

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2024

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 copies of internal paperwork regarding the investigation into the behaviour of the then Minister of State Christopher Pincher MP. The FCDO confirmed that it held information but withheld this on the basis of sections 36(2)(c) (effective conduct of public affairs), 40(2) (personal data) and 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the information withheld by virtue of section 40(2) is exempt from disclosure on the basis of this exemption. However, the Commissioner has concluded that the information withheld from disclosure on the basis of section 36(2)(c) is not exempt from disclosure on the basis of this exemption. The Commissioner has also concluded that the FCDO breached section 17(1) given its delays in responding to this request.
3. The Commissioner requires the FCDO 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 section 36(2)(c) of FOIA. In doing so it can redact the names and contact details of junior officials.

4. The public authority must take these steps 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.

Request and response

5. The complainant submitted the following request to the FCDO on 25 July 2022:

“I would like copies of the internal paper work in the FCDO regarding the investigation into the behaviour of Minister of State Christopher Pincher MP and of the subsequent correspondence sent to the Cabinet Office and 10 Downing Street, and any received therefrom in relation to the matter.

Mr Pincher was Minister of State at the Foreign and Commonwealth Office from 25 July 2019 to 13 February 2020.

As you know, the investigation has become public knowledge and a former FCDO Permanent Secretary has disclosed the fact of documents being sent to Downing Street in relation to the outcome of the investigation.”

6. The FCDO acknowledged receipt of the request on 27 July 2022 but did not issue a substantive response until 13 July 2023. In this response the FCDO explained that the information it held falling within the scope of the request was considered to be exempt from disclosure on the basis of sections 36(2)(c), 40(2) and 41(1) of FOIA.
7. The complainant contacted the FCDO on 31 July 2023 and asked it to conduct an internal review of this refusal.
8. The FCDO informed him of the outcome of the internal review on 1 December 2023. The internal review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

9. The complainant contacted the Commissioner on 22 December 2023 about the FCDO’s decision to withhold the information he had requested. Furthermore, he was dissatisfied with the FCDO’s delays in both responding to his request and in completing the internal review.

10. The FCDO withheld some of the information falling within the scope of this request on the basis of section 36(2)(c) (email correspondence) and some of the information within the scope of the request on the basis of sections 40(2) and 41(1) (a report).

Reasons for decision

Section 40 – personal information

11. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data? And is any of the information special category data?

15. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".
16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. Information relating to special category data is given special status in the UK GDPR.
20. Furthermore, article 9 of the UK GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.
21. The FCDO argued that the information withheld on the basis of this exemption clearly constituted personal data, and even if it were disclosed in redacted form, it would still be possible to identify individuals from this information. The FCDO also explained that parts of the information withheld on the basis of section 40(2) also included special category data.
22. The Commissioner has examined the information in question and agrees with this assessment. He notes that it contains the personal data of a number of individuals, and also agrees with the FCDO that even in redacted form, disclosure would be likely to allow the individuals in question to be identified. The Commissioner also accepts that some of the information withheld on the basis of section 40(2) constitutes special category data.

The special category data

23. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
24. The Commissioner considers that the only conditions that could be relevant to a disclosure under FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
25. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being

disclosed to the world in response to the FOI request or that they have deliberately made this data public.

26. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

Personal data which is not special category data - would disclosure contravene principle (a)?

27. With regard to the information which constitutes personal data, but is not special category personal data, the fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

28. The most relevant DP principle in this case is principle (a).

29. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

30. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

31. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

32. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”².

² Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

33. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
34. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

35. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. The FCDO acknowledged that there is a legitimate public interest in demonstrating accountability and transparency in the handling of complaints against those who hold Ministerial office.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

37. The Commissioner agrees with this assessment and the first limb is therefore met.

Is disclosure necessary?

38. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
39. The FCDO argued that it was not necessary to disclose the report. The fact that complaints were made, investigated and a report produced is public knowledge, and in its view it is not necessary to go further and disclose the report itself to achieve real accountability and transparency.
40. The complainant explained that he was not interested in the identity of any such persons or what precisely they spoke of. He noted that the complaint of improper behaviour by Mr Pincher is in the public domain and he did not seek the details of what was recorded in government paperwork about it or as to who raised or pursued the matter by way of complaint. Rather, the complainant explained that what he wished to see is how the matter was handled between the FCO (as it then was) and the Cabinet Office in communication within and between the two entities, and the chronology of resulting actions.
41. The Commissioner considers that disclosure of the report could add further to the transparency in respect of this issue, albeit more from the point of the investigation rather than understanding the chronology highlighted by the complainant. Nevertheless the Commissioner accepts that it could be argued that disclosure is necessary in order to provide additional transparency in relation to the steps taken in relation to this matter.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

42. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
43. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
44. The FCDO argued that members of staff have a reasonable expectation when choosing to make a complaint that the fact that they have done so will not be disclosed. Complaints of a personal nature are always treated confidentially, and anyone making such a complaint has a reasonable expectation that disclosure under FOIA will not be used to inform other people whether they made a complaint and the nature of that complaint. Furthermore the FCDO argued that disclosure of the information, even in redacted form, would be likely to lead to the identification of staff members which would be distressing for them.
45. The Commissioner agrees with the FCDO's submissions on this point. Whilst disclosure of the report itself could add further to transparency around this issue, any such value in disclosure is significantly outweighed by the legitimate interests of the data subjects. In view of the above the Commissioner has therefore concluded that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful. The information withheld on the basis of section 40(2), which is not also special category data, is therefore exempt from disclosure on the basis of section 40(2) of FOIA.
46. The FCDO applied section 41(1) to the same information to which it cited section 40(2). However, in view of his decision on section 40(2), the Commissioner has not considered the former exemption in this decision notice.

