

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 December 2018

**Public Authority:** The Cabinet Office

**Address:** 70 Whitehall

London

SW1A 2AS

### Decision (including any steps ordered)

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1. The complainant submitted a request to the Cabinet Office seeking a copy of correspondence between Sir Jeffrey Donaldson MP and the then Minister for the Cabinet Office, Ben Gummer, in relation to Brenda Hale being appointed to the Armed Forces Covenant Reference Group. The Cabinet Office 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 section 36(2)(c) (effective conduct of public affairs) of FOIA. The Commissioner accepts that this exemption is engaged but has concluded that in all the circumstances of the case the public interest in the disclosure of the information outweighs the public interest in maintaining the exemption.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
  - Provide the complainant with a copy of the correspondence falling within the scope of his request.
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

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4. The complainant submitted the following request to the Cabinet Office on 14 June 2017:

*'Under your stated obligations under the Freedom of Information Act, I would ask you to release all correspondence between Sir Jeffrey Donaldson MP and the Minister for the Cabinet Office Ben Gummer or any other member of the Cabinet Office staff or minister in relation to Brenda Hale being appointed to the Armed Forces Covenant Reference Group.'*

*The correspondence in question is mentioned in the following parliamentary question.*

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2017-01-10/HL4532/>

*This is a follow up request to my initial request which had a reference of Re: IR323983*

*I would appreciate if this could be dealt with as quickly as possible. If you could send the letters as well as a schedule of correspondence that would be most appreciated.'*

5. The Cabinet Office responded on 13 July 2017 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 section 41 (information provided in confidence) of FOIA.
6. The complainant contacted the Cabinet Office on 28 August 2017 and asked it to conduct an internal review of this refusal.
7. The Cabinet Office informed him of the outcome of the review on 26 March 2018. The review concluded that section 41(1) had been misapplied; rather, the information in question was exempt from disclosure on the basis of section 36(2)(c) (effective conduct of public affairs) of FOIA.

## Scope of the case

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8. The complainant contacted the Commissioner on 13 June 2018 in order to complain about the Cabinet Office's decision to withhold the information falling within the scope of his request and also its decision to refuse to provide him with a schedule of this correspondence. He was

also dissatisfied with the length of time it took the Cabinet Office to conduct the internal review in relation to this request and also the length of time it had taken the Cabinet Office to complete the internal review in relation to his previous request on this subject matter (Cabinet Office reference: IR323983).

9. FOIA does not contain a statutory time period within which internal reviews must be completed. However, the Commissioner has commented on these delays in the Other Matters section of the notice.
10. The notice itself considers whether the information falling within the scope of the complainant's request of 14 June 2017 is exempt from disclosure on the basis of section 36(2)(c) of FOIA.

## Reasons for decision

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### Section 36 – effective conduct of public affairs

11. The Cabinet Office is seeking to rely on section 36(2)(c) of FOIA to withhold the requested information. This section 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.'*

12. 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.
13. 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.

14. 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 5 October 2017 which set out the relevant background to the request including arguments for the engagement of the exemption contained at section 36(2)(b)(c). The qualified person provided their opinion on 12 October 2017. 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.
15. Turning to the substance of the opinion itself, and whether it is reasonable, the qualified person considered that disclosure of the withheld information would undermine the expectation that communications with Ministers would be treated confidentially. This would be likely to prejudice the effective conduct of public affairs because it would be likely to lead to decisions being taken on the basis that advice was not as frank and/or candid as to could be.
16. The Commissioner understands that it is accepted practice for Ministerial correspondence, including emails between MPs and Cabinet Ministers, to remain confidential unless there is a significant public interest in the release of particular correspondence. In light of this established practice the Commissioner accepts that if the withheld information were to be disclosed than this would be contrary to this practice. Therefore, she accepts that it is reasonable to argue that there could be a chilling effect on similar communications in the future leading to an impact on the frankness and/or candour of such communications and thus an impact on the effective conduct of public affairs. That is to say, an impact on communications between MPs and Ministers. The Commissioner has therefore concluded that the qualified person's opinion was a reasonable one and the exemption contained at section 36(2)(c) in relation to the withheld information is engaged.

### **Public interest test**

17. Section 36 is a qualified exemption and in line 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. If the public interest is equal on both sides, then the information must be released.

*Public interest arguments in disclosing the information*

18. In support of his view that the public interest favoured disclosure of the withheld information, the complainant made the following points:

- There must be openness and accountability with the Cabinet Office to ensure public trust;
- The DUP is now a partner of government and any agreements they have with the Conservative party should be open and transparent;
- He understood that the appointment to this committee should have been made by the Northern Ireland Executive (NIE) with the approval of both the First Minister and Deputy Ministers and therefore it was important that letters are released to ensure that due process had been followed.
- He noted that Jeffrey Donaldson MP was not a member of the NIE so it was important to public trust to understand why he was able to appoint someone to the group and under what instruction he was doing it.
- He argued that it could not be a breach of confidence to be transparent about how a representative of the Northern Ireland government has been appointed to another government group.
- The DUP ensure that the reference to the Military Covenant being introduced across the UK was written in The Queen's speech which meant that Brenda Hale will have a significant role in funding decisions and therefore there was a public interest in the process by which she was appointed being open and transparent.

