

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2024

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information about a potential appearance by Sue Gray before a House of Commons Select Committee.
2. The above public authority ("the Cabinet Office") relied on section 36 of FOIA (prejudice to the effective conduct of public affairs) to withhold the information.
3. The Commissioner's decision is that the Cabinet Office has correctly applied section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to the withheld information.
4. The Commissioner considers that the Cabinet Office has breached section 17(3) of FOIA by failing to complete its deliberations on the balance of the public interest within a reasonable time.
5. The Commissioner does not require further steps to be taken.

Request and response

6. On 21 July 2021, the complainant wrote to the Cabinet Office and requested information in the following terms:

"On 12th July, the Public Administration and Constitutional Affairs Committee (PACAC) published this news article:

<https://committees.parliament.uk/committee/327/public-administration-and-constitutional-affairs->

committee/news/156535/gove-blocks-greensill-ethics-supremo-committee appearance/¹

It says: "The former Government ethics chief who oversaw Lex Greensill's hiring as an Government advisor had been due to be questioned tomorrow by MPs on the Committee on the financier's appointment and on the 'double-hatting' of former senior civil servant Bill Crothers. Crothers simultaneously held positions as the Cabinet Office's Chief Commercial Officer and at Lex Greensill's firm, Greensill Finance."

Committee Chair William Wragg said:

"Sue Gray's office had accepted our approach to have her appear to answer important questions surrounding Lex Greensill's position at the heart of Government. Regrettably, the rug has been pulled from under us by the Cabinet Office. Although the Chancellor of the Duchy of Lancaster and Minister for the Cabinet Office, Rt Hon Michael Gove MP, offered to appear in her place, the Committee summoned Ms Gray precisely because she had first-hand knowledge of Greensill's appointment and has been name-checked by several witnesses to our inquiry. Sue Gray's evidence would have made an important contribution to our inquiry in a way that Mr Gove's clearly would not.""

In light of the above, I would like to request the following information:

- (1) All internal correspondence and communications held by Sue Gray which mentions, or refers to, PACAC's inquiry into Greensill [Capital Ltd].
- (2) All external correspondence and communications between Sue Gray and PACAC [House of Commons Public Administration and Constitutional Affairs Select Committee] (in relation to the Greensill inquiry).
- (3) All external correspondence and communications between Sue Gray and Michael Gove in relation to PACAC's inquiry into Greensill.

¹ [Gove blocks Greensill ethics supremo Committee appearance - Committees - UK Parliament](#)

- (4) All internal correspondence and communications held by Michael Gove which mentions, or refers to, PACAC's inquiry into Greensill.
 - (5) All external correspondence and communications between Michael Gove and Sue Gray in relation to PACAC's inquiry into Greensill.
 - (6) All external correspondence and communications between Michael Gove and PACAC (in relation to the Greensill inquiry)."
7. After four public interest test extensions, the Cabinet Office responded on 25 November 2021. It relied on section 36(2)(b)(ii) of FOIA to withhold the information.
 8. Following an internal review, the Cabinet Office wrote to the complainant on 17 June 2022. It stated that it had located some additional information that fell within the scope of part 4 of the request, but that the majority of this additional information was withheld under sections 36(2)(b)(i), (2)(b)(ii) and 2(c) of FOIA. The Cabinet Office disclosed two pieces of information to which exemptions under the Act did not apply.

Scope of the case

9. The complainant contacted the Commissioner on 16 September 2022 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office correctly applied the stated exemptions to withhold the information requested.
11. Following the intervention of the Commissioner, on 22 December 2023, the Cabinet Office explained:

"We have now reviewed all of the information which we originally considered to be in scope of the FOI request. We have concluded that some of it is not in fact in scope of the request. The likely reason for the scope being considered too widely originally is as a result of this FOI request being submitted 9 days after another FOI request which asked for similar information. Some of the information was therefore conflated across the two requests. In particular, the following information is no longer considered to be in scope:

- a. all information originally withheld relating to part 6 of the request (upon being checked, CDL and his office had no communication with PACAC);

b. one piece of information which we had considered was in scope of part 1 of the request (the information in question was not held by Sue Gray or her office);

c. one piece of information which we had considered was in scope of part 2 of the request (as per b, the information in question did not constitute correspondence or communication between Sue Gray and PACAC).

We therefore only hold information relating to Parts 1, 2 and 4 of the request.”

12. The Cabinet Office stated: “To be absolutely clear, the Cabinet Office holds no information in scope of Parts 3, 5, or 6 of the request.”
13. During the course of his investigation, the Commissioner has had sight of the withheld information.