Section 36 – effective conduct of public affairs

47. Section 36(2)(c) of FOIA 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..

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

48. In determining whether section 36(2)(c) is 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.
49. 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.
50. With regard to the process of seeking this opinion, the FCDO sought the opinion of the Minister for the Americas and Caribbean on 6 July 2023 with regard to whether section 36(2)(c) of FOIA was 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 was an appropriate qualified person.
51. The qualified person was provided with a copy of the information to which this exemption was being applied and advice from officials as to why it was considered that section 36(2)(c) applied to this information. The qualified person provided their opinion that the exemption was engaged on 12 July 2023. Whilst the rationale as to why the exemption applied is contained in the recommendation to the qualified person, to which the latter simply agreed, the Commissioner is satisfied that this is an appropriate process to follow in seeking the qualified person's opinion (and is in line with the approach taken by other central government departments).

52. However, with regard to the substance of the opinion (ie the advice to which the qualified person was asked to agree), in the Commissioner's view this does not contain an explanation as to **why** prejudice would be likely to occur if the information in question was disclosed. Rather the submission to the qualified person consists of a re-statement of the wording of section 36(2)(c); an observation that the Commissioner's guidance suggests that factors relevant to the use of this exemption include the nature of information/timing of the request eg whether it contains free and frank information about an ongoing issue; and, the statement that in view of this guidance the Minister should conclude that disclosure of the information would be likely to prejudice the effective conduct of public affairs. The email from the qualified person's private office simply records that they agreed that the exemption is engaged.
53. In the Commissioner's opinion the submission to the qualified person lacks the type of reasons and rationale which are normally included in such documents which set out **why** disclosure of the particular information would be likely to be prejudicial. In the Commissioner's view there is an absence of any logical argument in the submission to the qualified person which outlines why section 36(2)(c) should apply in this case. Rather any potential prejudice that may occur is at best merely implied or hinted at. On this basis the Commissioner is not prepared to accept that the qualified person's opinion was a reasonable one. This is not to say that the Commissioner considers 'an' opinion that section 36(2)(c) is engaged is necessarily an irrational or unreasonable one. Rather, it is the case that the qualified person's opinion has done little more than state that the withheld information should be withheld under section 36(2)(c); there is, in effect, no actual opinion as to why this may be the case for the Commissioner to consider and determine whether this is reasonable.
54. The Commissioner notes that the public interest arguments set out in the internal review response of 1 December 2023 arguably do provide some reasons and arguments to support the position that this exemption is engaged (as well as reasons for supporting the decision that the public interest favours maintaining the exemption):

"it would inhibit the ability of government departments to investigate complaints against Ministers effectively. This remains the case, and I have therefore reviewed the public interest test in release of the information.

The information relates to a highly sensitive investigation into the conduct of a Minister. I acknowledge your point regarding the public interest in knowing more about the processes involved in the investigation, and the fact that there is already information in the public domain regarding the outcome. However, there is also a public interest

in maintaining the confidentiality and integrity of investigations of this kind in order to protect the overall fairness of the process. Those involved in such investigations, including those raising and investigating complaints, need to be confident that the process as a whole provides a safe space for them to contribute and review information, free from external interference or distraction. They should have the reasonable expectation that the information concerned, including information about the processes involved, will not generally be released into the public domain. This remains the case even when some information relating to an investigation may already be in the public domain, and/or when the investigation in question has closed.

I consider that release of the information in scope of your request would inhibit internal discussion and handling of the issues involved in such complaints”.

55. This is broadly the type of analysis and argument that the Commissioner would expect to have been put to the qualified person, in particular making it clear to the qualified person that the “other” prejudice caused by disclosure of the information would be to the ability of the FCDO to conduct such investigations, and why this would be the case (ie the sensitive and high profile nature of the case, and the fact that although there is some information in the public domain, there remains a risk to the confidentiality of the process if such information was disclosed).
56. However, the Commissioner cannot take such arguments into account when determining whether section 36(2)(c) is engaged. His role is limited to considering the matters considered by the qualified person.
57. For the reasons set out above the Commissioner has therefore concluded that the qualified person’s opinion is not a reasonable one and section 36(2)(c) is therefore not engaged.
58. As a result of this finding the Commissioner requires the FCDO to disclose the information it has withheld on the basis of section 36(2)(c) of FOIA. However, in doing so it can redact the names and contact details of junior officials. The Commissioner accepts, as he has done in previous cases, that such information is exempt from disclosure on the basis of the section 40(2) (personal data) exemption of FOIA.

Procedural matters

59. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.

60. Section 10(1) of FOIA requires these actions to be taken and compliance with section 1(1) within 20 working days of receipt of the request.
61. Under section 17(1) a public authority that is relying on an exemption to withhold information should give the applicant a refusal notice stating that fact within the same timescale.
62. In this case, the FCDO did not issue the complainant with such a refusal notice until over 12 months after his request. This represents a breach of section 17(1) of FOIA. The Commissioner has commented further on this delay in the Other Matters section below.

Other matters

63. 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 timeframe.³ 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.⁴
64. In this case, as noted above, the FCDO failed to meet these timescales; it took 89 working days to complete the internal review. This was in addition to the 12 months that it took to issue its initial response to this request.
65. The FCDO explained to the Commissioner that such delays were as a result of the need to complete consultations, staff resourcing and the need to deploy available staff onto crisis response work. Whilst the Commissioner recognises such constraints, he clearly cannot accept delays of this nature either in respect of the initial processing of requests or at the internal review stage. He acknowledges that the FCDO is in the process of making changes to improve its FOI performance, within its resourcing constraints, and therefore hopes and expects that delays of this nature will not be repeated.

³ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁴ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Right of appeal

66. 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

67. 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.
68. 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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