

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 May 2022

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

Decision (including any steps ordered)

1. The complainant requested information relating to the Prime Minister's 'lockdown declaration' on 23 March 2020 and, specifically, any legal advice that had been sought prior to the Prime Minister's address to the nation. The Cabinet Office initially relied on section 42(2) and, subsequently, section 35(3) of FOIA to refuse to confirm or deny whether it held any relevant information.
2. The Commissioner's decision is that the Cabinet Office has failed to demonstrate that issuing a confirmation or a denial would, in itself, disclose information to which legal professional privilege could be maintained and is therefore not entitled to rely on section 42(2) of FOIA. Whilst the Commissioner agrees that section 35(3) of FOIA is engaged, he considers that the balance of the public interest favours confirming or denying whether the information is held.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Confirm or deny whether it holds any information falling within the scope of the request.
 - To the extent that any information is held, either disclose that information or issue a refusal notice that complies with section 17 of FOIA.

4. The Cabinet Office 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

5. On 17 December 2020 the complainant requested information of the following description:

“I request:

- any discussion of whether to seek legal advice on the lawfulness of the PM's lockdown declaration of 23/03/20,
- whether the PM sought the same, and
- if so, such request and advice.”

6. The correspondence then proceeded to set out the public interest reasons why (in the complainant's view) the information should be disclosed.
7. On 20 January 2021, the Cabinet Office responded. It refused to confirm or deny that it held the requested information. It relied on section 42(2) of FOIA to do so as it considered that confirming or denying that information was held would, in itself, reveal information that was legally privileged.
8. The complainant requested an internal review on the same day. The Cabinet Office sent the outcome of its internal review on 29 April 2021. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 19 March 2021 to complain about the way his request for information had been handled. He argued that there was a strong public interest in knowing:

“did the PM put 60 million people under house arrest without legal authority?”
10. The Commissioner commenced his investigation on 21 January 2022 with a letter to the Cabinet Office. He noted that, based on the wording

of the request, he considered it unlikely that issuing a confirmation or a denial would, in itself, disclose legally privileged information and asked the Cabinet Office to justify its use of the exemption. The Cabinet Office responded on 16 March 2022. It maintained that it was entitled to rely on section 42(2) of FOIA, but now considered that it was also entitled to rely on section 35(3) of the FOIA to refuse to confirm or deny that information was held. The Cabinet Office argued that if any information was held within the scope of the request it would be covered by section 35(1)(a) of FOIA as it would relate to the formulation of government policy. It argued that there was a strong public interest in neither confirming nor denying whether such information was held.

11. As it has long been recognised that there is a very strong public interest in protecting the principle of legal professional privilege, the Commissioner will look at section 42(2) first. If he does not consider that the exemption has been correctly cited, he will then consider whether the Cabinet Office is entitled to rely on section 35(3) to refuse to confirm or deny that information is held.
12. For the avoidance of doubt, the Commissioner did not seek to establish, nor did the Cabinet Office confirm, whether any information falling within the scope of the request is actually held. Nothing in this notice should be taken as implying that the Cabinet Office does or does not hold relevant information. Any examples used are purely hypothetical.

Reasons for decision

Section 42 – legal professional privilege

13. Section 42 of FOIA states that:

“(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

“(2) The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) [the duty to confirm or deny that relevant information is held] would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”

14. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) the Information Tribunal described legal professional privilege as:

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation.”

15. It seems reasonably clear to the Commissioner that if any information was held by the Cabinet Office it would be likely to attract legal privilege because it must, by definition, relate to communications between a client (the government) and their legal adviser for the dominant purpose of seeking or imparting legal advice on the actions the government was about to take. Any information that was not legal advice, or did not relate to the particular action, would not fall within the scope of the request.
16. However, it is not sufficient for hypothetical information to be covered by privilege. In order for the Cabinet Office to demonstrate that it is entitled to rely on this exemption to neither confirm nor deny whether it holds information, it must demonstrate that just confirming (or denying) that information was held would, in itself, disclose legally privileged information.
17. The Commissioner's guidance on section 42 makes clear that the mere fact that a public authority has sought advice, or that advice has been provided, does not, on its own, disclose privileged information.¹ In order to engage the exemption, a confirmation or a denial must disclose something about the substance of the actual advice that was provided.
18. The guidance shows an example contrasting two requests, for ostensibly the same recorded information, that have been worded differently. In request A, the requester asks for:

“a copy of any legal advice you have obtained that would allow you to sell the kitchens of Borset High School to a private catering company.”