Background

14. The financial services company Greensill Capital collapsed in March 2021, raising concerns about the proximity of the company and its founder, Lex Greensill, to key figures in government. Greensill Capital was contracted by the government to provide an early payment scheme for pharmacies and was an approved lender for the Coronavirus Large Business Interruption Scheme and the Coronavirus Business Interruption Scheme.
15. It emerged that Greensill Capital had employed both former Prime Minister David Cameron and the government’s former Chief Commercial Officer, Bill Crothers, who had started working at the company while still a civil servant.
16. In April 2021, the House of Commons Public Administration and Constitutional Affairs Committee (PACAC) launched an inquiry named “Propriety of governance in light of Greensill”.
17. The Committee requested that Sue Gray, then Second Permanent Secretary at the Cabinet Office, attend an evidence session to aid the inquiry. Under the Osmotherly Rules the then Chancellor of the Duchy of Lancaster (CDL), Rt Hon Michael Gove MP, decided that he should attend the Committee, as he did not believe it was appropriate for serving civil servants to give evidence in the way requested.
18. Following this, on 12 July 2021, PACAC published an article on its website entitled “Gove blocks Greensill ethics supremo Committee

appearance". The article said that "the rug has been pulled from under us by the Cabinet Office," and that Sue Gray had been asked to appear, rather than the CDL, due to her first-hand knowledge of Greensill's appointment.

Reasons for decision

19. Section 36(2) states 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 otherwise to prejudice, the effective conduct of public affairs.'

20. In deciding whether section 36(2) is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one.

21. 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 matter. 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 not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Nor does the qualified person's opinion have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

22. In this case, the Cabinet Office made available to the Commissioner the section 36 submissions to the qualified persons and their associated reasonable opinions. Information in scope of Parts 1, 2, and 4 of the request was covered by submissions and opinions in Annex 1 and Annex 2. The additional information in scope of Part 4 discovered later was covered by the submission and opinion contained in Annex 3.

23. The Commissioner also viewed a table detailing the dates of the three qualified persons' opinions and the information relevant to each. Some of the information in scope of Parts 1, 2 and 4 of the request was in scope of a different request from another applicant, which was received by the Cabinet Office only nine days earlier than the request in question here. A section 36 opinion was provided by Chloe Smith MP, the then Minister of State for the Constitution and Devolution, in respect of that information. As there were only nine days between receipt of that request and the complainant's request, the Cabinet Office did not consider it necessary to seek a fresh opinion on the same information. The Commissioner accepts this approach.
24. Each annex contained the section 36 submission to the qualified person, the information covered by the submission, and a copy of the qualified person's opinion on the application of section 36 to that information. Collectively, the submissions and three qualified persons' opinions cover all of the information in scope.
25. In respect of the information in scope of Parts 1 and 4 of the request in Annex 1, on 18 August 2021, the qualified person, Chloe Smith MP, the then Minister of State for the Constitution and Devolution, provided her opinion that section 36(2)(b)(ii) was engaged and that disclosure of that particular withheld information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. It is worth noting that the Cabinet Office submissions to the qualified person advised that section 36(2)(c) applied to the information, but the qualified person was of the opinion that section 36(2)(b)(ii) seemed to more precisely fit the information.
26. In respect of the information in scope of Parts 1, 2 and 4 of the request in Annex 2, on 24 November 2021, the qualified person, Lord True, the then Minister of State for the Cabinet Office, provided his opinion that section 36(2)(b)(ii) was engaged. The Cabinet Office submissions to the qualified person advised that disclosure of that particular withheld information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation, and this was confirmed by the qualified person, who assessed that releasing such information would be likely to limit officials' ability to engage in similar exchanges in future as it would cause officials to be more reticent in sharing their candid views.
27. In respect of the additional information discovered in scope of Part 4 of the request contained in Annex 3, on 15 June 2022, the qualified person, Lord True, the then Minister of State for the Cabinet Office, provided his opinion that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) were engaged in respect of specified pieces of information. Lord True was of the opinion that section 36 was not engaged in respect of two

pieces of information which were disclosed to the complainant on internal review.

28. In respect of the material withheld under section 36(2)(b)(i) in Annex 3, the Cabinet Office's view was that disclosure of such information would be likely to inhibit the free and frank provision of advice, and this was confirmed by the qualified person.
29. In its submissions to the Commissioner regarding the application of section 36(2)(b)(i), the Cabinet Office argued that "in order to advise Ministers and senior officials effectively, it is important that those providing the advice are uninhibited by risks of premature disclosure, should they lead to a chilling effect. Releasing information in scope of this request would be likely to have a detrimental, chilling effect on the future ability of officials to provide advice to their seniors or Ministers, and subsequently the quality of any future advice may deteriorate. Consequently, the effectiveness of deliberations and decision making would be harmed generally."
30. In respect of the material withheld under section 36(2)(b)(ii) in Annex 1 and 2, the qualified person's opinion in each case was that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
31. In its submissions to the Commissioner regarding the application of section 36(2)(b)(ii), the Cabinet Office argued that "Officials must be able to engage in these types of frank exchanges with each other in order to debate options and reach a decision in all manner of situations. For this to occur, all involved in those discussions must not be inhibited by the concern that their discussions will be exposed prematurely to public scrutiny or comment - particularly when they want to provide frank views on what might be contentious situations. Disclosure would be likely to limit officials' ability to engage in similar exchanges in future as it would be likely to cause officials to be more reticent or circumspect in sharing their candid views in similar instances."
32. In addition, the Cabinet Office argued that "The release of such information publicly is likely to impact the ability of officials both in government and working in Parliament to exchange information freely, including communications on behalf of their principals: as it would inhibit the ability of such individuals to exchange and express free and frank views. This is particularly important given the sensitive nature of the exchange, and the impact this could have on the ability of officials to be frank in future similar dealings. This could ultimately damage the ability for relevant officials in Parliament and the Government to communicate, hindering the effective management of Parliamentary business within Government."

33. In respect of the material withheld under section 36(2)(c) in scope of the request, the Cabinet Office advised the qualified person that disclosure of the information would be likely to prejudice the effective conduct of public affairs, and this was confirmed by the qualified person.
34. In its submissions to the Commissioner regarding the application of section 36(2)(c), the Cabinet Office argued that "It is important to note that it is not the specific information in scope that makes this exempt information, but instead the process which this relates to, which means that releasing this would be prejudicial to the effective conduct of public affairs. In particular, releasing this information would be likely to prejudice the function of Cabinet Office monitoring and responding to Parliamentary business in order to appropriately understand and be able to respond to Parliamentary inquiries. This is information which is fundamental to the internal Cabinet Office process of understanding select committee proceedings which are relevant to departmental business. Officials should be able to work in a 'safe space' in which they can share readouts and prepare for potential select committee hearings without the expectation that such work will be disclosed publicly."
35. Having had sight of the withheld information, the Commissioner does not consider that it is unreasonable for the qualified persons to contend that:
 - (a) disclosure of the specified withheld information in Annex 3 would be likely to impact upon/inhibit the ability of officials to provide free and frank advice; and
 - (b) disclosure of the specified withheld information in Annexes 1, 2 and 3 would be likely to impact on/inhibit the ability of officials to have free and frank exchange of views; and
 - (c) disclosure of the specified withheld information in Annex 3 would be likely to have a detrimental impact upon the coherence and effectiveness of Government communications.
36. The Commissioner is therefore satisfied that the opinions of the qualified persons were reasonable ones and that consequently sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) are engaged in respect of the withheld information in the manner described above.
37. Section 36 is a qualified exemption and, in accordance 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 test

Public interest arguments in favour of disclosing the withheld information

38. The Cabinet Office recognised that “there is a public interest in citizens being confident that decisions are taken appropriately. There is also a public interest in transparency so as to allow public scrutiny of the manner in which individuals appear before Parliamentary Committees.” there is a public interest in there being better knowledge of the communications between senior advisers to the Government, particularly surrounding a matter which was the subject of controversy and public scrutiny.”
39. The Cabinet Office also recognised the specific public interest in PACAC’s inquiry into Greensill, including Sue Gray’s participation in this.
40. In their complaint to the Commissioner, the complainant argued that it is “in the public interest to examine in full detail the blocking of a key witness to a parliamentary inquiry. It is vital to examine the emails which might have been exchanged in the run up to the news breaking that a government minister had stepped in to frustrate an inquiry. As the chair of the committee said “the Committee summoned Ms Gray precisely because she had first-hand knowledge of Greensill’s appointment and has been name-checked by several witnesses to our inquiry. Sue Gray’s evidence would have made an important contribution to our inquiry in a way that Mr Gove’s clearly would not.”

Public interest arguments in favour of maintaining the exemptions under section 36(2)(b)(i) and (ii)

41. In its submissions to the Commissioner, the Cabinet Office contended that, “It is public knowledge that the Second Permanent Secretary did not appear before the Committee. We consider it is not in the public interest to disclose internal emails, and emails between Cabinet Office officials and the Committee Clerks, as disclosure would be likely to have an adverse effect on the generally productive relationship at official level, in particular in terms of how freely officials communicate with one another. It is important that relationships between government officials and those working in Parliament are strong, so that the two can work together to ensure the right information is exchanged. If those working in government or Parliament are unable to communicate effectively due to the frankness of such communications being diminished, it is also likely to have a detrimental effect on the overall ability of government to work effectively with and provide full and accurate information to Parliament, due to a lack of ability of those in Parliament to fully

communicate the nuances of what might be required, and those in government to ask detailed and politically sensitive questions.”

42. The Cabinet Office stated further, “We consider there to be a strong public interest in officials being able to provide advice or exchange views freely and frankly. In communications between government officials, it is equally important that people can exchange full and frank views so that the most appropriate conclusion can be found with all courses of action considered. It is likely that the ability to be frank in internal conversations would be diminished if officials believed such communications were likely to be released publicly, given it is clear that the scope of discussions and views exchanged would be limited if officials felt a need to completely avoid sensitive topics - which would thus decrease the ability to advise completely frankly by limiting the subject matters considered. It is important that officials are able to provide advice to ministers and seniors in a safe space in which they can freely and frankly provide assessment of options to decision makers, in the knowledge that it will be the final decision which is made public and not the advisory position provided. To release advice of any nature is likely to damage this principle and lead to officials feeling less comfortable providing well-rounded advice. The future ability of government officials to be frank would therefore be likely to be adversely affected by the disclosure of this information, given it would likely have a detrimental effect on the way in which such frank advice is given and candid discussions take place.”
43. The Cabinet Office also pointed out that the CDL’s published response at Cabinet Office Oral Questions on 8 July 2021 explains the reason for the decision, and that this satisfies the public interest: “My hon. Friend chairs the Committee brilliantly, but there are rules - the Osmotherly rules. They stress that serving civil servants act only in accordance with the wishes of Ministers and therefore it is rarely appropriate for them to appear to be questioned in the way that my hon. Friend would like. So, I am ready, willing, and able to appear in front of the Committee, but it is my view that it would be inappropriate for a serving civil servant to appear in the way that my hon. Friend requests.”
44. In addition to this, the Cabinet Office argued that Parliamentarians have had ample opportunity to question Ministers on this issue in the House of Commons, both at the time of this happening and since, which further satisfies the public interest.

Public interest arguments in favour of maintaining the exemption under section 36(2)(c)

45. The Cabinet Office explained that the information withheld under section 36(2)(c) comprised communications from the department’s

Parliamentary branch to relevant colleagues about PACAC's inquiry into Greensill. The Cabinet Office argued that "Such communications rely on their own safe space, as they lead to the consideration of how the Cabinet Office might respond to a similar request for information from a committee. The disclosure of this information would not be in the public interest, as it would hinder the effective ability of Parliamentary branches in Whitehall to monitor and respond to select committee inquiries. We do not consider it a good use of internal resources to have to react to such interest."

Balance of the public interest arguments

46. 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.
47. The Commissioner considers (as the Cabinet Office has recognised and accepted) that there is a specific public interest in why Sue Gray did not appear to give evidence at the PACAC's inquiry into Greensill.
48. The Commissioner considers that the Cabinet Office has advanced clear and persuasive arguments in favour of maintaining the exemptions cited and that there is public interest in officials having the freedom to communicate freely and without fear of publication. The Commissioner accepts the Cabinet Office's arguments that disclosure of some of the information would be likely to act to inhibit the provision of advice and the free and frank exchange views in the future. The Commissioner also accepts that disclosure of the rest of the withheld information would be likely to have a detrimental impact upon the coherence and effectiveness of Government communications.
49. The Commissioner recognises that the complainant has advanced arguments about a matter of important and legitimate public interest. However, having had sight of the withheld information, the Commissioner does not consider that disclosure of the information would appreciably add to the public interest served by information which is already in the public domain regarding the reason why Sue Gray did not appear before the PACAC's inquiry into Greensill.
50. The Commissioner considers that the CDL's published response at Cabinet Office Oral Questions on 8 July 2021 satisfied the due and

proportionate public interest in transparency and accountability in this matter and that any additional public interest weight and value of the withheld information is outweighed by the stronger and wider public interest in providing officials with the freedom to frankly advise and exchange views without the fear of publication, and maintaining the coherence and effectiveness of Government communications.

51. In conclusion the Commissioner is satisfied that section 36 applies to the withheld information.

Procedural matters

52. Under section 17(3) of FOIA 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. The Commissioner notes that the Cabinet Office extended the deadline four times in this case to consider the public interest test and took four months to provide its refusal notice. The Cabinet Office has not fully justified the time taken to respond to the request.
55. In this case, the Cabinet Office breached section 17(3) of FOIA in the handling of this request.

Other matters

56. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so and, where an authority chooses to offer one, the section 45 Code of Practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances. 30. In this case, the Cabinet Office took five months to provide the outcome of its review. The Commissioner reminds the Cabinet Office of the Code of Practice and urges it to respond in a timely manner.

Right of appeal

57. 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

58. 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.
59. 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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