

## Freedom of Information Act 2000 (FOIA)

### Decision Notice

**Date:** 17 August 2020

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

#### Decision (including any steps ordered)

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1. The complainant requested copies of correspondence sent to or from the Infected Blood Policy Team at the Department for Health and Social Care during the month of October 2018. The Cabinet Office refused the request in reliance on the exemption at section 36(2)(c) of the FOIA.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on section 36(2)(c) to refuse the request. No steps are required. The Commissioner does however find that the Cabinet Office failed to respond to the request within the statutory time for compliance.

#### Request and response

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3. The complainant requested the following information from the Cabinet Office on 3 February 2019:

*"Copies of all correspondence to/from the Infected Blood Policy Team at DHSC during the period 1<sup>st</sup> October 2018 – 31<sup>st</sup> October 2018."*

4. The Cabinet Office did not respond to the request until the Commissioner intervened. The Commissioner issued a decision notice on 8 May 2019 requiring the Cabinet Office to issue a response.<sup>1</sup>

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<sup>1</sup> Decision notice FS50829656

5. The Cabinet Office responded on 10 May 2019. It withheld the requested information in reliance on the exemption at section 36(2)(c) of the FOIA.
6. The complaint requested an internal review on 11 May 2019.
7. The Cabinet Office communicated the outcome of that review on 25 July 2019. The internal review upheld the original refusal.

## Scope of the case

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8. On 25 July 2019 the complainant asked the Commissioner to investigate the Cabinet Office's refusal to provide the requested information. In addition, the complainant asked the Commissioner to consider the time taken to respond to the request, and to conduct the internal review.
9. The Commissioner wrote to the Cabinet Office on 10 September 2019. She requested a copy of the withheld information and further details of the Cabinet Office's reliance on section 36(2)(c). The Commissioner requested a response by 8 November 2019.
10. The Commissioner did not receive a response to her correspondence, and issued an information notice on 18 November 2019 under section 51 of the FOIA.
11. The Cabinet Office responded to the information notice on 13 January 2020. However, on inspection of the response it appeared to the Commissioner that not all of the requested information had been provided.
12. Following exchanges of correspondence the Cabinet Office disclosed further information to the Commissioner on 27 May 2020.

## Reasons for decision

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### Section 36(2)(c): prejudice to the effective conduct of public affairs

13. Section 36(2)(c) of the FOIA provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, prejudice the effective conduct of public affairs.

14. In order to establish that the exemption has been applied correctly the Commissioner considers it necessary to:
  - Ascertain who acted as the qualified person;
  - Establish that an opinion was given by that person;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.
15. The Cabinet Office advised the Commissioner that a submission regarding section 36 was sent to the then Minister for the Constitution, Chloe Smith MP, on 9 April 2019. The Minister provided her opinion on 12 April 2019, which essentially confirmed that she agreed with the points set out in the submission. The Commissioner has inspected the submission and accompanying information provided to the qualified person.
16. Section 36(5) of the 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 qualified person. Therefore the Commissioner is satisfied that the Minister for the Constitution was authorised to act as the qualified person in this case.
17. In determining whether the exemption is engaged, the Commissioner must consider 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.
  - The qualified person's knowledge of, or involvement in, the issue.
18. 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 unreasonable 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.

