

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested a full copy of a report relating to Exercise Nimbus (the report). The Cabinet Office refused to disclose the report, citing section 35(1)(b) (the exemption for ministerial communications) as its basis for doing so.
2. The Commissioner's decision is that section 35(1)(b) is engaged and that the public interest favours maintaining the exemption.
3. The Commissioner does not require any further steps as a result of this decision notice.

Request and response

4. On 24 May 2023, the complainant wrote to the Cabinet Office and requested information in the following terms:
"... please provide a full copy of the Exercise Nimbus report ...".
5. The Cabinet Office responded on 22 June 2023. Its response described Exercise Nimbus as a ministerial exercise, held in February 2020, to test

decision-making for the UK's pandemic preparedness and response in the context of the novel coronavirus outbreak. It refused to disclose the report, citing section 35(1)(b) (ministerial communications).

6. Following an internal review the Cabinet Office wrote to the complainant on 21 July 2023, upholding its decision to rely on section 35(1)(b).

Scope of the case

7. The complainant contacted the Commissioner on 4 September 2023 to complain about the way their request for information had been handled.
8. The complainant challenged the Cabinet Office's arguments, and ultimately disagrees with its refusal to disclose the report.
9. The Commissioner therefore considers that the scope of this case is to decide whether the Cabinet Office is entitled to rely on section 35(1)(b) to refuse disclosure of the report.
10. The Commissioner did not ask the Cabinet Office for a copy of the withheld information, or detailed submissions on section 35(1)(b). He considers that he is able to make his decision without those things.

Reasons for decision

11. Section 35(1)(b) of FOIA provides that information held by a government department is exempt from disclosure if it relates to ministerial communications.
12. Section 35(5) of FOIA explains that 'ministerial communications' includes any communications between Ministers of the Crown and, in particular, proceedings of the Cabinet or any committee of the Cabinet.
13. The exemption is subject to a public interest test.
14. As explained in the Commissioner's guidance¹ on the ministerial communications exemption, the purpose of section 35(1)(b) is to protect the operation of government at Ministerial level. It prevents disclosures that would significantly undermine Ministerial unity and effectiveness or

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#exemptionministerial>

result in less robust, well-considered or effective Ministerial debates and decisions.

15. At internal review, the Cabinet Office told the complainant that the report "is related to a ministerial exercise requested by, and provided to, a cabinet committee".
16. The Commissioner accepts that the report relates to ministerial communications, on the basis of the Cabinet Office's comments referenced above and the type of information that is being requested.
17. As his guidance explains, the concept of a communication is broad, and includes meetings between Ministers as well as written communications to convey information between Ministers. To engage the exemption, information does not have to 'be' a Ministerial communication itself; it is also covered if it recounts or refers to a Ministerial communication.
18. He also highlights that in a previous decision notice involving the same public authority², he accepted that information about a similar type of exercise called Exercise Cygnus engaged the ministerial communications exemption.
19. Whilst the Commissioner has not asked the Cabinet Office for submissions in the present case, he considers that the type of information being withheld and the Cabinet Office's arguments as to why it engages the exemption are highly likely to mirror IC-91642-W3P0.
20. He is therefore satisfied that section 35(1)(b) is engaged, in the present case.

Public interest test

21. Against disclosure, the Cabinet Office emphasised the public interest in policy-making of the highest quality; and the importance of Ministers and officials having space to develop effective policies and plans.
22. In its internal review, it said that the exercise considered a range of fictional scenarios, to elicit a challenging discussion; and that sharing information about performance of individuals would inhibit participation.
23. The Cabinet Office also explained that the withheld information would not be fully representative of the Government's work and overall

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2620317/ic-91642-w3p0.pdf>

preparedness in this area (thereby questioning how far it would give an insight).

24. The Cabinet Office referenced the ongoing UK Covid-19 Inquiry³ and said that disclosing the report under FOIA "solely due to the likelihood of that information being disclosed to [the UK Covid-19 Inquiry]" would not be appropriate.
25. It also referred to the convention of cabinet collective responsibility.
26. The Commissioner has also considered the comments made by the Cabinet Office in IC-91642-W3P0, as quoted in his decision notice for that case (paragraphs 37 – 38). This is because he considers they are likely to be relevant to the present case.
27. In favour of disclosure, the Cabinet Office recognised a general public interest in disclosure of information relating to government decision-making over pandemics; and that openness may increase public trust in, and engagement with, the Government.
28. The complainant has emphasised to the Commissioner the impact of the Covid-19 pandemic, and considers that "full transparency is essential to enhance accountability and improve pandemic preparedness in future".
29. The complainant stated that information about similar, historic exercises was later disclosed under FOIA.
30. They argued that disclosure of the report will enable scrutiny and enhance decision-making, and provide a real (if incomplete) insight into pandemic planning.
31. Whilst the complainant has acknowledged that the report might be released to the UK Covid-19 Inquiry, they also commented that if the Cabinet Office's argument is that withholding the report will improve decision-making, "By that logic they wouldn't release information to [the UK Covid-19 Inquiry]".

Public interest test – Commissioner's position

32. The Commissioner has considered the arguments of both parties and the overall circumstances of the case, and his view is that the public interest favours maintaining the exemption.

³ <https://covid19.public-inquiry.uk/>

33. Whilst he recognises the public interest regarding the handling of the Covid-19 pandemic, he directs the reader to his decision notice in IC-91642-W3P0, especially paragraphs 43 – 46, as much of the reasoning stated there is relevant to this case.
34. The Commissioner also emphasises the ongoing UK Covid-19 Inquiry, covering the same issues that the complainant has emphasised, such as preparedness and decision-making in relation to the Covid-19 pandemic.
35. As his guidance on the public interest test⁴ explains, where other means of scrutiny are available (here, the UK Covid-19 Inquiry), they may go some way to satisfying the public interest that would be served by disclosure. This lessens the public interest in disclosing the information requested under FOIA.
36. Furthermore, his guidance says that if the other investigation is ongoing (as the UK Covid-19 Inquiry is in this case), the public interest may be better served by allowing it to continue without interference, rather than disclosing information prematurely.
37. Regarding the complainant's point at paragraph 31 above, the Commissioner notes that the Cabinet Office has explained at internal review that decisions about disclosure to an inquiry and under FOIA are separate decisions.
38. The Commissioner finds that the Cabinet Office was entitled to rely on section 35(1)(b) of FOIA, given the weight he assigns to the Cabinet Office's arguments around safe space, chilling effect and cabinet collective responsibility, and his view that in all the circumstances the UK Covid-19 Inquiry lessens the public interest in disclosure under FOIA.

⁴ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/#pit11>

Right of appeal

39. 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

40. 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.
41. 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

Daniel Kennedy
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