

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **29 June 2023**

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking briefings provided to Michael Gove, prior to his appearance before the Public Administration and Constitutional Affairs Committee in December 2020, which referred to the Clearing House. She also sought copies of any notes taken during the committee by officials or Mr Gove on the same subject. The Cabinet Office provided copies of notes taken that were held. However, it withheld information from a briefing document on the basis of sections 36(2)(b)(i) and (c) (effective conduct of public affairs) of FOIA arguing that the public interest favoured maintaining these exemptions. The complainant challenged this decision and also questioned whether additional briefing material was held.
2. The Commissioner's decision is that the Cabinet Office has located all of the briefing material falling within the scope of the request. The Commissioner has also decided that whilst the withheld information is exempt from disclosure on the basis of sections 36(2)(b)(i) and (c), the public interest in disclosure of this information outweighs the public interest in maintaining the exemptions.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the information which it has withheld on the basis of sections 36(2)(b)(i) and (c) of FOIA.

4. The public authority 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 Act and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted the following request to the Cabinet Office on 1 February 2021:

"On 10th December 2020, Michael Gove appeared before the Public Administration and Constitutional Affairs Committee.

In light of this, I would like to request the notes taken during that hearing by Mr Gove and other Cabinet Office officials, as well as any briefing papers for that hearing which refer or relate to the Clearing House. I would also like to request any briefing papers for that hearing which refer or relate to the publication openDemocracy."¹

6. The Cabinet Office contacted the complainant on 1 March 2021 and confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure on the basis of section 35(1)(a) (formulation or development of government policy) of FOIA and explained that it needed additional time to consider the balance of the public interest. The Cabinet Office sent a similar further extension letter on 30 March 2021.
7. The Cabinet Office issued a substantive response on 28 April 2021. It explained that the information held consisted of a) "Ministerial briefing papers" and b) references to the Clearing House in a monitoring document capturing the discussion at the Public Administration and Constitutional Affairs Committee. The Cabinet Office intended to disclose the information described at b) as an annex to its response² but explained that the information described at a) was exempt from disclosure on the basis of sections 36(2)(b)(i) and 36(2)(c) (effective

¹ The title of the committee session was 'The work of the Cabinet Office'. Although the Clearing House was discussed during Mr Gove's evidence, it was not the sole of focus of the session. A copy of a transcript and video of the session are available here <https://committees.parliament.uk/event/2911/formal-meeting-oral-evidence-session/>

² Due to an administrative error, this annex was not attached to the Cabinet Office's response to the complainant of 28 April 2021. To rectify this, the Cabinet Office provided the complainant with this information during the course of the Commissioner's investigation.

conduct of public affairs) of FOIA and the public interest favoured maintaining these exemptions.

8. The complainant requested an internal review on 11 May 2021. The Cabinet Office provided the outcome of that review on 27 August 2021. It maintained its reliance on the exemptions cited in the refusal notice.

Scope of the case

9. The complainant contacted the Commissioner on 21 November 2021. She raised the following grounds of complaint:
10. Firstly she has explained that she did not receive the annex to the Cabinet Office's response of 28 April 2021.³
11. Secondly, she has questioned the amount of information being withheld by the Cabinet Office. This was because in her view the Cabinet Office's response of 28 April 2021 indicated that there was more than one ministerial paper: "The information that is held are Ministerial briefing papers (emphasis added)". However, the complainant noted that the internal review only referred to one such briefing: "The disclosure of ministerial briefing, even in part, would inhibit the free and frank provision of advice, which would in turn prejudice the effective conduct of public affairs."
12. Thirdly, she disputed the Cabinet Office's position that the public interest favoured withholding any such briefings. Rather in her view, she considered there to be a significant public interest in the disclosure of this information. The complainant's submissions to support this position are set out below.
13. It is important to note, for the reasons which will become clear below in relation to the Commissioner's consideration of section 36, that in line with a decision of the Upper Tribunal⁴ his role is limited to considering the application of exemptions, including the balance of the public interest, at the point of statutory compliance with the legislation, ie within 20 working days of the request. Even in circumstances where a public authority has relied on section 10(3) to extend its consideration of the public interest test, the Commissioner view is that this provision only extends the time for considering the balance of the public interest test. The circumstances upon which the public interest is to be assessed

³ As noted above, this specific point has now been resolved.

⁴ Montague v Information Commissioner and Department for International Trade [2022] UKUT 104 (AAC)

remain those as they stood at the time of the request, or at latest, at the point of statutory compliance.

Reasons for decision

The amount of information falling within the scope of the request

14. The Commissioner asked the Cabinet Office to address the complainant's concerns about the volume of information considered to fall within the scope of the request and whether there was in fact more than one briefing document.
15. In response the Cabinet Office explained that it did not consider that its responses indicated that additional information was held.
16. It noted that the original FOI response made clear that the information in scope of this request is: "Ministerial briefing papers and references to the Clearing House in a monitoring document capturing the discussion at the Public Administration and Constitutional Affairs Committee (PACAC) meeting on 10 December 2020" [Cabinet Office emphasis]. The internal review stated that: "The disclosure of ministerial briefing, even in part, would inhibit the free and frank provision of advice, which would in turn prejudice the effective."
17. The Cabinet Office explained that for clarity, the term 'Ministerial briefing' does not commonly refer to a singular document but is a phrase used to cover advice that is provided to Ministers (usually over a number of pages of documents but with no fixed definition of volume) and can often also be used as a shorthand for 'Ministerial briefing papers', the term referred to in the original response. It explained that there is no difference in common usage within the civil service between the term Ministerial briefing papers and Ministerial briefing. Neither term is used to give an indication of the number of pages contained within a briefing drafted for Ministers and these terms cannot provide a qualitative assessment of the volume of information within a briefing. It suggested that even the term 'briefing paper' does not indicate a singular page of briefing but rather describes a paper of a unspecific length on a particular topic or topics and so similarly cannot be considered an indicator of length or volume of advice.
18. The Cabinet Office accepted that from a lay perspective this may not be entirely apparent but hoped that the above explanation made clear why it had used the language it did and that it was not attempting to reduce the volume in scope of the request at the internal review stage.
19. The Cabinet Office also explained that the information in the scope of the part of the request seeking briefing material was from a section of

Ministerial briefing provided to the then Chancellor of the Duchy of Lancaster, Michael Gove (and in parallel to Mark Sweeney, a Senior Civil Servant) in advance of the hearing in question.

20. The Cabinet Office explained that at the time the request was received it considered that its FOI team had conducted a reasonable search for information held by the department. This included a search of information held by the FOI policy team and individuals whose roles included work for the then Clearing House function. The FOI team also requested that the office of the then Chancellor of the Duchy of Lancaster, Michael Gove, and the office of his special advisers conducted searches as well as ascertaining whether any relevant information was held by the Cabinet Office parliamentary team. The Cabinet Office explained that one briefing pack was located (which contained the withheld information). It explained that no other documents were found to be in scope. However, this was not unexpected as it is usual practice for a department to provide a single briefing pack on many topics for Ministers in advance of a committee hearing in order to ensure they are adequately briefed and have all relevant information available to them in one place.
21. In light of the Cabinet Office's submissions set out above the Commissioner is satisfied that all information falling within the scope of this request has been located.

Section 36 – effective conduct of public affairs

22. The parts of section 36 which the Cabinet Office are seeking to rely on are as follows:

'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
(b) would, or would be likely to, inhibit—
(i) the free and frank provision of advice...
...(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'
23. In determining whether these sections are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is

not related to the specific subsection the opinion is unlikely to be reasonable.

- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
24. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person’s opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person’s position could hold. The qualified person’s opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
25. With regard to the process of seeking this opinion, the Cabinet Office sought the opinion of the Minister for State on 15 March 2021 with regard to whether sections 36(2)(b)(i) and (c) of FOIA were engaged. Qualified persons are described in section 36(5) of FOIA with section 36(5)(a) stating that ‘qualified person’ means ‘in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown’. The Commissioner is therefore satisfied that the Minister of State was an appropriate qualified person.
26. The qualified person was provided with a rationale as to why the exemptions could apply and copies of the withheld information. The qualified person provided their opinion that the exemptions were engaged on 18 March 2021.
27. Turning to the substance of the opinion, the qualified person argued that disclosure of the briefing papers would be likely to inhibit the free and frank provision of advice and would also be likely to otherwise prejudice the effective conduct of public affairs. More specifically, the qualified person argued that it is important that Ministers are able to receive free and frank advice from officials, without the concern that the advice could be published. The qualified person argued that disclosing the information in scope would have a detrimental impact as Ministers would not be able to receive the level of advice required in order to allow them to prepare for parliamentary committees and respond to any questions that may

arise. The qualified person also argued that disclosure would mean that future similar briefings that were produced would be written with more circumspection, making any advice, opinions, or discussion less frank and therefore less useful. This could in turn lead to less effective and useful evidence from Ministers to parliamentary committees.