Request B seeks:

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

"a copy of any legal advice you have obtained about selling the kitchens of Borset High School to a private catering company."

19. The guidance goes on to explain that the public authority receiving request A would probably be entitled to rely on section 42(2) to neither confirm nor deny holding any information. Confirming that information was held would not only reveal that advice had been sought, but would also reveal the content of any legal advice (ie. it would reveal whether the sale was, or was not, legal - because any advice showing that the sale wasn't legal would not fall within the scope of the request). By contrast, the public authority would not be able to refuse to confirm or deny holding information within the scope of request B because providing a confirmation or a denial would only reveal the fact that legal advice had been provided. It would not reveal the substance of that advice.
20. In his letter of 21 January 2022, the Commissioner noted that the request did not seek only legal advice that confirmed that a lockdown was lawful. It only sought legal advice relating to "the lawfulness" of the action. He asked the Cabinet Office to explain why issuing a confirmation or a denial would involve disclosure of privileged information.
21. The Cabinet Office responded to say that:

"In the context of the specific FOI request, the Cabinet Office does not recognise the distinction the Commissioner is trying to make between 'lawfulness' and 'legal or illegal'. The question is therefore not clear.

"The requester asked for three things (numbers added):

[1] '...any discussion of whether to seek legal advice on the lawfulness of the PM's lockdown declaration of 23/03/20,

[2] - whether the PM sought the same, and

[3] - if so, such request and advice...'.

"Because the request is so specific, i.e. regarding 'legal advice on the lawfulness of the PM's lockdown declaration of 23/03/20', the Cabinet Office refuses to confirm or deny whether it holds the information sought because to do so would itself reveal something about the substance of that advice should it exist. This is in line with the ICO's guidance on section 42(2).

"We note that theoretically, the first part of the request could cover discussions between officials considering whether to seek legal advice or not, rather than solely discussions between officials and lawyers (of

course any discussions on whether to seek legal advice or not could theoretically take place with lawyers themselves). However, to answer this question substantively would undermine the NCND for the remaining (and predominant) aspect of the request (i.e. copies of requests for legal advice and the subsequent advice given)."

22. In the Commissioner's view, the Cabinet Office has failed to interpret the request properly as it has failed to distinguish between a request seeking legal advice on whether a particular action is "lawful" and one seeking legal advice on the "lawfulness" of a particular action. Those two words may be similar, but they are not the same.
23. "Lawfulness" implies a spectrum of different positions ranging from actions that will always be lawful to actions that will never be lawful. In between there will be a whole range of nuances reflecting the particular circumstances or particular processes that have been or must be followed for an activity to be lawful. However what's important is that it is not a binary distinction.
24. The Commissioner is therefore of the view that the Cabinet Office could confirm that it had sought legal advice (if it had in fact done so) without indicating whether that advice had concluded that the proposed action was or was not lawful. Therefore the Cabinet Office could confirm or deny that it had sought legal advice without revealing the substance of any advice provided and thus without revealing any information which would be covered by legal privilege.
25. Whilst at least some of the information the Cabinet Office may hold is likely to engage section 42(1) of FOIA, the Commissioner does not consider that the Cabinet Office is entitled to rely on section 42(2) of FOIA to refuse to confirm or deny that it holds information.

Section 35 – formulation or development of government policy

26. Section 35 of FOIA states that:

"(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

- (a) the formulation or development of government policy,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice

"(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

27. Section 35 is a class-based exemption meaning that any information of a particular type will automatically be covered. Unlike section 42, a public authority does not have to demonstrate that the mere act of confirming or denying would itself reveal something about the policy process. So long as the requested information would (if it existed) fall within at least one of the four subcategories of section 35(1), the public authority is entitled to neither confirm nor deny holding the information – so long as the balance of the public interest favours maintaining the exemption.
28. The Commissioner's guidance states that information will relate to the formulation of government policy if it relates to the generation and evaluation of new ideas. Information will relate to the development of government policy if it relates to reviews of the effectiveness of existing policy or considers whether the existing policy is fit for purpose.
29. However, the guidance also states that section 35 will not cover information relating to the implementation of existing policy. Not every decision will necessarily be a policy decision. Whilst the term "policy" is not defined in the legislation, the Commissioner interprets the term as referring to a framework or set of rules designed to effect a change likely to affect substantial numbers of people.
30. The Cabinet Office argued in its submission that:

