

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **6 February 2023**

Public Authority: **Foreign, Commonwealth & Development Office**
Address: **King Charles Street**
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant submitted a request to the Foreign, Commonwealth & Development Office (FCDO) seeking information relating its processing of a previous request for information which she had submitted to the department seeking copies of the Foreign Secretary's ministerial diaries. The FCDO disclosed some information falling within the scope of the request but withheld further information on the basis of sections 35(1)(d) (operation of a Ministerial office), 36(2)(b)(i) and (ii), 36(2)(c) (effective conduct of public affairs) and 40(2) (personal data) of FOIA. The complainant challenged the FCDO's reliance on these exemptions with the exception of section 40(2).
2. The Commissioner's decision is that the disputed information is exempt from disclosure on the basis of either section 35(1)(d) or sections 36(2)(b)(i) and (ii), 36(2)(c). For some of this information the Commissioner is satisfied that the public interest favours maintaining the relevant exemptions. However, for some information withheld under both sets of exemptions the Commissioner is satisfied that the public interest favours disclosure.
3. The Commissioner has also concluded that the FCDO breached section 17(3) of FOIA given the time it took complete its public interest test considerations before issuing a substantive response to the request.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information withheld on the basis of section 35(1)(d), with the only exception being the parts of this information identified in the confidential annex.
 - Provide the complainant with an unredacted copy of the redacted document that the FCDO initially released in response to part 2 of the request.
5. 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. The complainant submitted the following request to the FCDO on 20 July 2021:

'(1) I would like to request all internal and external correspondence and communications that mention, or refer to, my request - as well as my request for an internal review - regarding ministerial diaries (reference number: FOI2021/08272 and IR2021/12605).

(2) I would like to request all correspondence and communications between this department and the Cabinet Office Clearing House in relation to my request - as well as my request for an internal review - regarding ministerial diaries. Please disclose copies of any advice the Cabinet Office Clearing House might have sent to this department (including any advice issued via the round robin list).'
7. The FCDO contacted the complainant on 17 August 2021 and confirmed that it held information falling within the scope of her request but it considered the exemption contained at section 36 (effective conduct of public affairs) of FOIA to apply and it needed additional time to consider the balance of the public interest test.
8. The FCDO sent the complainant further public interest extension letters at approximately monthly intervals until it provided her with a substantive response to her request on 8 January 2022. The FCDO provided her with information falling within the scope of her request but explained that parts of this had been redacted on the basis of sections

35(1)(d) (operation of a Ministerial office), 36(2)(b)(i) and (ii), 36(2)(c) and 40(2) (personal data).

9. The complainant contacted the FCDO on 17 January 2022 and asked it conduct an internal review of this response.
10. The FCDO informed her of the outcome of the internal review on 4 February 2022. The review upheld the decision set out in the refusal notice. It clarified that the information disclosed in relation to part 1 of the request had been redacted on the basis of sections 35(1)(d) and 40(2) and that although some information had been disclosed in relation to part 2 of the request, further information had been withheld on the basis of sections 36(2)(b)(i), (ii) and 36(2)(c).

Scope of the case

11. The complainant contacted the Commissioner on 4 May 2022 in order to complain about the FCDO's handling of her request. She disputed the FCDO's reliance on the various exemptions cited with the exception of section 40(2).
12. The complainant was also dissatisfied with the amount of time it took the FCDO to provide her with a substantive response to her request.

Reasons for decision

Section 35(1)(d) – operation of Ministerial private office

13. Section 35(1)(d) states that:

'35.(1) Information held by a government department or by the Welsh Government is exempt information if it relates to...

...(d) the operation of any Ministerial private office'

14. Section 35(5) of FOIA defines a 'Ministerial private office' as meaning:

'any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister, or any part of the administration of the Welsh Government providing personal administrative support to the members of the Welsh Government.'

15. The exemption covers information that 'relates to' the operation of the private office with the phrase being interpreted broadly. However, this

does not mean that all information with any link to a Ministerial private office is covered. Section 35(1)(d) refers specifically to the operation of a Ministerial private office, which itself is defined as providing administrative support. In other words, it covers information relating to the administrative support provided to a Minister.

