

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **11 December 2018**

Public Authority: **The Cabinet Office**

Address: **70 Whitehall
London
SW1A 2AS**

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking a copy of the 'Facebook Insights files' for the Prime Minister's official Facebook page for a three month period. The Cabinet Office responded and argued that the requested information was exempt from disclosure on the basis of sections 35(1)(a) (formulation and development of government policy) and 35(1)(b) (Ministerial communications) of FOIA. It subsequently dropped its reliance on these exemptions and sought instead to withhold the information on the basis of section 36(2)(c) (effective conduct of public affairs) of FOIA. The Commissioner has concluded that the requested information is not exempt from disclosure on the basis of section 36(2)(c) of FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the 'Facebook Insights files' which he requested.
3. 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 the Act and may be dealt with as a contempt of court.

Request and response

4. The complainant submitted the following request to the Cabinet Office on 16 February 2018:

'I want to receive Facebook Insights files (posts, videos, page) for the UK's prime minister official facebook page:

<https://www.facebook.com/10downingstreet> I am requesting the files for the last 3 months of 2017 Please send the files to my emaiul [sic]'

5. The Cabinet Office responded on 15 March 2018 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 35(1)(a) (formulation and development of government policy) and 35(1)(b) (Ministerial communications) of FOIA.
6. The complainant contacted the Cabinet Office on the same day and asked it to conduct an internal review of this decision.
7. The Cabinet Office informed him of the outcome of the internal review on 15 June 2018. The review concluded that section 35(1)(b) did not apply to the request but that section 35(1)(a) did apply and that the public interest favoured maintaining that exemption.

Scope of the case

8. The complainant contacted the Commissioner on 30 June 2018 and asked her to investigate the Cabinet Office's handling of his request. He argued that the information he requested did not fall within the scope of the exemption provided by section 35(1)(a) of FOIA, and even if it did, then the public interest favoured disclosing the requested information.
9. During the course of the Commissioner's investigation, the Cabinet Office explained that it was no longer seeking to rely on section 35(1)(a) to withhold the requested information. Rather, it was now seeking to rely on section 36(2)(c) (effective conduct of public affairs) of FOIA to withhold this information. This decision notice therefore considers whether this exemption provides a basis upon which to withhold the requested information.

Reasons for decision

Section 36 – effective conduct of public affairs

10. The Cabinet Office is seeking to rely on section 36(2)(c) of FOIA to withhold the requested information. Section 36(2)(b) and (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 otherwise to prejudice, the effective conduct of public affairs.'

11. In determining whether section 36(2)(b) 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.

12. 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.

13. With regard to the process of seeking this opinion the Cabinet Office sought the opinion of the qualified person, in this case the Minister for the Constitution. The qualified person was provided with a briefing on the relevant background to the request including arguments for the engagement of the exemption contained at section 36(2)(b)(c). The qualified person confirmed that the exemption was engaged via an email from their private office. The Commissioner is satisfied that this is an appropriate process for the Cabinet Office to follow in order to seek the opinion of the qualified person.
14. Turning to the substance of the opinion itself, and whether it is reasonable, the qualified person argued that the withheld information is used by officials to determine what communications strategies are succeeding and what needs to be improved. Disclosure of this information would stop officials having a safe space to develop plans regarding communication strategies and to give and receive full and objective advice on the Insight pages. Without the ability to do so, this would result in less effective advice from officials and could lead to poorer decision making. The qualified person noted that senior officials need a safe space to determine how the public is reacting to live issues and help develop the formulation of government policies.
15. With regard to whether this is a reasonable opinion, the Commissioner considers it important to note that the limb of section 36 which the Cabinet Office is seeking to rely on is section 36(2)(c). As noted above in the quote from the legislation, this provides an exemption for information where the disclosure of which would 'otherwise' prejudice public affairs.
16. The Commissioner's guidance on this exemption discusses how section 36(2)(c) should be interpreted and applied by referencing two particular Information Tribunal cases, both involving the Ministry of Defence. The Commissioner has quoted the relevant parts of this guidance below:

'In McIntyre v Information Commissioner and the Ministry of Defence (EA/2007/0068, 4 February 2008), the Information Tribunal said at paragraph 25:

"We take a similar view to the Commissioner that this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by

the disclosure or the diversion of resources in managing the impact of disclosure".

