

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2023

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

Decision (including any steps ordered)

1. The complainant has requested information relating to a meeting attended by Lord Frost and the Loyalist Communities Council. The Cabinet Office provided some information and withheld the remainder, relying on the exemptions at sections 28(1), 40(2) and 41 of FOIA.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on the exemptions cited in respect of the withheld information. No steps are required.

Request and response

3. On 10 May 2021, the Rt Hon Lord Frost of Allenton and the Secretary of State for Northern Ireland, the Rt Hon Brandon Lewis MP, met with representatives from a number of groups to discuss experiences of the Northern Ireland Protocol (the NI Protocol).¹ The meeting was widely reported by the media as including representatives of loyalist paramilitaries.²
4. On 13 May 2021, the complainant wrote to the Cabinet Office and requested information in the following terms:

¹ <https://www.gov.uk/government/publications/the-northern-ireland-protocol>

² <https://www.belfasttelegraph.co.uk/news/northern-ireland/loyalist-group-holds-meeting-with-brexit-minister-and-secretary-of-state-over-issues-with-ni-protocol/40420012.html>

“If you could provide all information relating to the meeting between Lord Frost and the Loyalist Communities Council [the LCC] and Paramilitary Representatives. If you could provide the names and organisations represented for all attendees as is expected under government transparency rules and notes of the meeting.”

5. The Cabinet Office responded on 28 May 2021, refusing the request in reliance on sections 22 (information intended for future publication) and 35 (formulation and development of government policy) of FOIA.
6. The complainant requested an internal review on 3 June 2021 and the Cabinet Office provided him with the outcome of that review on 13 August 2021. It maintained reliance on the exemptions previously cited and stated that the Cabinet Office was now also relying on section 28 (relations between administrations in different parts of the UK) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 27 October 2021 to complain about the way their request for information had been handled. The complainant clarified that he had not challenged the Cabinet Office's reliance on section 22 in respect of information that was subsequently published,³ but he felt that the Cabinet Office ought to have disclosed more information.
8. Following notification of the complaint, the Cabinet Office reconsidered the request. It issued a further response to the complainant on 25 April 2023 which disclosed some of the previously withheld information. This comprised a briefing paper produced in advance of the meeting.
9. The Cabinet Office confirmed to the Commissioner that it was maintaining reliance on the exemption at section 28(1), and was also now relying on sections 40(2) (third party personal data) and 41 (information provided in confidence). It confirmed that it was no longer relying on the exemption at section 35(1)(a).

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1027696/Cabinet_Office_ministerial_meetings_April_to_June_2021.csv/preview

10. The Commissioner has therefore considered the Cabinet Office's reliance on sections 28(1), 40(2) and 41 in respect of the remaining withheld information.

Reasons for decision

Section 40(2): third party personal information

11. 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 (ie third party personal data), and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)⁴. 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 UK General Data Protection Regulation (the UK GDPR).
13. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the DPA). If it is not personal data, then section 40 of FOIA cannot apply.
14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

15. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or

⁴ As amended by Schedule 19 Paragraph 58(3) of the DPA.

more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.

18. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
19. The Cabinet Office has applied the exemption at section 40(2) in respect of two categories of information:
 - i) names and email addresses of junior officials and an individual who communicated with the Secretary of State for Northern Ireland following the meeting; and
 - ii) names and other personal information relating to all but one of the individuals who attended the meeting.
20. The Commissioner is satisfied that this information clearly both relates to and identifies the individuals in question. It therefore falls within the definition of "personal data" in section 3(2) of the DPA. None of the individuals are the complainant, so it is third party personal data.
21. The fact that information constitutes third party personal data does not automatically exclude it from disclosure under FOIA. The public authority is required to determine whether disclosure would contravene any of the DP principles.
22. The Cabinet Office maintained that disclosure of the withheld personal data would contravene principle (a), as set out at article 5(1)(a) of the UK GDPR:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
23. 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.
24. The Commissioner's view is that public authorities should consider lawfulness first. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing, ie disclosure of the personal data into the public domain. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

25. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to

the extent that at least one of the" lawful bases for processing listed in the Article applies.