28. The Commissioner is satisfied that the qualified person's opinion was a reasonable one. With regards to section 36(2)(b)(i) the Commissioner accepts that it is reasonable to argue that officials need a safe space in which to provide Ministers with advice prior to meetings and select committee hearings. The Commissioner also accepts that it is reasonable to argue that the quality of that advice may be impacted if officials expected that advice to be published, particularly shortly after the meeting itself (the request was submitted less than two months after the committee hearing). With regards to section 36(2)(c), the Commissioner accepts that if the quality of briefing packs provided to Ministers prior to parliamentary committees was undermined, it is rational to argue that this could lead to less effective and useful evidence being given by Ministers to such committees; the Commissioner accepts that this can be correctly seen as an 'other' prejudice to the effective conduct of public affairs.
29. Sections 36(2)(b)(i) and (c) are therefore engaged.

Public interest test

30. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemptions cited outweigh the public interest in disclosing the information.

Public interest arguments in favour disclosing the withheld information

31. The complainant noted that in its initial response to her request, the Cabinet Office referred to information it had published about the role of the Clearing House.⁵ However, the complainant noted that such information was only published shortly prior to a First tier Tribunal

⁵ The information which the Cabinet Office directed the complainant to is available at the following link. Some of this was published on 18 March 2021 ie the information which it cited in its response to the complainant. Further information available on the link was added at later dates (namely April 2022 and August 2022):

<https://www.gov.uk/government/publications/cabinet-office-and-freedom-of-information>

hearing regarding the Clearing House.⁶ Furthermore, the complainant argued that the Cabinet Office had still not fully published information about its operations, and in particular what happens when a government department disagrees with the Clearing House.

32. The complainant argued that the withheld information should be disclosed to allow examination of how the Cabinet Office reacted internally in the run up to and after the committee hearing. The complainant argued that 'During the hearing, Michael Gove denied the existence of the Clearing House, stating: "The idea that there is a secret clearing house or any sort of blacklist is, I am afraid, not correct." But there is plenty of evidence that has emerged confirming the existence of the Clearing House. Was a minister properly briefed before facing PACAC? And if he was not, then why not? These questions can only be answered by a disclosure of the information.'
33. The complainant emphasised that there is a huge amount of public interest in this release of this information. She noted that the Tribunal hearing referred to above had resulted in a parliamentary inquiry⁷ and the Commissioner's evidence to the inquiry had revealed that the Cabinet Office had rejected an audit by the Commissioner of the Clearing House.
34. The complainant also explained that she doubted whether disclosure of the information would adversely affect officials; rather she suggested that the Cabinet Office was afraid of scrutiny.

⁶ EA/2020/0240

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2848/Cabinet%20Office%20EA.2020.0240%20Open%20Decision.pdf>

⁷ The Public Administration and Constitutional Affairs Committee's report about its inquiry explained that this was launched because 'Prior to the Tribunal proceedings, the Clearing House had an opaque status. Following the Tribunal, the Committee launched this inquiry to provide a view on the transparency surrounding the Clearing House, the Cabinet Office's efforts to review the Clearing House, and the Cabinet Office's oversight of and attitude towards the FOI Act 2000 more generally.' <https://committees.parliament.uk/publications/22055/documents/163743/default/>

Public interest arguments in favour of maintaining the exemptions

35. The Cabinet Office explained that a key factor it took into account when concluding that the public interest favoured maintaining the exemptions was the core requirement for the civil service to be able to provide Ministers with appropriately detailed and frank briefing before they appear in front of a parliamentary committee without concern that such briefing will be made public shortly afterwards. The Cabinet Office noted that the request was submitted only two months after the Chancellor of the Duchy of Lancaster's appearance at the Public Administration and Constitutional Affairs Committee.
36. The Cabinet Office explained that although each request for briefing material would be considered on its own merits, parliamentary accountability is a fundamental tenet of our democracy and one which both the civil service and Ministers take seriously. Therefore, the Cabinet Office argued that it was incumbent on civil servants to ensure that Ministers are appropriately briefed before any appearance. As a result the Cabinet Office explained that such briefings are often written in a frank manner often covering sensitive issues or topics in brief without the contextualising information that would be expected in a document intended for publication.
37. As a result the Cabinet Office argued that there was a very strong public interest in this process of briefing and enabling civil servants to brief Ministers in a thorough and frank manner on any issue they consider might be discussed. The Cabinet Office argued that there was no public interest in undermining this process, particularly as such hearings can be viewed on the Parliamentary website with a transcript of the hearing also subsequently made available.
38. In response to the complainant's grounds of complaint, the Cabinet Office noted that as indicated in its response, the government had made information available in the public domain regarding the operation of the Clearing House. (The Cabinet Office also drew the Commissioner's attention to publications regarding the Clearing House and details of how it engaged with other government departments.)
39. In summary, the Cabinet Office took the view that the concerns raised by the complainant have been publicly considered and concluded. That the Cabinet Office "Clearing House" function had been established for many years and has operated in different forms since FOIA came into force. The Cabinet Office also noted that it had made considerable information about this function available and the Clearing House had been the subject of a thorough review by Sue Langley OBE (launched in April 2022) following which the Government agreed that the 'FOI Clearing House' should be redesigned to more clearly operate as an advisory function. (The Cabinet Office also noted that the Government

also welcomed Sue Langley's recommendation that the Cabinet Office should continue to play a central role in ensuring that FOIA operates as intended by Parliament.⁸⁾