16. As a consequence, this exemption is interpreted fairly narrowly. In effect, it is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about Ministerial priorities and similar issues.
17. The exemption is likely to cover information such as routine emails, circulation lists, procedures for handling Ministerial papers or prioritising issues, travel expenses, information about staffing, the Minister's diary, and any purely internal documents or discussions that have not been circulated outside the private office.
18. In the circumstances of this case the FCDO argued that the exemption was engaged for some of the information falling within the scope of part 1 of the request because such information related to administrative matters within the Minister's private office, namely the operation of the Foreign Secretary's diary.
19. In her submissions to the Commissioner the complainant explained that the purpose of her request was to seek information about the handling of a particular request where she had asked for copies of ministerial diaries. She emphasised that the request which is the focus of this complaint had nothing to do with the actual diaries themselves and therefore she considered section 35(1)(d) unlikely to apply.
20. Whilst the Commissioner acknowledges the complainant's point, having reviewed the information withheld on the basis of section 35(1)(d), the Commissioner is satisfied that it falls within the scope of this exemption. The information relates directly to the administration of the Foreign Secretary's diary, and in turn, therefore relates to the operation of his office.

Public interest test

21. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(d) outweighs the public interest in disclosing the information.

Public interest in favour of disclosing the information

22. The FCDO acknowledged that there was a general public interest in understanding how the ministerial private offices operate and that

release of this information could provide some insight into the workings of the Minister's private office.

23. The complainant argued that in her view there was a compelling public interest in the disclosure of all of the information falling within the scope of her request for the following reasons:

- To scrutinise how the department's FOI team interacts with ministers, special advisers and the Cabinet Office when treating a FOI request.
- To scrutinise the quality of the advice that is given to departments when handling requests.
- To scrutinise the clearance system, which can give rise to delays.
- She also argued that the FCDO had failed to acknowledge the controversies surrounding the Clearing House.¹
- She noted that as the information relates to the operation of the Clearing House, there is a precedent for advice provided by it being released under FOIA.²

Public interest in maintaining the exemption

24. However, the FCDO argued that disclosure of the withheld information would prejudice the effective running of the ministerial private office as

¹ On 8 July 2021 the Public Administration and Constitutional Affairs Committee launched an inquiry into the Clearing House's processing of FOI requests. This was partly as a result of the findings of the Tribunal case referred to at footnote 2 which had found that there was a 'profound lack of transparency' about the operation of the Clearing House.

<https://committees.parliament.uk/work/1348/the-cabinet-office-freedom-of-information-clearing-house/news/156429/cabinet-office-handling-of-foi-requests-inquiry-launched/>

² In decision notice FS50841228 the Commissioner concluded that the public interest favoured disclosure of the 'advice' information contained on round robin lists circulated to government departments by the Clearing House. <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618028/fs50841228.pdf>

This decision was broadly upheld by the First-tier Tribunal in case EA/2020/0240.

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

The Commissioner issued a further decision notice on December 2022 which also found that although the advice contained on Clearing House round robin lists was exempt under section 36, the public interest favoured disclosure of such information.

<https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023387/ic-102300-d7w4.pdf>

it would undermine the management of the minister's diary by encroaching on the safe space needed to administer this without outside interference or distraction.

Balance of the public interest test

25. The Commissioner has carefully considered the information which has been withheld on the basis of section 35(1)(d). In his view the majority of this information could be disclosed without any real risk of harm occurring to the effective operation of the minister's diary. For such information, the balance of the public interest favours disclosure of the information. However, for some of the information the Commissioner accepts that there is a genuine risk that disclosure of this encroaches on the safe space needed to run a ministerial office effectively. Moreover, the Commissioner considers that for such information there is a limited public interest in its disclosure as it would not add significantly to the public's understanding of how a ministerial office is run. For such information the public interest favours maintaining the exemption.
26. The Commissioner has expanded on his rationale for reaching this decision, and identified the information he has concluded is and is not exempt from disclosure, in a confidential annex which will be provided to the FCDO only.
27. In reaching these findings, the Commissioner appreciates the complainant's points in relation to the clearance of FOI requests and the operation of the Clearing House. However, the information withheld on the basis of section 35(1)(d) does not concern such matters and disclosure of this information would not serve the interests identified by the complainant. Such arguments are however more directly relevant to the information withheld on the basis of section 36 and therefore they are considered below.