26. The Commissioner considers that the lawful basis most applicable is Article 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"⁵.

27. Accordingly, in considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.
- iv) The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

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) of 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 UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UKGDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

Legitimate interests

28. 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. These may be the requester's own interests or the interests of third parties, and may include commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
29. The Cabinet Office acknowledged that there was a legitimate interest pursued in the request, although it did not explain what it considered that legitimate interest to be.
30. The complainant maintained that there was a legitimate interest in confirming who attended the meeting. He pointed out that the Cabinet Office had initially stated that Lord Frost had "met with a small delegation from the LCC only". However, the information subsequently published (see paragraph 8 above) confirmed that, in addition to the LCC, the meeting was attended by representatives of a number of other groups: the REACH project, the Ex-Prisoners Interpretive Centre, and South Belfast Ulster Political Research Group.
31. The Commissioner acknowledges that there is a legitimate interest in informing the public about a meeting, between UK Government representatives and non-elected representatives of unionist and loyalist organisations, held to discuss concerns about the UK's exit from the European Union (Brexit) and the NI Protocol.

Is disclosure necessary?

32. Having identified a legitimate interest, the next step is to consider whether disclosure of the personal data in question is actually necessary to meet that legitimate interest 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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. The Commissioner recognises that the Cabinet Office disclosed the names of the organisations represented at the meeting, albeit after the complainant's request was submitted. In the Commissioner's opinion this information is sufficient to meet the legitimate interest identified in terms of informing the public about who attended the meeting. The Commissioner considers that disclosing the names of the organisations is more important than the names of the individuals who attended, since those individuals were representing the organisations indicated.

34. The Commissioner is not persuaded that it is necessary for the Cabinet Office to disclose the personal data of the individuals who attended the meeting. Nor does the Commissioner believe it is necessary to disclose the personal data falling within the first category set out at paragraph 22 above (officials' names). He does not consider that the disclosure of these names would assist the public's understanding of the meeting.
35. In light of the above the Commissioner finds that the necessity test is not met, therefore the Cabinet Office would not be able to rely on Article 6(1)(f) as a lawful basis for processing the personal data in question. It follows that disclosure of this information would not be lawful, and would contravene principle (a). For this reason the Commissioner finds that the Cabinet Office was entitled to rely on the exemption at section 40(2) of FOIA in respect of the withheld personal data.

Section 41: actionable breach of confidence

36. Section 41(1) of FOIA provides an exemption from disclosure for information that was obtained by the public authority from any other person (including another public authority), and where disclosure of the information would constitute an actionable breach of confidence.
37. The Cabinet Office relied on section 41 of FOIA in respect of correspondence from the LCC. The Commissioner accepts this information was obtained by the Cabinet Office from another person, therefore the test at section 41(1)(a) is met.
38. For section 41(1)(b) to be met disclosure of the withheld information must constitute an actionable breach of confidence. In the Commissioner's view a breach will generally be actionable if:
 1. The information has the necessary quality of confidence.
 2. The information was communicated in circumstances importing an obligation of confidence.
 3. Unauthorised disclosure would cause detriment to either the party which provided it or any other party.
39. The Commissioner has inspected the information in question and is satisfied that it has the necessary quality of confidence since it is not trivial and is not in the public domain. The Commissioner is also satisfied that the information was provided in confidence to the Cabinet Office by the LCC.
40. The Cabinet Office stated that detriment would be caused to the confider if the withheld information were to be disclosed into the public domain. The Commissioner notes that detriment is not always a prerequisite, but

accepts that it would be likely in this case. Therefore the three tests are met.