40. In light of the above, the Cabinet Office did not consider that disclosure of the information contained within the Ministerial briefing would outweigh the significant public interest in ensuring that Ministers can be briefed thoroughly and appropriately in advance of parliamentary committee hearings, a core function of the civil service.

Balance of the public interest test

41. 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.
42. As explained above, the Commissioner's role is limited to considering the balance of the public interest at the point the request was submitted, or at the latest by the time of statutory compliance, ie 20 working days after the request. This request was submitted on 1 February 2021; the time for compliance was therefore 1 March 2021. This is important because the information cited by the Cabinet Office which had been published by the government regarding the Clearing House was not published until 18 March 2021. As a result the Commissioner's view is that the availability of such information in the public domain at the point the Cabinet Office actually issued its substantive response to this request (ie on 28 April 2021) is not relevant to the balance of the public interest test. (It follows of course that the later publications of information about the Clearing House in April and August 2022 are also irrelevant to the Commissioner's assessment of the public interest test in this case.)
43. With regard to attributing weight to the arguments in favour of maintaining the exemption, the Commissioner accepts that officials do need a safe space in which to brief Ministers prior to parliamentary committees. Moreover, the Commissioner accepts that, in general, there is a genuine risk of prejudice occurring both to the quality of such briefings and in turn Ministers' ability to represent the government's position at such committees if advice was routinely disclosed. This is

⁸ Details of the review and government response are at the link contained at footnote 5.

because the Commissioner accepts that routine disclosure of such briefings would have a direct impact on the content and effectiveness of such briefings.

44. In the particular circumstances of this case the Commissioner recognises that disclosure of the withheld information in response to this request would have resulted in the information being placed into the public domain only two months after the committee in question had taken place. The Commissioner accepts that the relatively recent age of the information increases the risk of such harm occurring.
45. However, with regard to the information requested, the Commissioner considers it important to note that it does not represent the full briefing provided to Mr Gove. Rather it is simply part of a briefing on a discrete and specific topic; the hearing covered a wide range of issues and the Commissioner would assume that entire briefing was equally wide in scope.
46. Moreover, in the Commissioner's view the content of the withheld information in question is unlikely to have a particularly significant impact on future briefings if it was disclosed. This is on the basis that the information does not, in the Commissioner's view, contain any obviously sensitive or candid observation but is primarily factual in nature.
47. Turning to the public interest in disclosure, based on the quote above at paragraph 32 the Commissioner understands that the complainant appears to be implying that Mr Gove was denying the existence of the Clearing House in its entirety. If that is the complainant's suggestion, respectfully the Commissioner does not agree with that interpretation of Mr Gove's testimony. Rather, the Commissioner understands the point being made was that there was no 'secret' Clearing House as opposed to the position that there was no Clearing House at all.
48. Nevertheless, the Commissioner does recognise that at the time of the request, and indeed at the point of statutory compliance with the request, there was limited information in the public domain about the Clearing House. The information highlighted by the Cabinet Office was not published until 18 March 2021, and cannot for the reasons set out above be taken into account when considering the balance of the public interest test. (Albeit, the Commissioner does accept that such information does go some way to providing insight in the Clearing House and its operation.)
49. In the Commissioner's view disclosure of the withheld information at the point of the request could have aided the public's understanding of the Clearing House. It would have also informed the public about how the Cabinet Office officials had briefed Mr Gove on the Clearing House prior

to the committee in question. The Commissioner accepts that at the time of the request there was arguably some opacity to the Clearing House's operations and as a result there was a significant public interest in the disclosure of the information to address this.

50. Taking the above into account the Commissioner considers that the balance of the public interest tips in favour of disclosure. In reaching this finding the Commissioner has placed particular weight on the fact that at the time of the request there was limited information available about the operation of the Clearing House and because in his view the prejudicial effects of disclosing the particular withheld information would, despite the proximity of the information to the Committee hearing, be relatively limited.

Right of appeal

51. 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

52. 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.
53. 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

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