"the requested information, if held, would be exempt as it would relate to the formulation or development of government policy - in this case the government policy in regards to its response to the Covid-19 pandemic. Any discussions, if held, regarding; a) the potential seeking of legal advice; b) communications seeking legal advice; and c) the legal advice provided by lawyers on specific decisions and announcements from the government would clearly relate to the formulation of policy."
31. The Commissioner accepts that the exemption is engaged because any relevant information that the Cabinet Office held would relate to the formulation of government policy. This is because it would relate to any internal discussions that took place about and any advice that was sought on the Prime Minister's statement – prior to the public statement being made. That statement introduced the government's intention to impose a nationwide lockdown – by any measure, a set of rules likely to affect a large number of people.
32. However, as in decision notice IC-70696-Q4X0, the Commissioner does not accept that the policy in question is the government's response to

pandemic in general.² That is far too broad an approach. Any information that the Cabinet Office held in respect of this particular request is very unlikely to relate to the purchase of personal protective equipment supplies, the development of a vaccine, or proposals for mass testing – all of which are strands of the overall response to the pandemic but are discrete policies in their own right. The advice (if it indeed were sought) would relate to the Prime Minister's decision to make a statement on national television telling the entire nation to stay at home. Whilst that forms part of the government's overall response, it is a discrete policy decision in its own right. Therefore the Commissioner considers that lockdown is the policy being formulated.

33. Identifying the relevant policy is important as the policy's stage of development at the time of the request is an important factor affecting the balance of the public interest.

Public interest test

34. Even where information would, if it were held, relate to the formulation of government policy, a public authority must still confirm whether or not it holds that information unless the balance of the public interest favours neither confirming nor denying.
35. In explaining why the public interest should favour neither confirming nor denying that any information was held, the Cabinet Office referred in its submission to:

"the need for the government to have a safe space generally in order to discuss and debate whether legal advice should be sought or not, and on what issues whilst formulating policy. Covid-19 policies are not settled policies, rather they are reactive to the changing nature of the pandemic. Ministers and officials need to be able to freely and frankly discuss their opinions on whether or not legal advice is required, without undue or premature scrutiny from the public. Whilst Ministers should expect some scrutiny from both the public and media, this should not be at the expense or compromise to the integrity of the policymaking process. It's clearly in the public interest that government policy formulation and decision making is protected during times of emergency, such as during the pandemic."

² See paras 60 and 61: <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4019988/ic-70696-q4x0.pdf>

36. The Cabinet Office also noted that many of its public interest arguments supporting the use of the section 42 exemption applied equally to the use of section 35. As he found that section 42 was not engaged, the Commissioner has not previously considered those public interest arguments which were:

“to confirm whether legal advice exists relating to the matters described in the request could be taken to indicate what level of importance was attached to it, or even whether the Government was in particular doubt about the strength of its legal position. Even if that impression were unfounded, the risk of creating it might suggest that other decisions are less important and decisions are taken without legal advice. On the other hand, to confirm that legal advice on an issue is not held might expose the government to criticism for not having sought advice, and hence having failed to give sufficient weight to the issue or to obtain the “best” advice. Again, even if unfounded this could lead to pressure to take legal advice in inappropriate cases or in an unmanageably large number of cases.

“A confirmation or denial would subject the government to premature scrutiny regarding work related to its response to the pandemic. Clearly the government was working under exceptional circumstances during this time. It was, and remains, imperative that the government is able to fully consider its response and decisions related to Covid-19, including where and when to seek legal advice. Impacts of the pandemic continue and at the time of the response to this request the UK was clearly grappling with difficult and wide-ranging decisions. Restrictions have changed over time. Confirmation or denial could lead to the public questioning why certain restrictions were amended and why legal advice was or was not sought. This could undermine trust in the government's decisions. This is of particular significance here, as the decisions and potential legal advice would be recent and relate to an ongoing issue.

“The risks described above regarding any confirmation or denial could also lead the government to seek legal advice unnecessarily, which would be a drain on limited resources. The government should be able to decide free from undue pressure and public scrutiny when legal advice should be sought, at what stage and what for.”