The Information Tribunal here took the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. So, if section 36(2)(c) is used in conjunction with any other exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). [Emphasis added] This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b). The Information Tribunal made this point in Evans v Information Commissioner and the Ministry of Defence (EA/2006/0064, 26 October 2007); they said, at paragraph 53, in relation to a claim of section 36(2)(c):

"The principle arguments in favour of this exemption advanced by the MoD and IC were similar to those put forward for section 36(2)(b)(i): that those attending such meetings would be inhibited from expressing themselves freely and frankly if there were a real possibility of disclosure under the Act; and likewise for those who recorded the meeting. However, if the same arguments are to be advanced, then the prejudice feared is not 'otherwise'. Some prejudice other than that to the free and frank expression of advice (or views, as far as section 36(2)(b)(ii) is concerned) has to be shown for section 36(2)(c) to be engaged."¹

17. The Commissioner has carefully considered the arguments advanced by the qualified person to support the engagement of section 36(2)(c). She acknowledges that the prejudice which the qualified person envisages accruing if the withheld information is disclosed is harm to the devising of new communications strategies or the refinement of current ones. However, as its clear from the submission to the qualified person this impact on the communication strategies stems directly from an impact on the candour of advice given to, and received by officials, if the information was disclosed and also the impact on the safe space needed to discuss issues relating to the Insight files. In the Commissioner's opinion these consequences of disclosing the withheld information are ones specifically protected against by the exemptions contained at sections 36(2)(b)(i) and (ii) of FOIA. Consequently, as with the

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf> Paragraphs 55 and 56.

Information Tribunal case quoted above EA/2006/0064, in the Commissioner's opinion the prejudice envisaged by the qualified person in this present case is not some 'other' prejudice; rather it is a prejudice covered by the exemptions contained at sections 36(2)(b)(i) and (ii). Therefore, the Commissioner has concluded that the qualified person's opinion is not a reasonable one because they have not shown how disclosure of the withheld information would, or would be likely to, 'otherwise' prejudice public affairs.

18. The Commissioner acknowledges that in its letter to her about this complaint the Cabinet Office did identify some further reasons why it believed that disclosing the withheld information was likely to be prejudicial. The Commissioner accepts that such reasons arguably identify some 'other' prejudice not covered by any of the other exemptions within FOIA. However, such arguments were not made in the submission to the qualified person or given as part of the qualified person's opinion and therefore they cannot be considered by the Commissioner when determining whether section 36(2)(c) is engaged.
19. Consequently, for the reasons set out above the Commissioner has concluded that section 36(2)(c) is not engaged.

Other matters

20. The Commissioner would like to note there was a considerable delay in the Cabinet Office responding to her enquiries in relation to this complaint. The Commissioner initially wrote to the Cabinet Office on 24 July 2018 and asked to be provided with a copy of the withheld information and submissions to support the Cabinet Office's view that this was exempt from disclosure. The Commissioner asked for a response to this letter to be provided within 20 working days, ie by 21 August 2018.
21. Having failed to receive a response within this timescale, the Commissioner issued an Information Notice under section 51 of FOIA to the Cabinet Office 26 September 2018 which formally requested the Cabinet Office to provide her with a response to her earlier letter. The Information Notice required the Cabinet Office to respond within 30 calendar days, ie by 26 October 2018. The Cabinet Office failed to meet this deadline and it did not provide the Commissioner with a response until 16 November 2018. This was three weeks after the deadline for complying with the Information Notice and some 83 working days since the Commissioner first contacted the Cabinet Office on 24 July 2018 and asked for a detailed response in relation to this complaint.
22. The Commissioner also wishes to note that this is not the first recent instance in which the Cabinet Office has failed to comply with an

Information Notice within the time specified in that notice. The Commissioner wishes to place on record the fact that the Cabinet Office's failure to respond to her enquires about complaints made under section 50 of FOIA in a timely manner significantly undermines her ability to reach a decision in a swift and efficient manner. She would also emphasise that an Information Notice is a legally binding document and that failure to comply with such a Notice may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of appeal

23. 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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

24. 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.
25. 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
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