

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 March 2023

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1 2AS

Decision (including any steps ordered)

1. The complainant has requested communications between the office of Michael Gove (then Minister for the Cabinet Office) and the businessman David Meller, and Meller Designs Limited. The Cabinet Office originally withheld all of the information requested under sections 35 (formulation or development of government policy), 43(2)(prejudice to commercial interests) and 40(2)(third party personal data). During the Commissioner's investigation the Cabinet Office revised their position and provided the complainant with a partial (redacted) disclosure of the information requested.
2. The Commissioner's decision is that section 35(1)(a) is engaged in respect of the residual withheld information but that the balance of the public interest favours disclosure of the information. The Commissioner has found that section 43(2) is not engaged to some of the residual withheld information. In respect of the parts of the information where the Commissioner has found that section 43(2) is engaged, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosure of the specific information. The Commissioner has found that section 40(2) is not engaged in respect of Mr Meller's named information.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.

- Disclose to the complainant those parts of the residual withheld information (as specified in a Confidential Annex attached to this notice) which are not exempt under section 43(2) and section 40(2).
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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 28 January 2021 the complainant wrote to the Cabinet Office and requested information in the following terms:

'Please provide a copy of all communications between the office of Michael Gove (for him and his private office staff) and

a) David Meller

b) Employees of Meller Designs Limited

Between March 1st and April 30th concerning supply offers of PPE, and any subsequent discussion of contract delivery'.

6. On 11 February 2021 the Cabinet Office asked the complainant to clarify the time frame of his request and the complainant replied the next day to confirm that the date range of his request covered the year 2020.
7. The Cabinet Office provided their substantive response to the request on 30 March 2021. They confirmed that they held the information requested but that it was exempt from disclosure under sections 35(1)(a)(formulation or development of government policy) 35(b)(Ministerial communications), 35(d)(operation of a Ministerial private office), 43(2)(prejudice to commercial interests) and 40(2)(third party personal data).
8. The complainant requested an internal review on 31 March 2021. He stated that this request had been refused in a *'blanket manner'* and contended that it was not clear how section 35 could apply to most of the information.
9. The Cabinet Office provided their internal review on 27 July 2021. The review found that sections 35(1)(b) and (d) did not apply to the requested information. The review upheld the application of sections 35(1)(a), 43(2) and 40(2). The Cabinet Office also advised that the information was exempt from disclosure under section 36(2)(c) as in the

reasonable opinion of a qualified person, disclosure would be likely to prejudice the effective conduct of public affairs. The Cabinet Office stated that they were applying section 35(1)(a) of the FOIA to the information requested '*on the basis that it relates to the development of government policy and that the Cabinet Office can rely upon it in the alternative to section 36(2)(c) of the Act*'.

Scope of the case

10. The complainant contacted the Commissioner on 29 July 2021 to complain about the way his request for information had been handled.
11. During the course of the Commissioner's investigation, the Cabinet Office disclosed redacted copies of all the email chains held (the requested information) within scope of the request to the complainant.
12. In submissions to the Commissioner, the Cabinet Office acknowledged that their internal review had been incorrect in stating section 35 as an alternative to section 36. Where information is exempt under section 35, it cannot also be exempt under section 36. The Cabinet Office confirmed to the Commissioner that their primary contention was that section 35 applied to the information within scope of the request, but that if the Commissioner concluded otherwise, then they relied on section 36 in the alternative.
13. Following the partial disclosure by the Cabinet Office, the complainant contacted the Commissioner and stated that his request '*was for all communications*' and not just email. The complainant asked if the Commissioner could check whether the Cabinet Office had checked Mr Gove's WhatsApp account, text messages and any private email accounts which Mr Gove uses for government business.
14. In response to the Commissioner's enquiries on this point, the Cabinet Office responded that '*the wording of the request is very clear*' and they contended that any information in scope of the request would be held within Mr Gove's former private office's records. The Cabinet Office confirmed that appropriate searches for any information in scope of the request were conducted by that office and the Cabinet Office advised that they could identify no reason that any further searches such as those described by the complainant would be reasonable or necessary in this case. However, for the avoidance of doubt, the Cabinet Office did confirm that no references to additional communications of the nature described by the complainant were found in any of the email chains within scope of the request which were reviewed.
15. The Commissioner acknowledges and accepts the complainant's point that his request was for '*all communications*' (i.e. not solely email

communications). However, the request as worded was for all communications '*between the office of Michael Gove (for him and his private office staff)*' and Mr Meller and employees for MDL. That is to say, the request, as worded, was targeted at Mr Gove's then private office rather than Mr Gove personally. Whilst the scope of the request as worded would encompass any communications which Mr Gove might have had with Mr Meller in the capacity of his private office, it would not extend to any communications which Mr Gove may have had outside that capacity (i.e. in a personal capacity).