37. The complainant on the other hand pointed to what he felt was a strong public interest in accessing any information that was held. Whilst his arguments were based on an assumption that the Cabinet Office did hold information but might wish to withhold it, the Commissioner considers that many of those arguments apply equally to the issue of whether the Cabinet Office is obliged to confirm or deny holding information at all.

38. The complainant identified several main arguments:

- The extreme nature of the instruction that was given to people living in the UK and the significant interference with their rights.
- The number of people who were affected by the announcement.
- The fact that, at the time of the Prime Minister's announcement neither Parliament nor any of the devolved assemblies had passed legislation introducing police powers to enforce lockdown. He pointed to several examples of instances that had occurred between the statement and the legislation coming into force, where the police had acted as though they had powers that they did not have.
- The expansion of the four reasons for leaving home that were outlined by the Prime Minister to the more numerous list of "reasonable excuses" that was passed into law by the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.
- The overall importance of the issue and of transparency in general.

The Commissioner's view

39. In the Commissioner's view, the balance of the public interest in this case favours confirming or denying that information is held.

40. The Commissioner has considered carefully what weight he should ascribe to the Cabinet Office's arguments in respect of seeking legal advice. His view is that it can carry only limited weight in the circumstances of this case.

41. Section 35(1)(a) of FOIA is not primarily designed to protect the process of seeking or imparting legal advice. Section 42 exists to protect legally privileged information and section 35(1)(c) provides specific protection for advice provided by Government's law officers³ (including the ability to neither confirm or deny whether those officers have been consulted) - the Commissioner has already dismissed the Cabinet Office's arguments in relation to the former exemption and the Cabinet Office has not attempted to cite the latter. The fact that such arguments are not best-suited to this particular limb of the exemption does reduce their overall impact.

³ In this instance the Attorney General and the Solicitor General

42. Nevertheless, the Commissioner does accept that the seeking and imparting of legal advice will sometimes form part of the process of formulating new policies. As a general rule, he has accepted in previous cases that there is a considerable public interest against setting a precedent that government departments must always disclose which policies have or have not benefitted from legal advice and at what stage. As the Cabinet Office pointed out, if it were routinely required to disclose which policies it had and had not sought legal advice on, there is a risk of a (possibly incorrect) inference being drawn that those policies on which legal advice had not been sought were somehow less important (or possibly even less likely to be lawful) than those on which advice had been sought. There is a public interest in preserving a safe space in which officials can feel free to seek legal advice when they genuinely need it, rather than sending in unnecessary requests (which of course would need to be fulfilled) for the sake of appearances.
43. That being said, each case should be judged on its own individual merits and the public interest will vary from case to case. In this case, the Commissioner considers that there is a very significant public interest in knowing whether legal advice was sought.
44. The Government's decision to require the majority of the population of the UK to remain at home is arguably the most momentous decision a British government has ever made during peacetime. The regulations that were subsequently passed into law contained some of the most extreme restrictions ever imposed on the UK. When Parliament (or one of the devolved assemblies) passes a law which could lead to a person being fined or even found guilty of a criminal offence for leaving their home, there is an exceptionally strong public interest in understanding why such a law is necessary and proportionate.
45. There were clearly pressing public health concerns at the time of that announcement and it is not for the Commissioner to determine how well-justified that decision was. However, given the extent and severity of the consequences of that decision, there is a very strong public interest in knowing the extent and quality of the advice provided to the Prime Minister before making his statement.
46. Turning to the issue of timing, the Commissioner notes that the request was responded to ten months after the Prime Minister's address. The policy (lockdown) had therefore already been announced by the time the request was submitted – reducing the safe space needed to discuss matters.
47. Whilst it is true to say that the government did impose subsequent lockdowns, the issues involved on each occasion would have been slightly different and, crucially, would have built on the work done prior

to the first lockdown in March 2020. That in turn increases the public interest in understanding just what those initial discussions were and what sources of advice were sought.

48. The Commissioner has carefully weighed the public interest in protecting officials from unfair scrutiny. He notes that, during the time period covered by the request, the UK was experiencing a public health emergency. The situation was extremely fast-moving and decisions which would normally have taken weeks of deliberation had to be made within hours. It would be unreasonable to expect the same levels of consideration to have been given in such extreme circumstances.
49. However, such is the importance of this particular decision, the Commissioner considers that the public interest lies in the Cabinet Office confirming or denying that it holds information.

Right of appeal

50. 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

51. 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.
52. 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

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