and would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of public affairs.

“It is important that officials are provided with a safe space in which to exchange ideas and comments freely and frankly when drafting documents intended for publication. That free and frank exchange should not be unduly inhibited by considerations relating to the possible publication of those free and frank exchanges.”
13. It is not for the Commissioner to substitute his own opinion for that of Ms Lopez. He does not need to share Ms Lopez’s opinion for it to be reasonable – providing that it identifies the applicable interest and is neither irrational nor absurd.

14. The withheld information comprises of a couple of drafts of the blog post and some tracked comments on the drafts. It also includes various emails between officials and special advisers covering the refining of the drafts, as well as preparation for publication.
15. The Commissioner accepts that it is neither irrational nor absurd to consider that civil servants might be less candid in providing advice or opinions if they feared that those opinions would subsequently be published.
16. Ms Lopez's opinion indicated that disclosure "would" have this effect – which implies that the effect is more likely than not to occur. However, the submission provided to her stated that the disclosure "would be likely to" have such an effect – implying that the chance is less than 50%.
17. Having considered the particular issue under discussion, the circumstances of the time and the information itself, the Commissioner is not satisfied that it is reasonable to claim that disclosure of the information being withheld would be more likely than not to deter civil servants from providing robust advice – that is, after all, their job. However, neither is it reasonable to claim that there is no possibility of any effect. The Commissioner has therefore accepted that the lower prejudice threshold is met, as it is reasonable to consider that disclosure "would be likely to" inhibit the free and frank provision of advice and to inhibit the free and frank exchange of ideas.
18. The Commissioner does not consider that Ms Lopez identified any other form of prejudice that would result from disclosure. Therefore disclosure would not "otherwise" prejudice the effective conduct of public affairs and the Commissioner is not able to accept that this particular part of the exemption (section 36(2)(c) of FOIA) is engaged.
19. As part of the exemption is engaged in relation to all the withheld information, the Commissioner has gone on to consider the balance of the public interest.

Public interest test

20. The complainant argued that the public interest should favour disclosure because the blog had been published to "seriously undermine the journalism [of OpenDemocracy]" and "discredit [OpenDemocracy's] journalism."
21. The complainant also argued that there was a lack of transparency around the Clearing House as (at least at the point the request was responded to), very little information was in the public domain – and that there was a "serious public interest" in its operation. He noted that:

"At that time the blog post was published, there was nothing on the government website that informed the public about the Clearing House and how it operates. It was not until a tribunal involving [OpenDemocracy] that the Cabinet Office decided to publish further information - and the information that it has published is still limited. For example, it does not elaborate on what happens when a government department disagrees with the Clearing House."

22. The public authority argued in its refusal notice that the public interest should favour maintaining the exemption because:

"officials require a safe space from which to give and receive advice in order to ensure material for publication is of the highest standard, particularly when considering a rapid response to media stories. This requires officials to provide open and honest comments and advice. The quality of the advice provided during the drafting process would be adversely affected if officials had the expectation that the information would be published, particularly if that publication occurred very soon after the document itself was published. Further factors in favour of withholding the information apply because disclosing the information in scope would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. Officials worked quickly to ensure that the publication was accurate and responsive to the claims the blog sought to address, which required officials to work collaboratively in a virtual environment, leaving comments and suggestions which served to improve the quality of the draft publication. If this information were to be published, this would be likely to have a detrimental effect on the way in which these types of discussions take place in the future...this would in turn lead to less effective and useful publications by the Cabinet Office as officials would not have the confidence to provide frank suggestions and work through drafts collectively to ensure they are up to a high standard."

23. The Commissioner considers that the public interest in disclosure is weak.
24. The complainant has not offered any evidence to support his accusation that there was an aim to "discredit" or "undermine" OpenDemocracy – the only substance to the claim appears to be that the public authority did not accept some of the claims OpenDemocracy had made in its blog. Nothing in the withheld information implies any improper motive on behalf of the public authority.
25. It is the right of any journalist to publish criticism of this (and any other) public authority. That right does not extend to having the impugned public authority accept that criticism without comment – especially if it wishes to dispute the factual basis for the criticism.

26. The public authority was entitled to publish a defence of its actions and to present facts and explanations to support its case. If the complainant wishes to dispute the facts relied upon, or to highlight explanations which he believes are unsubstantiated, he is able to do so already with the material already in the public domain. He does not require access to the withheld information in order to do so – and the Commissioner is sceptical that the withheld information would be of particular assistance to him in doing so anyway.
27. The Commissioner accepts that, at the point the request was responded to, the information about the Clearing House in the public domain was not sufficient to allow for a full understanding of its role. He also accepts that the operation of the Clearing House was, at the time, a matter of considerable interest to journalists and some civil society groups.
28. However, he notes that the withheld information would add very little about the inner workings of the Clearing House that was not already in the blog post. It contains nothing, for example, that would “elaborate on what happens when a government department disagrees with the Clearing House.”
29. If the complainant, or indeed any other individual, believes that a government department has withheld information to which he is entitled (regardless of the involvement of the Clearing House), he may bring a complaint to the Commissioner. The Clearing House is not the final arbiter of whether information can be withheld.
30. Whilst the Commissioner is not convinced that the public interest in favour of maintaining the exemption is exceptionally strong, he does accept that there is some public interest in allowing officials to discuss matters and advise ministers candidly. He also accepts that there were tight deadlines involved in preparing the blog post such that the individuals concerned would not have had the same opportunity to finesse their comments in anticipation of publication as they might have done with a longer project.
31. Whilst the Commissioner accepts that the information may be particularly important to the complainant and OpenDemocracy, the evidence does not suggest any significant public interest in the wider world. Whilst the complainant has put forward arguments as to why the information would, in theory, advance a public interest, the actual information being withheld would not serve that interest because it adds little about the interest that was not already in the public domain at the point at which the public authority ought to have responded to the request.

32. The Commissioner is therefore of the view that the balance of the public interest favours maintaining the exemption.

Procedural matters

33. A public authority relying on an exemption to withhold information is usually required to provide the requester with a refusal notice specifying any exemptions that are being relied upon. This should usually be done within 20 working days.
34. However, when an exemption involves a public interest test, the public authority can delay issuing its substantive refusal notice if it needs additional time to consider the balance of the public interest. The legislation says that this can be delayed "until such time as is reasonable in the circumstances" however the FOIA Code of Practice states that best practice is for such an extension to be no longer than an additional 20 working days.
35. The public authority in this case took four months to issue its refusal notice (though it did provide holding responses). The Commissioner recognises that the request was submitted during a period of lockdown and when the public authority was exceptionally busy co-ordinating the response to the Covid-19 pandemic. He also notes a marked improvement in timeliness rates more recently.
36. Nevertheless, the Commissioner still cannot consider such a delay to be "reasonable in the circumstances." The evidence the public authority provided shows that it did not seek the opinion of a minister until June 2021. Given that section 36 cannot be engaged until a minister has provided an opinion, the public authority could not have been considering the balance of the public interest prior to that date.
37. The Commissioner therefore finds that the public authority breached section 17 of FOIA in its response to this request.

Right of appeal

38. 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

39. 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.
40. 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

Roger Cawthorne
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