19. The submission to the qualified person set out that disclosure of the requested information “would be likely to inhibit the effective conduct of public affairs in future because the expectation of confidence in communications between officials would be likely to diminish”. The submission further set out that this would be detrimental to the decision making process in future since it would be “likely to discourage officials from recording discussions about similar matters”. The submission explained that this would risk future decisions being taken “on the basis of advice that was not as frank and candid as it could be”. It argued that the public interest would be better served by preserving “safe space” in which free and frank advice could be provided.
20. The submission also pointed out that the substance of the information, namely the lines to take, had been put into the public domain by the time the request was made. The submission highlighted the importance of officials being able to discuss the provision of advice and lines to take without fear that early thinking would be disclosed, since disclosure would be likely to result in officials feeling constrained in the manner in which such discussions could take place in the future.
21. The Commissioner is mindful that she must not disclose any of the detail of the withheld information in this decision notice. She considers that it can accurately be described, in broad terms, as relating to communications planning and lines to take. In the Commissioner’s opinion it appears to relate more to administrative and process matters, such as ensuring that relevant officials were copied in and kept in the loop, than documenting substantive decision making or exchanges of opinion. For this reason the Commissioner accepts that section 36(2)(c) is more appropriate than section 36(2)(b).
22. The Commissioner is prepared to accept as reasonable the opinion that disclosure of the information in question would be likely to have a prejudicial effect. She accepts that officials do not expect administrative emails to be routinely published into the public domain. She is less persuaded that officials would be discouraged from recording discussions, since the information in question does not in fact record the detail of discussions. In any event, the Commissioner would point out that adequate record keeping is a key part of any official’s job.
23. The submission also pointed out that the requested information contained references to matters that were still under discussion. The Commissioner cannot describe this information in detail since to do so would defeat the purpose of applying an exemption. The Commissioner can say that in her assessment it does not relate to the actual formulation or development of government policy regarding the infected blood issue, otherwise it would fall under the exemption at section 35(1)(a) rather than section 36(2)(c).

24. Having examined the submission and the qualified person's opinion the Commissioner finds that the exemption at section 36(2)(c) is engaged in respect of the requested information. She has therefore gone on to consider the balance of the public interest.

### **Public interest test**

25. Section 36(2)(c) is a qualified exemption and is therefore subject to the public interest test as set out in section 2(2) of the FOIA. The Commissioner must therefore decide if the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If the public interest is evenly balanced then the information must be disclosed.

### Public interest in disclosing the information

26. The Cabinet Office acknowledged the general public interest in the disclosure of public information. It recognised that openness in government may increase public trust in and engagement with the government.
27. The Cabinet Office also recognised the public interest in the Infected Blood Inquiry and its interaction with government departments.
28. The complainant argued that the inordinate delay in issuing a response and internal review outcome suggested that there may be a strong public interest in disclosure of the requested information. He was of the view that the Cabinet Office's poor handling of the request "required increased transparency in order to maintain public confidence".
29. The complainant also reiterated arguments he had put to the Cabinet Office when he requested an internal review, since none of these were addressed in the outcome of the review. The complainant argued that the Cabinet Office did not need "safe space" to consider lines to take since these were complete by the time of the request.
30. The complainant added that disclosure of the withheld information would inform the public about the issue of infected blood. This would enable the public to participate more fully in public debate. He also pointed out that the issue covered by the requested information continued to have a significant impact on affected individuals and their families. These individuals were entitled to receive as much information as possible to help their understanding. Disclosure of the information would further help to dispel fears of a "cover up" and would encourage confidence in the Inquiry.

### Public interest in maintaining the exemption

31. The Cabinet Office argued that there was a strong public interest in ensuring that the quality of decision making was not harmed by such decisions being taken on the basis of advice that was not as frank and candid as it could be. The Cabinet Office argued that the public interest clearly lay in protecting the ability of officials to discuss between themselves the drafting of advice to ministers, lines to take, etc.
32. The Cabinet Office acknowledged that the lines to take had been published and considered that this met the public interest in disclosure. The Cabinet Office was of the view that there was no compelling public interest in overriding the public interest in maintaining the confidentiality of communications.

### Balance of the public interest

33. The Commissioner acknowledges the complainant's argument that the infected blood issue is a matter of significant public interest. The Commissioner agrees that there is a strong public interest in the public being adequately informed and enabled to participate not only in the public debate but also the Infected Blood Inquiry.
34. The Commissioner has regard to the specific content of the requested information in this case, and she appreciates that the complainant cannot have sight of it in order to make submissions. As set out above the Commissioner considers that the requested information does not contain substantive detail about the government's thinking with regard to the issue of infected blood. It is largely administrative in nature, and for this reason the Commissioner finds that its disclosure would not inform the public to any significant degree. The Commissioner does not consider that it would assist the public's understanding, or facilitate a more informed public debate. Consequently the Commissioner finds that the public interest in favour of disclosure, although legitimate, cannot be afforded substantial weight.
35. The Commissioner has also been mindful of the complainant's suspicion as to the possible content of the requested information. Regrettably the Commissioner has recorded inordinate delays on the part of the Cabinet Office in a number of cases. The Commissioner has seen no evidence to suggest that the delays in this case have any link to the content of the requested information. The Commissioner can state that in her view the requested information does not contain any evidence to suggest a cover up as suspected by the complainant.
36. Having found that the qualified person's opinion was reasonable, appropriate weight must be given to the prejudice identified in balancing the public interest. What is appropriate weight will depend on the