Section 36 – effective conduct of public affairs

28. The FCDO has relied on sections 36(2)(b)(i), (ii) and (c) to withhold one document in full and to redact separate information from the digest provided to the complainant. The Commissioner understands that the information from the redacted digest consists information contained in a round robin list circulated to all government departments by the Clearing House.
29. Sections 36(2)(b)(i), (ii) and 36(2)(c) of FOIA state that:

'(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, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.'

30. In determining whether sections 36(2)(b)(i), (ii) and (c) 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.
- The qualified person's knowledge of, or involvement in, the issue.

31. 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.

32. With regard to the process of seeking this opinion, the FCDO sought the opinion of the Lord Ahmad, the Minister of State on 9 September 2021 with regard to whether sections 36(2)(b)(i), (ii) and (c) of FOIA were engaged. 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 16 September 2021. Whilst the rationale as to why the exemption applies is contained in the recommendation to the qualified

person, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other central government departments).

33. Turning to the substance of the opinion, the information being withheld consists of advice provided by the Clearing House in relation to the processing of the complainant's original request for a copy the Foreign Secretary's ministerial diaries.
34. The qualified person argued that in order to process FOI requests effectively, officials need to have a safe space in which to consider and discuss how to respond to requests. This process involves taking into account guidance that is provided during the consideration of a request.
35. The qualified person noted that the advice was not meant to be definitive and that requests can be complex and need to be considered on a case by case basis. He further argued that releasing internal Clearing House advice would risk it being misinterpreted and as a result giving a misleading impression as to what information the FCDO would, and would not, release under FOIA. Disclosure of the information would risk the safe space staff need to consider options for responding to FOI requests without fear of unwanted challenge, which in turn could undermine the FCDO's effective request handling under FOIA.
36. As noted above, the Commissioner has previously issued decision notices in which a requester had sought copies of round robin lists of advice provided by the Clearing House to government departments. In those cases the Cabinet Office sought to withhold the information contained in the advice column on the basis of sections 36(2)(i) and (ii). The Cabinet Office's rationale for doing so differed slightly to the arguments put forward by the FCDO's qualified person, albeit there was some overlap in the principles underpinning the arguments. The Cabinet Office's position being that Clearing House officials may alter or change the nature of the advice provided if they knew the advice contained on the lists would be disclosed.
37. In those decision notices, the Commissioner found that the advice contained on the round robin lists was largely as one would expect in relation to departments handling identical requests, including those on sensitive subject matter requests. However, the Commissioner accepted that it is not unreasonable to conclude that there is a real and significant risk that officials would be less candid in the future when offering similar advice if the advice they have previously provided was disclosed. The Commissioner also accepted in those notices that it is not unreasonable to argue that officials may amend the content of the advice so that it appears to be less broad brush in light of concerns about how such advice could be perceived if disclosed. In both scenarios – ie a change in

candour in the advice and an alteration as to how the advice is presented – could lead to prejudice to either the free and frank provision of advice and/or the free and frank exchange of views for the purposes of deliberation.

38. In terms of the FCDO's reliance on section 36, the Commissioner would make very similar observations regarding the advice which has been redacted from the extract of the round robin list provided to the complainant, ie contains advice in line with what would be expected. Nevertheless, the Commissioner accepts that it is not unreasonable for the qualified person to argue that disclosure of this advice would be likely to impact on the safe space needed by the FCDO to consider how to handle FOI requests and impinge on the free and frank discussion related to their processing. The Commissioner accepts that this is also the case for the piece of Clearing House advice which has been withheld in its entirety; the Commissioner notes that this is more detailed than the summary of the advice contained in the round robin list. In turn, the Commissioner accepts that it is not unreasonable to argue that in light of such consequences the FCDO's ability to process FOI requests effectively could be undermined thus causing some 'other' prejudice to the effective conduct of public affairs.