16. Therefore, in the context of the request as worded, the Commissioner would agree with the Cabinet Office that further checks and searches such as those described by the complainant, would not have been reasonable or necessary in this particular case. The Commissioner would note that it is of course possible for an all-encompassing request such as that envisaged by the complainant to be made, but any such request would need to be appropriately widely worded and not limited by wording such as that employed (albeit perhaps unintentionally) in this case.
17. Therefore, the information within scope of the Commissioner's investigation is that residual information which has not been disclosed to the complainant by the Cabinet Office. That information comprises information redacted from the email chains provided to the complainant and two documents sent as email attachments, labelled Annex B.2 and Annex B.3.
18. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office correctly applied the relevant exemptions to the residual withheld information.

Reasons for decision

19. Section 35(1)(a) states that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to

(a) The formulation or development of government policy'

20. Section 35 is a class based exemption. Therefore, if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for a public authority to demonstrate prejudice to these purposes.
21. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process, where options are

generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

22. It is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged. In accordance with the Information Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
23. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
24. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - The final decision will be made either by the Cabinet or the relevant Minister;
 - The government intends to achieve a particular outcome or change in the real world; and
 - The consequences of the decision will be wide-ranging.
25. Having had sight of the residual withheld information, the Commissioner is satisfied that the information clearly relates to the formulation and development of the Government's policy towards responding to the COVID-19 pandemic, specifically its policy of sourcing and obtaining supplies of PPE. Section 35(1)(a) therefore applies to the withheld information in its entirety.

Public interest test

26. Section 35(1)(a) is a qualified exemption and therefore subject to the public interest test. The Commissioner must therefore consider whether the balance of the public interest lies in favour of maintaining the exemption or in disclosing the information.

Public interest in favour of disclosing the withheld information

27. In his request for an internal review the complainant contended that there were a number of public interest arguments favouring disclosure of the information. The complainant stated:

'If some of this correspondence is discussion of general PPE policy between Mr Gove and Meller or his staff, given the widespread concerns raised about government PPE policy, including by the NAO, there is a clear public interest in transparency'.

28. The complainant contended that *'there is the strongest of public interest in transparency around a PPE procurement, given widespread concerns raised'*, and stated:

'Government contractors must expect significant transparency around their activities even in normal times, to prevent corruption or the appearance of corruption. Transparency in public contracting is one of the key factors that ensures the UK remain relatively incorrupt, on global metrics.

In times of pandemic, where procurement can be described as urgent at best, and contracts are often awarded without a tender, contracted parties must expect an even higher level of scrutiny after the fact, to ensure that they, and the government, has acted properly in the award at the time'.

29. The complainant further stated:

'Mr Meller is a prominent Conservative donor, with an established relationship with Mr Gove, whose firm has received very large sums for the contracting of PPE. I understand this correspondence will likely relate to the arrangements for getting Mr Meller's offer to supply PPE into the system. This relationship poses a clear corruption risk. As such, there is the strongest of public interests in full transparency'.

30. In submissions to the Commissioner the complainant contended as follows:

'The public interest in disclosure in this case appears clear cut. Given the well-publicised issues with the VIP lane¹ procurement, which Meller

¹ The name given to the fast-track process set up by DHSC procurement teams for offers to supply PPE from companies referred by ministers, MPs, NHS officials or other people with political connections. A report by the National Audit Office in 2020 found that firms referred

Designs Limited was assigned to, information on how the company got VIP status, as well as millions of pounds of public contracts, when its controlling party was a donor to Mr Gove, as well as helping to run his campaign to lead the Conservative Party, is in the clearest public interest in disclosure'.

31. In submissions to the Commissioner the Cabinet Office acknowledged that there is a public interest in understanding how the government manages and managed matters related to the pandemic, including the procurement of PPE in the early phases of the pandemic. The Cabinet Office also acknowledged that there is a public interest *'in transparency surrounding matters related to the spending, or considered spend, by government'*.
32. The Cabinet Office stated that they had (during the Commissioner's investigation) disclosed a significant portion of the information in scope of the request. They also noted that the Department of Health and Social Care (DHSC) had also published a list of the suppliers awarded contracts for PPE through the high priority lane and details of who referred them². The Cabinet Office advised that further details about these contracts are available on the Contracts Finder on gov.uk.
33. The Cabinet Office therefore contended that their redacted disclosure of information to the complainant and the wider public transparency of the information published *'meets the public interest in this case and minimises the public interest in disclosing the remaining information'*.
34. The Cabinet Office also advised that the remaining redactions to the information within scope of the request *'predominantly focused on third party commercial information'* and they contended that *'any further disclosure of the remaining information is not going to shed further light into the matters identified by the complainant in his request for an internal review'*.
35. However, as the Upper Tribunal recently confirmed in *Montague v The Information Commissioner and The Department of Trade* (UA -2020 000324 & UA-2020-000325)[13 April 2022], the time for judging the competing public interests in a request is at the date of the public

to the VIP lane had a 10 times greater success rate for securing contracts than companies whose bids were processed via normal channels. (from the Guardian 16 Nov 2021).