severity, extent and frequency of the prejudice. The Commissioner accepted the Cabinet Office's argument that disclosure "would be likely" to cause prejudice, which is a lower bar than accepting that disclosure "would" cause prejudice. This means that the weight that the qualified opinion carries as a public interest factor in this case is less than would be the case were the likely severity, extent and frequency of the identified prejudice greater. It does nonetheless carry some weight.

37. The Commissioner does not agree with the Cabinet Office that there needs to be a compelling public interest in disclosure in order to outweigh the public interest in maintaining the exemption. The test under section 2(2) of the FOIA is clear: the question is whether the public interest in maintaining the exemption is sufficiently strong to outweigh the public interest in disclosure. It is a simple balancing exercise with an assumption in favour of disclosure.
38. However in this case the Commissioner accepts that the public interest in maintaining the exemption is slightly stronger than the public interest in disclosing the withheld information. The Commissioner is therefore satisfied that the balance of the public interest lies in maintaining the exemption at section 36(2)(c). The Commissioner finds that the Cabinet Office was entitled to refused the complainant's request on this basis.

## **Procedural matters**

### **Section 1: general right of access**

#### **Section 10(1): time for compliance**

#### **Section 17(1): refusal notice**

39. Section 1(1)(a) of the FOIA requires a public authority to inform the complainant in writing whether or not recorded information is held that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued.
40. Section 10(1) requires that the public authority comply with section 1 promptly, and in any event no later than 20 working days after the date of receipt of the request.
41. If the public authority wishes to refuse any part of a request it is required by section 17(1) to issue a refusal notice within the statutory time for compliance. The refusal notice must explain how any exemptions relied on apply to the withheld information.
42. In this case the Cabinet Office did not issue a substantive response to the request within the statutory time for compliance. The Commissioner is disappointed that the Cabinet Office failed to respond until required to do so by a decision notice.

43. The Commissioner therefore finds that the Cabinet Office failed to comply with section 10(1) of the FOIA in respect of this request.
44. The Commissioner is further disappointed that the refusal notice issued by the Cabinet Office did not adequately explain how the exemption at section 36(2)(c) was engaged. It is not enough to cite an exemption, or reproduce its wording. Section 17(1)(c) explicitly states that the authority must state, if not otherwise apparent, why the exemption applies. Since the Cabinet Office failed to do so, the Commissioner records a failure to comply with section 17(1)(c). In the Commissioner's opinion it is also basic customer service for a public authority to explain its position to a requester, and she would expect the Cabinet Office to set a better example to other authorities.

### **Other Matters**

45. The complainant also asked the Commissioner to make a finding with regard to the time taken to conduct an internal review. Since this is not a requirement of Part I of the FOIA it cannot form part of the Commissioner's decision, but the Commissioner has set out her view below.
46. The Commissioner's published guidance sets out her view that internal reviews should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
47. In this case the Cabinet Office took just over two months to complete the internal review. The Commissioner has seen no evidence of exceptional circumstances at the time the internal review was requested, and she is mindful that the original refusal was issued three months after the request was submitted. Again, the Commissioner expects the Cabinet Office to set a better example to other public authorities.

## Right of appeal

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48. 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 123 4504  
Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.

50. 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** .....

**Sarah O’Cathain**  
**Senior Case Officer**  
**Information Commissioner’s Office**  
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**Water Lane**  
**Wilmslow**  
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**SK9 5AF**