*Public interest in maintaining the exemption*

19. The Cabinet Office emphasised that communications between MPs and Ministers are a significant channel of communication between such parties and they depend upon these communications remaining confidential in order that issues can be discussed openly and frankly. The Cabinet Office therefore argued that it would be firmly against the public interest if the effectiveness of this channel of communications was undermined. Furthermore, the Cabinet Office argued that there was little in the correspondence that illuminates the process of the appointment and that disclosure of the schedule of correspondence would create an expectation that the content of the correspondence is more interesting than it in fact is.

*Balance of the public interest arguments*

20. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, she 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 she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.
21. The Commissioner has carefully considered the information falling within the scope of this request. In her view disclosure of this would add some further light into the process which led Brenda Hale to be nominated, albeit that she accepts the Cabinet Office's point that the extent to which disclosure would prove to be illuminating is somewhat limited. The Commissioner notes the complainant's position that such a nomination was meant to have been by the NIE and Jeffrey Donaldson MP was not a member of the NIE and thus not in a position to nominate Brenda Hale. The Commissioner accepts that this adds to the public interest in understanding the basis upon which she was nominated. However, the Commissioner notes that in its internal review response the Cabinet Office did offer some information about the issue *'It may be helpful if I explain that the Covenant Reference Group is not a ministerial group but rather a group of stakeholders and officials, which monitors the implementation of the Armed Forces Covenant and sets the funding priorities for the Covenant Fund. While there is currently no NIE representative on the CRG, an invitation remains open for the Northern Ireland Executive to nominate an official level representative.'*
22. The Commissioner also accepts that the Cabinet Office's position that that correspondence between MPs and Ministers is assumed to be confidential. She therefore accepts that if such correspondence was disclosed this would be likely to create the risk of a chilling effect on such correspondence in the future. Nevertheless, the Commissioner is somewhat uncomfortable with the Cabinet Office's view that such information would only be disclosed if there was a significant public interest in doing so. In her view this is a rather generic approach which fails to take into the particular circumstances of the case, including of course the content of the withheld information itself. In the circumstances of this case the Commissioner notes that that the Parliamentary Question cited in the complainant's request essentially contains an overview the withheld information. In light of this, in the Commissioner's view, the extent to which disclosure of the withheld information would risk creating a chilling effect is arguably limited.
23. Taking all of the above factors into account, the Commissioner considers that the public interest arguments on both sides can be said to be

equally balanced. Given the presumption in favour of disclosure contained at section 2 of FOIA, the Commissioner has therefore concluded that the public interest favours disclosing the withheld information (and thus by default, also providing the complainant with a schedule of the correspondence itself).

## Other matters

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24. As noted above, FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
25. With regard to the first request on this subject which the complainant submitted to the Cabinet Office (its reference IR323983) the complainant submitted his request for an internal review on 15 March 2017. It was acknowledged on 20 March 2017. Having heard nothing further, the complainant contacted the Cabinet Office again on 13 June 2017. The Cabinet Office responded the next day and apologised for the delay explaining that it thought that this internal review had already been completed; it also explained to the complainant why it did not hold any information falling within the scope of his request.
26. With regard to the request which is the subject of this complaint, as noted above the complainant submitted his internal review request on 29 August 2017. The Cabinet Office did not inform him of the outcome of the review until 26 March 2018, some 146 working days later. (This is despite the fact that the complainant contacted the Cabinet Office on 13 November and 4 December 2017 in order to chase up the status of the internal review; no response was sent to these emails). In its submissions to the Commissioner in relation to this complaint the Cabinet Office acknowledged that its delay in completing this internal review was unacceptable and it offered its apologies to the requester. The Cabinet Office explained that although the internal review was assigned promptly it appeared that the relevant business unit overlooked it. It explained that the FOI team then took over responsibility for submitting the section 36 submission but unfortunately the internal review was overlooked again.
27. The Commissioner accepts that administrative errors and/or oversights do sometimes occur. However, it is clearly regrettable that in circumstances of the complainant's two requests, three such errors have occurred thus significantly delaying the complainant being informed of the Cabinet Office's internal review findings. The Commissioner would hope that the Cabinet Office ensures that if such an administrative error did occur again when it was processing a request, then additional care

and oversight is given to ensure that there are no further delays or errors in handling that particular request.

28. The Commissioner also wishes to note that there was a notable delay in the Cabinet Office providing her with its submissions in respect of this complaint. The Commissioner wrote to the Cabinet Office on 10 July 2018 seeking a copy of the withheld information and details to support its reliance on section 36(2)(c) of FOIA. The Commissioner asked for a response to this letter within 20 working days. Having failed to receive a response to her letter, the Commissioner served an Information Notice, under section 51 of FOIA, on the Cabinet Office on 26 September 2018 formally compelling it to provide her with a response to her letter of 10 July 2018. The Cabinet Office provided her with a response on 24 October 2018.

## Right of appeal

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29. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Water Lane**  
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