² [PPE procurement in the early pandemic - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

authority's decision on the request under Part 1 of the FOIA and prior to any internal review of the initial decision.

36. As the ICO's current guidance to public authorities on the public interest test makes clear³, the *Montague* decision means that if a public authority offers an internal review, they cannot reassess the balance of competing public interests at that stage. Rather, the public authority must look back at their decision to establish if – at that time – they dealt appropriately with the request, including the balance of the public interest. This means that the Commissioner assesses such public interest cases by reference to the time of the public authority's decision, which will not include the time of the internal review, if conducted.
37. However, as the ICO guidance also notes, it is sometimes possible that during the Commissioner's investigation or at Tribunal, new facts and evidence emerge since the time of the public authority's decision on a request. In such instances, the Commissioner can take into account the new evidence in so far as this can inform the grounds of exemption(s) which the public authority can rely on.
38. The above being the case, the Commissioner cannot take into account, for the purposes of the public interest test, the publishing by DHSC of the aforementioned information on 17 November 2021. Rather, the time for assessing the public interest test in this case is 12 March 2021, this being the time by which the Cabinet Office were statutorily required to provide a response to the complainant's clarified request of 12 February 2021.

Public interest in favour of maintaining the exemption

39. In favour of maintaining section 35(1)(a) to the residual withheld information, in submissions to the Commissioner the Cabinet Office contended that '*there is clearly very weighty public interest in protecting the government's ability to consider and formulate government policy and to protect information where the disclosure would harm the safe space for continued policy formulation in response to a global pandemic*'. The Cabinet Office stated that the government's response to the COVID-19 pandemic, or any emergency, must be robust, well-informed and protected from premature disclosure of sensitive information.

³ [The public interest test | ICO](#)

40. The Cabinet Office also stated that participating stakeholders also need the freedom to share options with the government in response to assistance to a national emergency. They contended that *'this has to take place without fear of premature disclosure'*. The Cabinet Office suggested that disclosure would be likely to invite judgements about whether the offers were comprehensive and should or should not have been pursued at a time when policy formulation was still a live matter.
41. The Cabinet Office advised the Commissioner that considering the circumstances at the time of the communications forming the subject of the request and considering ongoing government responses to the pandemic, they considered that their 'arrangements for managing communications of this nature are covered by the safe space protected by section 35(1)(a). They stated that the integrity of the policy-making process contributes to effective decision-making, which was clearly vital under the circumstances.

Balance of the Public Interest

42. The Commissioner recognises and accepts that the withheld information in this case relates to the Government's policy of responding to the coronavirus pandemic. However, he does not consider that it is reasonable or reflective of the reality, to suggest that all policy strands of the Government's overall policy response were necessarily still at the formulation or development stage at the time of the complainant's request.
43. As the Commissioner set out in IC-70696-Q4X0⁴ (18 March 2022), he considers that some components of the Government's overall policy response to the pandemic, such as lockdown, vaccine rollout and the sourcing and obtaining of PPE, are major and discrete policies in themselves (though obviously feeding into each other), and the point at which they could be considered to have moved beyond the formulation or development stages and into implementation, will differ and depend upon the facts and circumstances of each policy area.
44. In its report of 26 November 2020 concerning an investigation into government procurement during the Covid-19 pandemic, The National Audit Office (NAO) stated that:

'On 18 March 2020, the Cabinet Office issued information and guidance on public procurement regulations and responding to the pandemic. This guidance noted that public bodies are permitted to procure goods,

⁴ [Decision notice \(ico.org.uk\)](https://ico.org.uk)

*services and works with extreme urgency using regulation 32(2)(c) under The Public Contracts Regulations 2015. This sets out the various options available to public bodies if they have an urgent requirement for goods, services or works due to an emergency such as COVID-19, including the use of direct awards to suppliers without any competition*⁵.