39. Sections 36(2)(b)(i), (ii) and (c) are therefore engaged.

Public interest test

40. 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 exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

41. The FCDO acknowledged that there is a public interest in understanding how the FCDO handles FOI requests, and it was for that reason it disclosed some of the information falling within the scope of the request.

42. The complainant argued that the public interest favoured disclosure of all of the information falling within the scope of her request for the reasons set out above at paragraph 23.

Public interest in maintaining the exemptions

43. The FCDO argued that there was a clear public interest in staff being able to conduct free and frank considerations of how to respond to FOI requests. An impact on this safe space, and in turn the candour of such

discussions, would undermine the FCDO's ability to respond to FOI requests effectively, which would also be against the public interest.

Balance of the public interest

44. 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.
45. With regard to the disclosure of the information withheld on the basis of section 36, the Commissioner accepts that this would have some impact on the safe space needed by officials considering how to handle requests. With regard to the timing of the previous request to which the Clearing House advice related, although the FCDO had completed its internal review of that request, the complainant would subsequently bring a complaint about the FCDO's handling of that request to the Commissioner in September 2021. Therefore, at the point that the request which is the subject of this notice was submitted in July 2021, the matters covered in the withheld advice were arguably ones that could be considered to be live. In any event, the Commissioner accepts that disclosure of the details of previous advice provided by the Clearing House to the FCDO could have an impact on how the FCDO processes and considers future requests by raising an expectation that certain requests will be met with particular responses.
46. However, in respect of the information redacted from round robin list, in line with the findings the notices referred to above, the Commissioner has reservations as to how severe this impact would be given that the advice is merely a summary of the Clearing House position and one that, as suggested, is arguably in line with what would be expected.
47. In contrast the Commissioner accepts that disclosure of the more detailed information contained in the document that had been withheld in full is likely to have a more prejudicial impact if disclosed. This is precisely because this document contains more detailed advice than that contained on the round robin list.
48. With regard to the public interest arguments in favour of disclosure, in the Commissioner's view there is a public interest in the disclosure of information which would allow the public to better understand the advice and guidance provided by the Clearing House in relation to particular requests. In the circumstances of this case disclosure of the withheld

guidance would provide a further insight into the FCDO's processing of the complainant's original request, beyond that already disclosed in response to the request which is the focus of this complaint.

49. More broadly, the Commissioner acknowledges that the Clearing House has attracted controversy about its practices. The Commissioner is conscious however that the previous decision notices he has issued emphasised the lack of information in the public domain about the operation of the Clearing House, at the time that those requests were submitted, as a key factor in his conclusions that the balance of the public interest favoured disclosure of information. In the circumstances of this case, the Commissioner notes that by the point of this request in July 2021, a full list of referral criteria for the Clearing House had been published in March 2021.³
50. On balance, taking the above factors into account, and cognisant of his previous decisions in respect of Clearing House advice, albeit appreciating that each request needs to be considered on its own merits, the Commissioner has decided that the public interest favours disclosure of the information redacted from round robin list. He has reached this finding because in his view the prejudicial risks of disclosing such information are limited and outweighed by the public interest in furthering the public's understanding of the advice given by the Clearing House. However, in contrast, the Commissioner accepts that the public interest favours maintaining the exemptions in relation to information contained in the more detailed Clearing House advice, ie the document with the FCDO withheld in full. This is on the basis that disclosure of this represents a greater risk of the prejudice which was identified by the qualified person occurring and the Commissioner does not accept that the public interest in disclosure overrides this.

Time taken to respond to the request

51. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the application of any exemptions:

'(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.'

³ <https://www.gov.uk/government/publications/cabinet-office-and-freedom-of-information>

52. Section 10(1) of FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest.
53. The Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days, which would allow a public authority 40 working days in total. The Commissioner considers that any extension beyond 40 working days should be exceptional and requires the public authority to fully justify the time taken.
54. In this case the complainant submitted her request on 20 July 2021 and the FCDO issued its substantive response on 8 January 2022. The Commissioner does not consider this to be a reasonable amount of time in the circumstances of this case and this delay therefore represents a breach of section 17(3).

Right of appeal

55. 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

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF