

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 May 2024

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

Decision (including any steps ordered)

1. The complainant requested information held by the Cabinet Office which "comprises, records or is related to "contact with the ICO" as referred to in the Minister of State's letter to Bambos Charalambous MP of 9 January 2013¹".
2. The Cabinet Office relied on section 36(2)(c) and 40(2)(personal data) to withhold some of the requested information from the complainant.
3. The Commissioner is not satisfied that the Cabinet Office correctly relied on section 36(2)(c) to withhold some of the requested information.
4. The Cabinet Office did not complete its deliberations on the balance of the public interest test within a reasonable time, and late relied on new exemptions; therefore it breached section 17(3) and 17(1) respectively of FOIA.

¹ The Commissioner notes that this is a typographical error. The correct date of the letter being 9 January 2023.

5. The Commissioner requires Cabinet Office to take the following steps to ensure compliance with the legislation:
 - Disclose its team email addresses, as described in paragraph 17, to the complainant.
 - Disclose the email described in paragraph 33, or issue a valid refusal notice explaining why it, or any of its content, is exempt from disclosure.
 - Take appropriate measures to determine if it holds any further requested information that comprises of internal emails or internal correspondence that fall within scope of the request. If it does hold such information, it should disclose it to the complainant or issue a valid refusal notice explaining why it is exempt from disclosure.
6. The Cabinet Office must take this step within 30 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.

Background

7. On 19 December 2022, the Member of Parliament for Enfield Southgate, Mr Bambos Charalambous MP, sent an email to the then Secretary of State for Digital, Culture, Media and Sport (DCMS) enclosing correspondence from the complainant, regarding the role of the Qualified Person in the context of section 36 FOIA.
8. As per the guidance to handling correspondence, that email was processed as 'ministerial correspondence'. DCMS requested that the correspondence be transferred to the Cabinet Office as the department which holds FOI Policy responsibility and the Cabinet Office agreed. DCMS transferred the correspondence attaching a document containing lines on its sponsorship relationship with the Information Commissioner's Office (ICO). Following email exchanges with the ICO, the Cabinet Office Minister (Baroness Neville-Rolfe DBE CMG) responded to Mr Charalambous MP's correspondence on 9 January 2023.

Request and response

9. On 26 January 2023, the complainant wrote to the public authority and requested information by saying as follows:

"This is a request for disclosure to me of recorded information held by the Department which comprises, records or is related to "contact with the ICO" as referred to in the Minister of State's letter to Bambos Charalambous MP of 9 January 2013 under your reference MC2022/18026, in response to his e-mail to the secretary of State for Digital, Culture, Media and Sport of 19 December 2022.

As the response must have followed contact between your Department and DCMS the request extends also to information which comprises, records or is related to that contact, or such contact between DCMS and the ICO for that purpose.

Compliance with this present FOI request may disclose whether the ICO in informing the Cabinet Office of its "updated version of the guidance" took, or claimed to have taken, any legal advice. I am aware that the ICO might enjoy legal professional privilege in respect of any advice sought or given in good faith, but also that FOIA provides for disclosure of privileged information if in the overriding public interest.

As to the public interest, the ICO is aware of a 3-judge Upper Tribunal case called Malnick saying in March 2018, as a general observation: 'it is clear that Parliament has chosen to confer responsibility on the [Qualified Person]...Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities...'. That case still finds no place in the ICO Guidance, which is inconsistent with the MoJ's guidance of 2008: 'It is because the scope of the provision [section 36] is so potentially wide that the requirement for a qualified person to take the decision...was included in the legislation".

10. On 23 February 2023, the Cabinet Office responded. It explained that it held information falling within scope of the request but needed further time to consider the public interest test in order to determine whether section 36 would be used to withhold requested information. It said it expected that it needed until 24 March 2023 to determine the issue.
11. On the 24 March 2023, the Cabinet Office then informed the complainant that it needed further time to consider the public interest test. It said it expected that it now needed until 25 April 2023 to determine the issue.
12. On 25 April 2023, the Cabinet Office then informed the complainant that it needed further time to consider the public interest test. It said it expected that it now needed until 25 May 2023 to determine the issue.

13. The Cabinet Office responded on 25 May 2023, confirming that it held information within scope of the request. It informed the complainant that section 36 (prejudice to the effective conduct of public affairs) was engaged but after weighing the public interest test, it had concluded the weight was in favour of disclosure. It disclosed the information subject to redactions where the information contained personal data and cited section 40(2) of the Act. The disclosed information had a date range from 21 December 2022 to 5 January 2023.
14. On 11 June 2023, the complainant requested an internal review. The Cabinet Office provided the complainant with the outcome of the review in a letter dated 18 October 2023. The outcome was that the Cabinet Office widened the scope of its searches and further information was disclosed to the requestor as a result (again with section 40 redactions).

Scope of the case

15. The complainant contacted the Commissioner 21 August 2023 to complain about the way his request for information had been handled.
16. In particular, he said as follows:
 - "... I seek an acknowledgement that the period said to have been devoted to balancing competing public interests (in favour of disclosure) was excessive, unreasonable and therefore in breach of the Act.
 - I ask the ICO to accept that the reliance on section 40(2) was late in breach of the statute, but also to verify if blacked-out text is personal data.
 - There must be a record of the transmission of Mr Charalambous's letter of 19 December 2022 from DCMS to the Cabinet Office (CO) and any accompanying information".
17. During the course of the Commissioner's investigation, the Cabinet Office informed² him (and latterly the complainant), that it would now rely on section 36(2)(c) to withhold its team email addresses from the complainant that fell within scope of the complainant's request.

² 22 February 2024

Reasons for decision

Section 1 FOIA

18. Section 1 of FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information within the scope of the request, and if so, to have that information communicated to them.
19. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".

Complainant's assertions

20. The complainant asserted and complained to the Commissioner as follows.

"I now know that by 12:51 on 21 December 2022 an un-named civil servant, knowing that my MP Bambos Charalambous had, "question[ed] the present ICO s36 guidance", expected

...that, "new guidance" would allow the Cabinet Office to "assure the MP that [his] concerns have been addressed". Those two passages indicate that the civil servant had had contact with an ICO public servant and formed a belief that some revised Guidance, then in draft form within the ICO, had addressed the concern expressed on my behalf in a letter to the DCMS.

The truth is revealed by the ICO officer's statement of 21 December 2022 at 15:13 that in reality the revised Guidance "hasn't changed substantially from the previous version". So, by the close of that day, both the ICO and the Cabinet Office official knew that they would not be able truthfully to assure Mr Charalambous of anything concerning his concerns.

No change in approach is evident from the information that has just been disclosed. No record of the contact(s) leading to the Cabinet Office's expectation that Mr Charalambous might be 'assured' has been disclosed. Such contact, if recorded, must have come within the 'comprises, records or is related to' wording of my FOI Request".

Cabinet Office's submissions

21. The Cabinet Office does not consider that a plain reading of the initial request includes in scope any records held before the date of receipt of the Member's correspondence, i.e. before 19 December 2022.

22. Its initial scoping of the request focused on correspondence between (i) ICO and Cabinet Office; and (ii) ICO and DCMS for the purpose of responding to the letter from the Member for Enfield.
23. It believes this was a reasonable scoping of the request given that the requester asked for:
 - records relating to contact by Cabinet Office with the ICO as referred to in the ministerial correspondence of 9 January 2023;and
 - records relating to contact between DCMS and ICO for the purpose of responding to the ministerial correspondence of 9 January 2023.
24. At the internal review stage, it took a more generous view of the scope of the request and decided that communications between DCMS and Cabinet Office for the purpose of the ministerial correspondence were also in scope.
25. That information was also disclosed to the requester, with redactions of personal information and mailbox addresses.
26. As per the above scoping of the request, its initial searches centred on records held of contact with the ICO following receipt of the Member's correspondence.
27. These consisted of searches of the Cabinet Office FOI Policy Team's inboxes and files for "section 36", "guidance" and/or the name of relevant contacts within the ICO FOI Policy Team for records created between 19 December 2022 and 9 January 2023.
28. The result was that it identified that it held the following email chain within scope (which were disclosed with section 40 redactions):
 - 21 December 2022 - FOI Policy and ICO - Section 36 Guidance In widening the scope at the internal review stage, the following further records, including those held by the Parliamentary Correspondence Team, were considered within scope.
 - Email chain - 20 December 2022 - DCMS to MCT - Request for transfer from DCMS to MCT
 - Email chain - 23 December 2022 - DCMS to MCT - Case MC2022/16413
 - Document - Policy Lines - DCMS Policy Lines for Cabinet Office

29. At the internal review stage, the requestor listed the type of information he would have expected the Cabinet Office to hold and to disclose to him. He posited that an absence of these records demonstrated that the Cabinet Office had not conducted an adequate search.
30. To the complainant's specific points on the 'absence' of records, the Cabinet Office stated as follows:
 - searches of the FOI Policy Team in boxes and files have returned no further results of a formal minute or agenda for a meeting of 11 January. It does not find that surprising and would refer to the explanatory paragraphs setting out the context above.
 - by the time of the meeting on 11 January 2023, the ICO had already issued the revised Section 36 guidance (published on 5 January) and therefore there was no particular reason for there to have been further communication between the two organisations on this matter.
31. The Cabinet Office explained that it holds policy responsibility for freedom of information policy has been a settled position since the machinery of government change in 2015. It added that through their daily work officials are adept at identifying which issues would engage policy relationships and which issues engage sponsorship relationships. Therefore, the question as to which department held responsibility for responding to the Member's correspondence would not have been subject to extensive debate and thereby create further records. The transfer of the Member's correspondence was straightforward, handled as a matter of course and in line with published guidance.

Commissioner's findings and reasonings

32. The Commissioner agrees with the Cabinet Office's assertion that the request seeks information generated by Mr Charalambous's letter of 19 December 2022 to DCMS. In reaching this conclusion, the Commissioner noted that the complainant, in his request for an internal review and in his complaint to the Commissioner, did not complain about the non-provision of information that predates Mr Charalambous's letter of 19 December 2022. The Commissioner is therefore satisfied that the Cabinet Office correctly "scoped" the information request as per the information the complainant was seeking.
33. However, the Commissioner has viewed an email (provided by the Cabinet Office) that the Cabinet Office believes is outside the scope of the request. The reason it provides for this belief is that the email is an "internal email".

34. The Commissioner disagrees with the Cabinet Office, as the email's contents relate to, and are connected to Bambos Charalambous MP's involvement as described in the request for information and a proper reading of the request includes internal correspondence. To avoid any doubt, the Commissioner has highlighted the relevant email in the confidential annex to this notice. As regards this information, the Cabinet Office did not comply with section 1(1) and 10(1) of FOIA as it did not confirm it held the information within the statutory timescale.
35. The Commissioner is concerned that his findings in paragraphs 33 and 34 above, indicate that the Cabinet Office wrongly delineated the request to exclude internal emails or other internal correspondence. Accordingly, the Cabinet Office should take appropriate measures to determine if it holds any other such information (i.e. internal emails or correspondence) that fall within scope of the request. If it does hold such information, it should disclose it to the complainant or issue a valid refusal notice explaining why it is exempt from disclosure.
36. Apart from the Commissioner's findings in paragraphs 33 - 35 above, on consideration of the other searches carried out, and in the absence of evidence to the contrary, the Commissioner is otherwise satisfied on the balance of probabilities, that the public authority conducted appropriate searches and does not hold further relevant information falling within the scope of the request.

Section 36(2) FOIA

37. As stated in paragraph 17 above, the Cabinet Office later relied on section 36(2)(c) to withhold team email addresses.
38. Section 36(2) of FOIA states that: "Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act –

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."
39. Section 36 differs from all other prejudice exemptions, as for it to be engaged a qualified person (QP) must give their reasonable opinion about likelihood of prejudice.

Cabinet Office's submissions

40. The Cabinet Office provided the Commissioner with a copy of the opinion given by the qualified person (dated 22 June 2022), Lord True, Minister of State for the Cabinet Office (the 'Minister'). It also provided a copy of the advice as to why the exemption could apply which had been provided to the Minister on 9 June 2022.

Commissioner's reasonings

41. Section 36(5) of FOIA sets out who may act as the qualified person in relation to a public authority. In the case of government departments, any Minister of the Crown may act as the qualified person.
42. The Commissioner notes that the QP's opinion was given in the context of another (earlier) matter unrelated to the complaint's request for information. However, the QP was asked to give his opinion as to whether, if in future, the public authority wished to withhold team e-mail address would section 36(2)(c) be engaged.
43. In *Information Commissioner v Malnick and The Advisory Committee on Business Appointments* [2018] UKUT 72 (AAC), the Upper Tribunal held at [56] that section 36(2) of FOIA is concerned with substantive rather than procedural reasonableness of the qualified person's opinion.
44. The Commissioner however distinguishes *Malnick* from the matter in hand. *Malnick* considered a case where a request for information had been made (on 19 February 2015), and which Baroness Browning, the QP, had considered the withheld information before reaching her opinion (on 24 March 2015). When the UT discusses "procedural reasonableness", it is doing so in the context of whether the QP had regard to all relevant factors. This is different from the present case where the purported QP's opinion pre-dates the request for information. The procedural irregularities in the present case go not just to whether it is a reasonable opinion, but to whether it is an opinion at all for the purposes of section 36(2).
45. The Cabinet Office seeks to rely upon an opinion of a Qualified Person, Lord True, Minister of State for the Cabinet Office (the 'Minister'). Unusually, however, that opinion is dated 22 June 2022, and therefore pre-dates the request for information in this case by several months.
46. Section 36(5) of FOIA sets out who may act as the Qualified Person in relation to a public authority. In the case of government departments, any Minister of the Crown may act as the qualified person.
47. The Commissioner notes that Lord True had ceased to be Minister of State for the Cabinet Office by the time of the request, and has been holding a different post since September 2022. While he has remained a Minister of the Crown (as Leader of the House of Lords) he was no longer in the same ministerial role when the request for information was made. While still being a minister, he falls within section 36(5)(a) at the relevant time, but by virtue of a different ministerial post than when he signed off the original opinion.

48. The Commissioner notes that the QP's opinion was given in the context of another (earlier) matter unrelated to the complainant's request for information. The Qualified Person provided his opinion that the exemption would be engaged in June 2022. Whilst the rationale as to why the exemption applied is contained in the advice to the Qualified Person (dated 9 June 2022), to which the latter's opinion simply agreed, the Commissioner is satisfied that such agreement to advice is an appropriate process to follow.
49. However, the Commissioner has considered whether that prior Qualified Person's opinion remains valid for - and can be relied on - in the present case. While recognising that a public authority may have developed a general approach to releasing or withholding certain types of information, the Commissioner is of the opinion that section 36(2) requires the qualified person to consider each case on its own merits, and for any opinion issued to relate to the specific request made, and consequently the information sought from the public authority.
50. As an exemption, the provisions of section 36 only become relevant once a request for information has been made, and to which that exemption may apply. Its use is therefore specific to and dependant on the particular request for information and the particular information held by the public authority within the scope of that request. This is reflected in the wording of section 36(2) itself, "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" (emphasis added) would cause the stated prejudice.
51. In the Commissioner's opinion, to amount to a valid opinion for the purposes of section 36(2), a Qualified Person's opinion must therefore necessarily post-date the request for the information, and must be an opinion relating to the specific request. The Commissioner is therefore of the view that the opinion of the Qualified Person dated 22 June 2022 is not a valid opinion for the purposes of section 36(2) in relation to the present case. In the absence of a valid reasonable opinion of a Qualified Person, the requirements of section 36(2) are not met.
52. As there has not been a valid (or indeed any) opinion reached by the QP in the present case, relating to the specific request made, the statutory requirements for section 36(2) to apply have not been made out and the exemption is not engaged.

Section 40(2)

53. The complainant asked the Commissioner to accept that the Cabinet Office's reliance on section 40(2) was late in breach of the statute and also to verify if blacked-out text is personal data.

54. As requested by the complainant, the Commissioner has viewed the text that was "blacked-out" (by reliance on section 40(2)) and he confirms that it was personal data as defined by section 40(2).
55. Its late reliance on this section places the Cabinet Office in breach of section 17(1).

Procedural matters – section 36

Time taken to consider public interest and respond to request

56. Section 10(1) of FOIA states that on receipt of a request for information a public authority must respond promptly, and within 20 working days.
57. However, where a qualified exemption is being considered, under section 17(3) a public authority can have a 'reasonable' extension of time to consider whether the balance of the public interest favours maintaining the exemption or disclosing the information. While FOIA does not define what might constitute a 'reasonable' extension of time, the Commissioner considers that a public authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days.
58. While the Cabinet Office did tell the complainant it needed further time to consider the public interest test, in all, it took 83 working days to provide its response to the request. The Commissioner therefore finds the complainant's complaint that "the period said to have been devoted to balancing competing public interests (in favour of disclosure) was excessive, unreasonable and therefore in breach of the Act" to be well founded.
59. Therefore, in the circumstances of this case, the Commissioner considers that the Cabinet Office breached section 17(3) of FOIA as it did not complete its deliberations on the public interest test within a reasonable time.

Other Matters

60. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable time.

61. The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days. In this case, as noted above, the Cabinet Office failed to meet these timescales.

Right of appeal

62. 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

63. 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.
64. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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Senior Case Officer

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