45. The withheld information in this case was created between 19 and 25 March 2020. The Commissioner considers that this was so proximate to the issuing of the above Cabinet Office information and guidance that the policy of sourcing emergency supplies of PPE could not be said to have fully transitioned from the development stage to the implementation stage at that point (19 – 25 March 2020)⁶.
46. However, the complainant's clarified request was made on 12 February 2021, almost one year after the Cabinet Office had issued the information and guidance permitting PPE supplies to be urgently sourced and obtained. By that time, many Covid-19 contracts for PPE had been awarded (including those made with MDL). That is to say, the policy had been operationally active for almost a year. Consequently, the Commissioner considers that whilst the withheld information relates to the formulation or development of the Government's policy with regards to the sourcing of emergency supplies of PPE, given the date of the withheld information itself, at the time of the complainant's request, that policy had moved from such formulation or development and into implementation. Therefore, the timing of the request does not affect the engagement of the exemption but does have relevance to the public interest test.
47. The Commissioner recognises that even after a policy decision has been made, issues arising during implementation may then feedback into a policy improvement process, and some details may be adapted on an ad hoc basis during implementation. However, fine-tuning the details of a policy does not automatically amount to policy development, and sometimes may more accurately be seen as adjustments to its implementation.
48. In this case the Commissioner considers that any minor adjustments which the Government may have since made to the policy of sourcing emergency supplies of PPE to adapt to changing circumstances, avoid unintended consequences or better achieve the original policy goal(s)

⁵ [Investigation into government procurement during the COVID-19 pandemic - National Audit Office \(NAO\) report](#)

⁶ [Section 35 - Government policy | ICO](#)

would be more accurately seen as decisions on implementation. This is in the context of the timing of the request and not the date of the withheld information.

49. In submissions to the Commissioner the Cabinet Office noted that they had (during the course of the Commissioner's investigation) partially disclosed all of the email chains in scope of the complainant's very specific request, *'with the remaining redactions predominantly focused on third party commercial information'*. The Commissioner agrees that is a correct statement of the position and one which he examines later in this notice under his consideration of section 43(2)(prejudice to commercial interests). The Cabinet Office contended that any further disclosure of the remaining information is not going to shed further light into the matters identified by the complainant in his request for an internal review.
50. In respect of some of the public interest arguments advanced by the complainant, the Commissioner would agree with the Cabinet Office that given the nature of the residual information, disclosure would not appreciably further these. For example, *'discussion of general PPE policy between Mr Gove and Mr Meller or his staff'*. However, the Commissioner considers, as the complainant has contended, that there is a strong and clear public interest in transparency, *'given the widespread concerns raised about government PPE policy, including by the NAO'*.
51. The Commissioner notes that on 22 April 2021, openDemocracy highlighted a report ('Track and Trace') from Transparency International UK⁷ which found that knowledge of the VIP (procurement) Lane appeared to be *'confined to only those within the party of government in Westminster'*. The report criticised the Government for prioritising politicians over medical professionals, such as the British Medical Association and The Royal College of Nursing, with expertise in sourcing PPE.
52. The report also found that the Government awarded more than £2.1bn worth of Covid-19 contracts to companies politically connected to the Conservative Party. OpenDemocracy stated that the report had found that *'more than two dozen contracts were handed to companies controlled by individuals who are either Tory party donors, linked to senior party figures, or party members'*. The report found that almost all Covid-19 related contracts, worth £17.8bn, awarded between

⁷ [Track and Trace - Transparency International UK.pdf](#)

February and November 2020, were given to suppliers without any form of competition, many without adequate justification.

53. The Commissioner notes that the Transparency International report post-dates the complainant's request (by three months). However, the residual withheld information in this case falls within the aforementioned period (February and November 2020) and so the Commissioner considers that the report's findings, to some extent, have relevance and application to the public interest balance in this case.
54. On 10 February 2021, the House of Commons Public Accounts Committee (PAC) published their report, '*COVID-19: Government Procurement and Supply of Personal Protective Equipment*⁸'. As the publication of the PAC report falls within the statutory time of responding to the complainant's request (12 March 2021), the Commissioner has taken into consideration the report's findings when weighing the public interest balance in this matter.

55. The PAC found that:

'Government faced significant challenges in having to work at pace, using emergency procurement procedures, in a competitive international market. However, its failure to be transparent about decisions, publish contracts in a timely manner or maintain proper records of key decisions, left it open to accusations of poor value for money, conflicts of interest and preferential treatment of some suppliers, and undermines public trust in government procurement and the use of taxpayers' money'.

56. The PAC found that the high-priority lane (VIP Lane) was not designed well enough to be a wholly effective way of sifting credible leads to supply PPE, stating that:

'Leads that were considered more credible were those from government officials, ministers' offices, MPs and members of the House of Lords but it is not clear why this assumption was made. The priority lane did not include organisations with expertise in the health and social care sector that had existing relationships with suppliers through their members or directly and were well-placed to assess the credibility of potential PPE suppliers, such as the British Medical Association'.

⁸ [COVID-19: Government procurement and supply of personal protective equipment \(parliament.uk\)](https://www.parliament.uk/publications/2021/02/covid-19-govt-procurement/)

57. The PAC noted that the Government awarded contracts worth more than £10 billion without competition and made extensive use of emergency procurement regulations to very quickly make direct awards of contracts. *'The NAO found that this opened up significant procurement risks, including increased risks of unequal treatment of suppliers and poor procurement processes. In the absence of competition, other measures **such as increased transparency** (Commissioner's emboldening) and clear documentation of decisions become even more important than in normal circumstances'*.
58. The Commissioner considers that the Government's procurement of PPE and the awarding of such contracts, particularly those awarded via the high-priority (VIP) lane, is a matter of considerable importance and public interest in terms of the due transparency and accountability which it demands. The sums of monies involved were huge. As the PAC noted in their aforementioned report, by 31 July 2020, the Government had awarded over 8,000 contracts for goods and services, such as PPE and professional services, in response to the pandemic, with a value of £18 billion. Around one in ten suppliers which came through the high-priority lane were awarded a contract, compared with one in a hundred for the ordinary lane. The Cabinet Office told the PAC that the total value of contracts awarded to suppliers (at that point) through the high-priority lane was £1.7 billion.
59. Many of those contracts, including the one with Meller Design Limited concerned in the present case, attracted considerable reporting and controversy in the media, due to close connections between suppliers and MPs and potential conflicts of interest.
60. The Commissioner does not accept that the residual withheld information retained a policy sensitivity at the time of the complainant's request, the policy being well into the implementation stage by that point. Consequently, the Commissioner does not accept, as the Cabinet Office have contended, that the disclosure of the withheld information in this matter would, at the time of the complainant's request, have been premature. That being the case, and given the pressing and legitimate demand for due transparency and accountability of the Government's PPE procurement process and contracts awarding which prevailed at the time of the request, the Commissioner is satisfied that the public interest in disclosure of the residual withheld information comfortably outweighs the public interest in maintaining the exemption.

Section 43(2) – Prejudice to Commercial Interests

61. Section 43(2) of FOIA provides that information is exempt where disclosure *'would, or would be likely, to prejudice the commercial interests of any person (including the public authority holding it)'*.

62. In order for a prejudice based exemption such as section 43(2) to be engaged, the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely to occur if the withheld information were disclosed, has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect against. Furthermore, the prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view, this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
63. In their substantive response of 30 March 2021, the Cabinet Office stated that the disclosure of the information within scope of the request *'would prejudice the interests of both David Meller and the Government'*.
64. In his request for an internal review, the complainant contended that the Cabinet Office had failed to establish the exemption, noting that the Cabinet Office had provided no reasoning *'as to why this disclosure would have any effect of 'being likely to affect adversely the ability of the government to procure PPE and other supplies essential to the tackling of COVID-19''*. The complainant stated that *'the only information that could conceivably have this effect would be pricing information, but this could be exempted if the public interest is judged to lie in this information being withheld'*.
65. The Cabinet Office maintained in their internal review that the disclosure of the information within scope of the request would be likely to prejudice the commercial interests of the Government, and specifically, the Cabinet Office. They explained that the information held included the prices that items of PPE were offered to the Cabinet Office. It would therefore become apparent the price range that the Cabinet Office would consider purchasing PPE for. The Cabinet Office stated that the disclosure of such information would put them at a disadvantage in future commercial negotiations for PPE *'if suppliers were aware of the*

prices that the Cabinet Office were willing to pay'. A consequence of this would be to make the purchase of PPE more expensive than would otherwise be the case and such an outcome would 'clearly not be in the public interest'.

66. The Cabinet Office also stated that the disclosure of the information would be likely to prejudice the commercial interests of Mr Meller and Meller Design Limited (MDL), which the Cabinet Office had treated interchangeably for the purposes of applying this exemption.

67. The Cabinet Office advised the complainant that:

'The disclosure of the information within scope of your request would reveal to competitors of DML and those businesses it supplies, the identities of Mr Meller's and DML's contacts, resulting in a loss of market share and income, an outcome which would prejudice their commercial interests.

The disclosure would also lead to a loss of confidence in Mr Meller and DML as intermediaries among those with whom they deal. The disclosure of commercially sensitive information concerning prices and products would undermine Mr Meller's and DML's reputation for discretion and would encourage the businesses with whom they deal to seek alternative intermediaries. This would also result in a loss of market share and income and a concomitant prejudice to their commercial interests'.

68. Finally, the Cabinet Office advised that they had concluded that the disclosure of the information would be likely to prejudice the commercial interests of those whom Mr Meller had been in contact with. The Cabinet Office stated that *'if the prices were to be disclosed it would make apparent to those suppliers' competitors the prices at which the suppliers were able to provide PPE to the Cabinet Office. That would serve to disadvantage the market position of those suppliers relative to other suppliers in the PPE marketplace'.*

69. During the course of his investigation, and following the point made by the complainant, the Commissioner asked the Cabinet Office to explain how and why the disclosure of the non-pricing elements of the withheld information would, or would be likely, to prejudice the commercial interests of the parties concerned. In the subsequent partial disclosure to the complainant by the Cabinet Office, some of the non-pricing information was provided.

70. In submissions to the Commissioner, the Cabinet Office stated that they believed that both types of the residual withheld information (pricing and non-pricing) are linked in the circumstances of this case, particularly when considering matters of public interest.

71. The Cabinet Office contended that the disclosure of the residual withheld information would be likely to prejudice the commercial interests of Mr Meller and/or MDL and the Cabinet Office, for the reasons set out in paragraphs 65 and 66 above. In addition, the Cabinet Office contended that the disclosure of the residual withheld information would:
- Disclose to competitors and the rest of the supply chain who DML's contacts are, meaning it is possible they would be disintermediated (impacting DML's supply chain position and market shares);
 - Likely adversely affect the ability of DML to generate income, as they would potentially lose both the confidence of their contacts and network, and risk being removed from the intermediary role in the supply chain.
72. As regards the impact of disclosure on the Cabinet Office's commercial interests, the Cabinet Office advised the Commissioner that suppliers would clearly be concerned about the impact on their business and commercial reputation, and *'there is a continued need for PPE suppliers, which those suppliers may be well placed to bid for in the future'*.
73. The Cabinet Office contended that disclosure would therefore also negatively impact the quality and quantity of the Government's supplier base, potentially leading to higher prices for essential equipment and services and/or lack of availability of suitable equipment and services. The Cabinet Office stated that the Department, and indeed Government, must retain commercial confidence of third party potential suppliers when they choose to engage in commercial activities with us.
74. In respect of the applicable threshold, the Cabinet Office confirmed that they believed that disclosure 'would be likely' to cause the prejudice described and that DML had been consulted on this matter.
75. The Commissioner was unable to find any online record or reference to the suppliers who had contacted Mr Meller (and whom Mr Meller in turn relayed to Mr Gove's office) with offers to provide supplies of PPE. Consequently, the Commissioner asked the Cabinet Office to confirm the identities of the suppliers, with links to a relevant company/organisation website, if applicable.
76. In supplemental submissions to the Commissioner, the Cabinet Office confirmed that they *'do not hold the employment details'* of the suppliers concerned. However, the Cabinet Office contended that this lack of information did *'not reduce or hinder'* their arguments and rationale for the prejudice to commercial interests which disclosure of the residual withheld information would cause. The Cabinet Office stated that:

'Even if the Cabinet Office does not know the names of the companies, this would not stop the disclosure of the information from being of use to competitors of MDL with detailed understanding of the relevant industry. Any disclosure of information as to MDL's supply chain contacts could adversely impact their commercial interests, increasing the chances of competitors being able to contact those individuals and undermine the MDL supply chain. As described in our previous response, this clearly has links to potential harm to the government's commercial interests too'.

77. Having had sight of the residual withheld information, the Commissioner is satisfied that whilst the information is clearly commercial in nature, some of it is not commercially sensitive and so does not engage the exemption. Specifically, the Commissioner does not consider that section 43(2) is engaged to some of the redacted information in the email chains. It is not clear how or why disclosure of that information could adversely impact MDL's commercial interests or the commercial interests of the Cabinet Office. The Commissioner expands further upon his view in respect of this information in the Confidential Annex attached to this notice.
78. In respect of any commercial interests of the suppliers, the fact that the Cabinet Office hold no background information on the same, nor submissions or representations from the suppliers themselves, means that the Commissioner is similarly not persuaded that the Cabinet Office have demonstrated how and why disclosure of the residual withheld information would prejudice the commercial interests of the suppliers. Indeed, the fact that the Cabinet Office are unable to confirm the bona fides of the suppliers, is a factor which, in the Commissioner's view, gives greater weight to the disclosure of the information (particularly if any of the suppliers were successful in obtaining contracts and therefore public money).
79. However, the Commissioner is satisfied that section 43(2) is engaged to the information contained in the two attachment documents (Annex B.2 and Annex B.3). The information contained in these two documents includes pricing information and technical and design specific information. The Commissioner is satisfied that disclosure of this information would be likely to prejudice the commercial interests of MDL, the Cabinet Office and the suppliers, for the reasons advanced by the Cabinet Office in their submissions. Similarly, the Commissioner is satisfied that the exemption is also engaged in respect to one of the redactions within the email chains.
80. With regard to the specific information (as specified in the Confidential Annex) which the Commissioner considers is not exempt under section 43(2), the Cabinet Office is required to disclose this information to the complainant.