41. The exemption at section 41 is not subject to the public interest test at section 2(2) of FOIA. However the Commissioner is mindful that an action for breach of confidence will fail if there is a public interest defence to disclosure. Therefore the Commissioner has considered whether there is an overriding public interest in disclosure which is sufficient to set aside the public interest in maintaining the duty of confidence.
42. The Cabinet Office confirmed its position that it could not rely on a public interest defence for breach of confidence. It pointed out the presumption in favour of maintaining a duty of confidence, and maintained that there was no overriding public interest in disclosure that would be sufficiently strong to overturn this.
43. The Commissioner recognises that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny. In this case the information withheld under section 41 was produced by the LCC, which does not have an electoral mandate but which purports to represent the wider Protestant and loyalist community in Northern Ireland.⁶ The Commissioner recognises that there is a strong public interest in informing the public as to the extent of influence sought, and achieved, by non-elected groups. The Commissioner further recognises the public interest in the public being informed about the UK government's approach to Brexit and the NI Protocol.
44. The Commissioner is mindful that the public interest in maintaining a duty of confidence is inherently weighty. The courts are reluctant to overturn a duty of confidence, save in exceptional circumstances and in the context of an overriding public interest in disclosure.
45. The Commissioner recognises that the NI Protocol is a matter of importance to the public, not just within Northern Ireland. However, having examined the withheld information in this case he is not persuaded that the public interest in disclosure, while significant, falls short of allowing the Cabinet Office to defend a claim of breach of confidence. Therefore he finds that the Cabinet Office was entitled to

⁶ <https://www.belfasttelegraph.co.uk/news/northern-ireland/loyalist-communities-council-launched-with-backing-of-uda-uvf-and-red-hand-commando/31606726.html>

rely on the exemption at section 41 of FOIA in respect of this information.

Section 28: relations within the United Kingdom

11. Section 28(1) of FOIA states that information is exempt if its disclosure would or would be likely to prejudice relations between any administration in the UK and any other such administration. The administrations referred to are the Government of the United Kingdom, the Scottish Government, the Executive Committee of the Northern Ireland Assembly (the NI Executive), and the Welsh Government.
12. The arrangements in place between the four UK administrations provide for the sharing of information between them in appropriate circumstances. The success of these arrangements requires the UK administrations to work together in an environment of mutual trust, co-operation and respect.
13. The purpose of the exemption is therefore to protect good relations between the different administrations within the UK, and the Commissioner considers that the exemption will be engaged where the disclosure of the information would be likely to harm trust, openness and the free and frank exchange of views between any of the administrations.
14. The Cabinet Office has relied on section 28(1) on the basis that disclosure of the withheld information would be likely to prejudice good working relationships between the UK Government and the NI Executive.
15. In order for a prejudice based exemption, such as section 28(1), to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm or prejudice which the public authority alleges would, or would be likely to, occur 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 disclosure and the prejudice which the exemption is designed to protect. Furthermore, the resultant 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 on by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

16. In relation to the threshold of “would be likely to prejudice” the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. However the anticipated prejudice does not need to be more probable than not.
17. In the Commissioner’s opinion, a disclosure which may result in a UK administration being reluctant to share information necessary for the proper discharge of its functions with a counterpart UK administration would be likely to engage this exemption. On the other hand, mere political embarrassment is not a factor that can be taken into account.
18. The Cabinet Office referred to arguments accepted by the Commissioner in a previous case involving consideration of relations between the UK administrations.⁷ In that case the Commissioner recognised that the disclosure of sensitive information would have been likely to have the effect of damaging relations between the Welsh Government and the UK Government. It would have been likely to harm the relationship of mutual trust and make co-operation more difficult in the context of sharing sensitive information.
19. The Commissioner accepts the Cabinet Office’s position that similar arguments are relevant to the specific withheld information in this case. The Cabinet Office pointed out that Sinn Féin, the largest nationalist party in Northern Ireland, had expressed concern about the UK Government agreeing to a meeting with the LCC.⁸ The Cabinet Office argued that disclosure of the withheld information would be likely to harm the relationship between the UK Government and the devolved administration in Northern Ireland, the NI Executive.
20. The Commissioner is mindful that he must consider the circumstances at the time of the request, ie May 2021. In March 2021 the LCC had written to the then Prime Minister indicating that they had withdrawn support for the Good Friday Agreement because of concerns about the Northern Ireland Protocol. At the time of the request the NI Executive was operational, albeit that the First Minister and leader of the Democratic Unionist Party, Arlene Foster, had indicated her intention to

⁷ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020386/ic-60323-b9b0.pdf>

⁸ <https://www.belfasttelegraph.co.uk/news/northern-ireland/loyalist-group-holds-meeting-with-brexit-minister-and-secretary-of-state-over-issues-with-ni-protocol/40420012.html>

resign and the day after the request was submitted, Edwin Poots had been elected to replace her.⁹

21. The Cabinet Office also set out that disclosure would have been likely to have an adverse effect on public debate on the Protocol, which would have had detrimental implications for relations between the UK Government and the NI Executive. Although the Cabinet Office presented its considerations as at the time of the request, it also reminded the Commissioner that the NI Executive had subsequently collapsed after the DUP First Minister resigned in February 2022. Following Assembly elections in May 2022, the DUP refused to nominate a deputy First Minister and other ministers to the NI Executive until the NI Protocol was removed.
22. The complainant challenged the Cabinet Office's position, pointing out that the NI Protocol was not a devolved matter. The complainant argued that the LCC had been "publicly vocal" about its opposition to the NI Protocol, therefore it was unlikely that the disclosure of information would harm relations between administrations.
23. The Commissioner acknowledges the arguments put forward by both parties and has considered them carefully in the context of the withheld information. The Commissioner finds that the exemption at section 28(1) of FOIA is engaged on the lower level of prejudice, ie that disclosure would be likely to harm relationships and make co-operation more difficult. In reaching this decision the Commissioner has taken account of the sensitivities surrounding the NI Protocol and the complexity of the political situation in Northern Ireland at the time of the request.
24. Section 28 provides a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosure

25. The Cabinet Office recognised the public interest in transparency regarding ministers engaging with the public, and specifically in this case with members of the loyalist community.

⁹ <https://www.bbc.co.uk/news/uk-northern-ireland-57121825>

26. The Cabinet Office also accepted that there was a public interest in being better able to understand communities' views at the time of the request on the NI Protocol and to engage in debate on issues associated with the NI Protocol.

Public interest in maintaining the exemption

28. The Cabinet Office set out that there was a strong public interest in ensuring a close and effective working relationship between the UK Government and the devolved administration in Northern Ireland. It maintained that there was a clear argument for avoiding the disclosure of information where such disclosure would be likely to have detrimental consequences as demonstrated in engaging the exemption.
29. The Cabinet Office also argued that the timing of the request was highly relevant to the public interest. The request was submitted one day after the meeting was held, during a period of that the Cabinet Office described as a critical point in discussions around the NI Protocol. The Cabinet Office set out that this increased the weight of the public interest in maintaining the exemption.

Balance of the public interest

46. The Commissioner recognises the impact that Brexit has had, across all parts of the UK but particularly in Northern Ireland. Implementation of the NI Protocol was agreed in December 2020, when the UK Government announced that it

“...achieves the necessary protections for the EU Single Market, while at the same time, and more importantly, protecting the territorial and constitutional integrity of the United Kingdom as a whole, and upholding the Belfast (Good Friday) Agreement in all its dimensions”.

47. It is a matter of public record that the NI Protocol was not universally welcomed, and that many unionists perceived that it had the potential to undermine Northern Ireland's place in the UK. It is also a matter of public record that Lord Frost met with a number of groups, organisations and elected representatives in May 2021 to discuss experiences of the NI Protocol.
48. As set out above the Commissioner has accepted that disclosure of the withheld information would be likely to prejudice relations between the NI Executive and the UK Government. Although the NI Executive was not in place at the time of issuing this decision notice, it was operational at the time of the request, and this is the time period that the Commissioner must consider. The Commissioner is satisfied that

protecting the relationship between the NI Executive and the UK Government was acutely important at the time of the request, in the context of the ongoing impact of Brexit on Northern Ireland in particular.

49. The Commissioner understands that discussions relating to the NI Protocol were very much live - and sensitive - at the time of the complainant's request. The Commissioner agrees that the timing of the request is critical to the balance of the public interest in this particular case. Although the Commissioner accepts the considerable public interest in disclosure, he finds that, at the time of the complainant's request, there was a stronger public interest in not prejudicing relations between the NI Executive and the UK Government. Accordingly the Commissioner finds that the public interest in maintaining the exemption at section 28 outweighs the public interest in disclosure of the withheld 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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