Public Interest Balance (Section 43)

81. In light of the above, the Commissioner's consideration of the public interest test has been limited to the specific parts of the residual information (as explained above) which the Commissioner is satisfied engage section 43(2).
82. In submissions to the Commissioner, the Cabinet Office stated that many of the public interest factors set out in respect of Section 35(1)(a) were also applicable under Section 43(2).
83. The Cabinet Office acknowledged that *'there is of course a public interest in openness and transparency of Government's commercial activities and public service delivery, enabling accountability in terms of the use of public funds'*. Additionally, the Cabinet Office recognised that *'there is a public interest in understanding the UK's conduct of commercial policy during the COVID-19 pandemic'*. The Cabinet Office contended that the public disclosures and transparency to date had highlighted this and had served the public interest in this matter⁹.
84. However, the Cabinet Office contended that the public interest in the Department being able to retain commercial confidence of parties when they choose to engage in potential commercial activities with the Department was *'significant'*. The Cabinet Office stated that although private sector companies engaging in commercial activities with the public sector *'must expect some information about those activities to be disclosed throughout the lifecycle of all commercial arrangements'*, they considered that private sector companies also engage with government with a degree of confidence that sensitive information will be appropriately protected where disclosure is likely to undermine their commercial interests.
85. The Cabinet Office contended that:

'In inviting companies to work with Government and participate in procurement exercises, it is very much in the public interest that the Government operates in a way that at every opportunity minimises the damage to a supplier's reputation or competitive position in their field. This is necessary to maintain the integrity of the Government and how it engages in commercial activities. It is vitally important that Government is able to secure high quality and good value offers. This is particularly crucial in times of crisis, to ensure continued provision of

⁹ For reasons explained in paragraph 38, the Commissioner is unable to take such published information into account when considering the public interest test in this case.

important goods or services to the public (such as PPE). The possibility that suppliers would decline to engage with Government in future exercises is a particular concern given the current context and potential for future requirements of PPE'.

86. After careful consideration, the Cabinet Office confirmed that they had determined that the public interest in withholding the residual withheld information outweighed the public interest in disclosure in this case.
87. The Commissioner agrees that there is a large degree of overlap between sections 35(1)(a) and 43(2) in respect of the public interest factors. Consequently, he considers that similar strong public interest factors which favour disclosure of the residual withheld information (as set out in the Commissioner's consideration of section 35(1)(a)) apply here.
88. However, the Commissioner considers that the public interest weight and value of the residual withheld information which engages section 43(2) in this case is limited. As noted above, the information contained in the email attachments and one of the email redactions is technical in nature, containing pricing and design specific information. The Commissioner does not consider that the disclosure of this particular information would appreciably advance the important and legitimate public interest arguments advanced by the complainant.
89. The Commissioner recognises and appreciates that private sector parties who engage with government require a degree of confidence that sensitive information will be appropriately protected where its disclosure is likely to undermine their commercial interests. The Commissioner also accepts, as the Cabinet Office have contended, that the disclosure of the relevant residual information would put the department at a disadvantage in future commercial negotiations for PPE by revealing sensitive pricing information and this could make the purchase of PPE more expensive than would otherwise be the case. The Commissioner considers that such an outcome would clearly not be in the public interest.
90. Given the limited public interest weight and value of the information contained in Annexes B.2, B.3 and the relevant email redaction, the Commissioner is satisfied that the public interest in disclosure of this specific information is outweighed by the wider public interests in maintaining the exemption to this information.

Section 40(2) – Third Party personal data

91. The residual withheld information contains names and contact information of various individuals involved in the email chains between MDL and Mr Gove's office.

92. The complainant has not advanced arguments relating to the names and contact information of those junior officials contained in the residual withheld information and it is the name of Mr David Meller that is under consideration here.
93. 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), 3(B) or 40(4A) is satisfied.
94. In this case the relevant condition is contained in section 40(3A)(a)¹⁰. 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 General Data Protection Regulation ('GDPR').
95. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
96. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information that has been withheld is personal data within the definition in section 3(2) of the DPA.
97. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
98. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

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

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

100. 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.
101. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

¹⁰ As amended by Schedule 19 Paragraph 58(3) DPA

102. 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'¹¹

103. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.

104. 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

105. 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. The interests may be public or personal, broad or narrow, compelling or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subject.

106. In submissions to the Commissioner, the complainant contended that *'David Meller is a public figure, and does not have a reasonable expectation of privacy around this correspondence'*. The complainant noted that all contact details had been removed from the redacted

¹¹ 5 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". However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:- "In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the 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".

copies of the email chains disclosed to him by the Cabinet Office, including whether or not Mr Meller sent any of the messages personally. The complainant submitted that, *'there seems no good reason to redact this, and this is a key part of the public interest in disclosure, given the conflict of interest between Meller as a personal Gove donor and receiving large pandemic contracts without competition'*.

107. As the complainant correctly noted, Mr Meller is a public figure with a high profile. That high profile is particularly pertinent in this case, given that Mr Meller is a businessman who has been a large donor to the Conservative party, was trustee of the think tank, Policy Exchange, founded by Mr Gove, and was finance chair of Mr Gove's 2016 Conservative leadership campaign.

108. The above background, with its potential conflict of interest, coupled with the fact that Mr Meller's company, MDL, was awarded Covid-19 contracts worth £164m through the VIP lane¹², means there is clearly a strong and legitimate interest in maximum transparency and accountability of any dealings which Mr Meller (either directly or via his company) had with government which resulted in the awarding of such lucrative contracts involving huge sums of public money.

109. The Commissioner therefore agrees that there is a legitimate interest in the disclosure of the requested information.

Is disclosure necessary?

110. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

111. The Cabinet Office contends that disclosure is unnecessary as the legitimate interests are very limited in regards to the relevant redacted residual withheld information.

112. Given that the Commissioner has concluded that there is a legitimate interest in Mr Meller's contacts with Mr Gove's office in this matter, this legitimate interest cannot be met by less intrusive means. The

¹² [Michael Gove backer won £164m in PPE contracts after 'VIP lane' referral | Michael Gove | The Guardian](#)

Commissioner has therefore concluded that the necessity test is met and has gone on to carry out a balancing exercise.

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

113. 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's 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.

114. 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 about the disclosure; and
- the reasonable expectations of the individual.

115. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

116. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

117. The Cabinet Office contended that Mr Meller, *'would reasonably have an expectation that his personal information would not be disclosed or treated in the same way as Senior Civil Servants under the Act, particularly in light of the circumstances at the time of corresponding with the Cabinet Office'*.

118. As noted, the complainant has contended that, *'David Meller is a public figure, and does not have a reasonable expectation of privacy around this correspondence'*.

119. In his request for an internal review, the complainant contended that:

'The balance clearly lies in disclosure because Mr Meller cannot be said to have any reasonable expectation of privacy around these affairs, compared to the particularly strong public interest in transparency in

this case. As a government contractor with a potential conflict of interest, he must expect the highest degrees of transparency about his relationship with government, especially in pandemic circumstances’.

The Commissioner’s view

120. In the circumstances of this particular case, the Commissioner is entirely satisfied that the legitimate interests outweigh the rights of Mr Meller.
121. The personal data that would be disclosed relates to the professional life of Mr Meller. It would not reveal anything about his personal or private life.
122. Given Mr Meller’s history of connections to Mr Gove and to the Conservative Party, the Commissioner does not consider that he could enjoy any reasonable expectation of privacy as regards his communications in this matter, particularly given the financial benefits which Mr Meller and his company stood to gain (and did gain) through the awarding of the Covid-19 contracts. In this context, it is surprising and disappointing that the Cabinet Office should have maintained that Mr Meller enjoyed a reasonable expectation of privacy in this matter.
123. It is not clear what the Cabinet Office mean by *‘particularly in light of the circumstances at the time of corresponding with the Cabinet Office’*, but if this is a reference to the commercially sensitive context in which the communications took place, the Commissioner notes that at the time of the complainant’s request, the Covid-19 contracts with MDL had been agreed and awarded some months earlier.
124. The Commissioner considers that knowing the degree of contact which Mr Meller directly had with Mr Gove’s office in this matter is an important part of the process of ensuring due transparency and accountability of the VIP lane PPE procurement process. The Commissioner is satisfied that Mr Meller would not suffer damage or distress as a result of disclosure.
125. The Commissioner considers that there is a strong and legitimate interest in transparency and accountability of all and any communications which Mr Meller may have had with Mr Gove or Mr Gove’s private office. To be clear, that reasonable and required transparency extends to Mr Meller’s name only, and not his personal contact details (i.e. email address/contact telephone number).
126. In light of the above, the Commissioner is therefore satisfied that, in the circumstances of this case, there is sufficient legitimate interest to outweigh the data subject’s fundamental rights and freedoms. There is therefore an Article 6 basis for processing this personal data and it would thus be lawful.

Fairness and transparency

127. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
128. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
129. The requirement for transparency is met because as a public authority, the Cabinet Office is subject to the FOIA.
130. The Commissioner has therefore decided that Mr Meller's name does not engage section 40(2) of FOIA.

Other matters

131. The Commissioner recognises and appreciates that the Cabinet Office revised their original position during the Commissioner's investigation and provided a partial disclosure of the requested information to the complainant. However, the Commissioner considers that the position originally taken by the Cabinet Office of withholding all of the information requested by the complainant was not reasonable or realistic. The Commissioner would encourage and expect the Cabinet Office to adopt, where appropriate and possible, a redacted approach to such information requests in future.

Right of appeal

132. 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

133. 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.

134. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF**