

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **31 August 2023**

Public Authority: **Cabinet Office**

Address: **70 Whitehall
London
SW1A 2AS**

Decision (including any steps ordered)

1. The complainant has requested copies of staff satisfaction surveys conducted in the Brexit Opportunities Unit. The Cabinet Office originally refused the request under section 40(2) of FOIA (personal data). In its internal review, the Cabinet Office amended its position, relying on section 36(2)(c) of FOIA (prejudice to the effective conduct of public affairs) to withhold the information in its entirety.
 2. The Commissioner has found that section 36(2)(c) applies to the withheld information.
 3. The Commissioner does not require the public authority to take any steps.
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Background

4. During the summer of 2021, the Brexit Opportunities Unit ('BOU') was set-up within the Cabinet Office. Cabinet Office Minister Lord Frost (at that time) said that the BOU "will review and reshape rules and regulations to boost growth and drive forward innovation, working across government on policies to maximise new opportunities from Brexit as an independent nation."¹
5. In June 2021, recruitment began for the Director of the BOU.
6. The complainant's initial request to the Cabinet Office on 19 July 2021 was as follows:

"I am writing to request further information on applications for the recently advertised Brexit Opportunities Unit director role.

Please provide the following information:

- As of 25 July 2021 at 23:55, when applications closed, the number of applications received for the role.

- The number of applications submitted by women.

- The number of applications submitted by Black, Asian and minority ethnic individuals.

- Any further demographic analysis that can be drawn from the applications, for example age or sexual orientation where disclosed. This information should be readily accessible from the anonymised Diversity Monitoring Form which was mandatory to complete during the process, so disclosure should not engage either cost or individual data protection exemptions of the Act.

- The amount paid to Odgers Berndtson for any and all services related to the recruitment of the role. Please note that we do not believe the commercial interests exemption under Section 43 of the Act applies - the information is not a trade secret, and the

¹ <https://www.gov.uk/government/news/search-for-head-of-the-new-brexit-opportunities-unit-begins>

public interest weighs in favour of disclosure on the basis of ensuring value for money from third party spending.

- Any and all internal documents relating to the "assessments" of candidates that will be conducted between 1st-14th September 2021.

- Any and all documents provided to the selection panel to help assist with their decision.

- Please also provide copies of any and all internal research e.g staff satisfaction surveys conducted with staff in The Brexit Opportunities Unit.

If you need any clarification then please contact me at this email. Under your section 16 duty to provide advice and assistance I would expect you to contact me if you find this request unmanageable in any way before the twentieth working day."

7. This request was responded to by the Cabinet Office on 29 July 2021, four days after applications closed. It provided an internal review dated 14 October 2021.

Request and response

8. On 18 October 2021, the complainant wrote to the Cabinet Office and requested information in the following terms:

"I can confirm that I would like to resubmit this request now the campaign to fill the role has concluded.

However, please note that the Cabinet Office's original response came on 29 July 2021 - four days after applications closed. My request was therefore, at the time it was answered, not asking for information that would have been created in the future. There is therefore no reason that the information could not have been provided in the original response, and the ICO may feel that disclosure would have been expected under the Section 16 duty to assist at that time."

9. On 25 November 2021, the Cabinet Office provided some of the requested information but stated that the staff satisfaction surveys were being withheld under section 40(2) of FOIA. In response to the amount paid to Odgers Berndtson, this was withheld under section 43(2).

10. The complainant requested an internal review on 26 November 2021. In relation to the staff satisfaction surveys they said: "...for the avoidance of doubt, I am requesting aggregated, rather than individual, personal data. An overall score or result drawn from every single staff member in the department cannot possibly lead to a single individual being identified, and therefore the GDPR exemption will not apply."
11. After intervention by the Commissioner, the Cabinet Office provided the outcome of the internal review on 18 March 2022. The Cabinet Office maintained reliance on section 43(2) FOIA to withhold the amount paid to Odgers Berndtson but noted that this aspect of the request had not been challenged by the complainant in the request for internal review. It provided some further information in relation to the request for documents provided to the selection panel. However, it revised its response in relation to the request for the staff satisfaction survey and withheld that information in its entirety under section 36(2)(c) of FOIA.

Scope of the case

12. On 23 March 2022, the complainant contacted the Commissioner to complain about the Cabinet Office's internal review response. They queried both the exemption cited to withhold the amount paid to Odgers Berndtson – section 43(2) of FOIA, and the staff satisfaction survey - section 36(2)(c) of FOIA.
13. On 13 March 2023, the Commissioner contacted the complainant and advised that the focus of his investigation would be to only determine whether the Cabinet Office correctly withheld information about the staff satisfaction survey in accordance with section 36(2)(c) of FOIA. The Commissioner confirmed that as the complainant had only disputed the staff satisfaction survey at internal review, the investigation would proceed on this basis. This correspondence was not responded to by the complainant and so the Commissioner proceeded on the basis that the complainant accepted the Commissioner's position in this regard.
14. The Commissioner, therefore, considers the scope of his investigation is to determine whether the Cabinet Office correctly applied section 36(2)(c) to withhold the staff satisfaction surveys requested by the complainant.

Reasons for decision

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

15. Section 36(2) states that:

'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act: –

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'

16. In deciding whether section 36(2) is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one.

17. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Nor does the qualified person's opinion have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

18. The Cabinet Office provided the Commissioner with a copy of the reasonable opinion given by the qualified person, Lord True, Minister of State for the Cabinet Office (the 'Minister'). It also provided a copy of the advice as to why the exemption could apply which had been provided to the Minister on 11 January 2022 and copies of the withheld information.

19. Section 36(5) of FOIA sets out who may act as the qualified person in relation to a public authority. In the case of government departments, any Minister of the Crown may act as the qualified person. Therefore

the Commissioner is satisfied that the Minister was authorised to act as the qualified person in this case.

20. The Minister provided his opinion that the exemption was engaged on 9 February 2022. Whilst the rationale as to why the exemption applied is contained in the advice to the Minister, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow. The Commissioner has inspected the submission and accompanying information provided to the qualified person. The Commissioner notes that the Qualified Person's opinion was obtained during the internal review rather than at the time of the request. The Cabinet Office relied on section 40(2) in the first instance and the Commissioner considers that the Cabinet Office's late reliance on section 36(2) does not render the opinion unreasonable.
21. The Commissioner is mindful that he must not disclose any of the detail of the withheld information in this decision notice. During the course of his investigation, the Commissioner has had sight of the withheld information and considers that it can accurately be described as the results of BOU staff surveys in July 2021 and August 2021 and written staff feedback from the August survey. The Cabinet Office advised the Commissioner that there was no staff survey in September 2021. Instead, that month a feedback session took place at a BOU staff awayday.
22. The Cabinet Office submissions to the Minister explained that BOU was a very small team of around 20 people and that the BOU conducted internal 'pulse' surveys for its staff on a monthly basis. The Commissioner understands that a 'pulse' survey is a short staff questionnaire to gather feedback from staff.
23. The Cabinet Office advised the Minister that the purpose of the survey is, "to provide BOU's senior leadership team with a sense of how the team are feeling, relating to management, workload and wellbeing. The survey helps develop actions to improve the team's work culture."
24. The submission stated that officials participate in surveys on the understanding that their responses will be treated as confidential and responses would be anonymised. In addition, the survey was run without external publication in mind.
25. The submission further stated that results are shared only with the Senior Leadership Team on a monthly basis, via an anonymised presentation. The results are not shared more widely, including with the rest of the team. Individual responses were not shared with anyone.

26. The Cabinet Office submissions to the Minister advised that disclosure of the results of the staff satisfaction surveys would be likely to otherwise prejudice the effective conduct of public affairs by making staff less willing to participate in similar surveys in future. The submission states it:

“would be likely to inhibit the ability of public authority staff to express themselves openly, honestly and completely and may reduce response rates or skew responses to future surveys...”

27. In addition, the Cabinet Office submission said that:

“This would be likely to lead to a less informed picture of the organisation, resulting in less informed conclusions and recommendations being reached.”

28. Further, the Cabinet Office advised the Minister that:

“It is our view that disclosure of information not intended for publication would be likely to have a negative impact on the commissioning and provision of similar reports in the future. Dealing with any adverse publicity would be a time-consuming diversion that risks causing an adverse effect on effectiveness and delivery of corporate objectives.”

29. Having considered the submissions provided, the Minister’s opinion was that section 36(2)(c) was engaged.

30. Having had sight of the withheld information, the Commissioner considers that it is reasonable for the qualified person to contend that disclosure of the information would be likely to have a detrimental impact upon the effectiveness and delivery of corporate objectives. The Commissioner is satisfied with the opinion that the harm envisaged is one that would otherwise prejudice the effective conduct of public affairs in that, disclosure would be likely to reduce response rates or skew responses for future surveys. The Commissioner accepts as reasonable that the effect of disclosing this information would be likely to cause employees to be more reticent in expressing their views in future.

31. The Commissioner is therefore satisfied that the opinion of the qualified person was a reasonable one and that consequently section 36(2)(c) is engaged.

32. Section 36 is a qualified exemption and, in accordance with the requirements of section 2 of FOIA, the Commissioner must consider whether, in all the circumstances of the case, the public interest in

maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

33. As noted, in their submissions to the Commissioner, the Cabinet Office recognised that "there is a public interest in transparency in responses to staff surveys... . Such surveys ... provide evidence that the department actively encourages its staff to provide their views as a snapshot at a particular point in time."
34. The complainant's request for internal review highlighted the "huge public importance of this position and unit" and argued that "multiple other government departments and Quangos such as the FCA routinely disclose such information."

Public interest arguments in favour of maintaining the exemption

35. In its submissions to the Commissioner, the Cabinet Office contended that "there is a strong public interest that the staff responding to this survey were able to provide honest and frank responses that would shape team working and culture to strengthen team delivery. This must remain in future for all teams operating in the public sector, to ensure teams are best equipped to deliver government priorities. We do not see any compelling public interest in this case that overrides the very strong public interest in maintaining the confidentiality of this information."
36. In addition, the Cabinet Office's submissions further argued that in relation to the written feedback provided by staff: "We believe respondents would not have been this open if they thought their opinions would be shared beyond the SLT. Disclosure of this information would, therefore, be likely to be detrimental to the way in which officials provide feedback in future, leading to a less effective survey and less understanding of employees' feelings about their team, workload, and other issues."
37. The Cabinet Office went on to say that releasing the requested information would decrease the usefulness of pulse surveys or wider surveys in the future across government departments. They advised that "More time might be spent considering presentational aspects, for example, what questions to ask or not ask. This would render surveys pointless. Given that the purpose of surveys is to listen to staff and seek to understand and improve organisational culture and address specific issues such as workload or work-life balance, we consider the

public interest in disclosure is strongly outweighed by the necessity of staff engagement and the improvement of the working culture.”

38. Overall the Cabinet Office said: “we consider that the public interest would be better served by withholding the requested information to preserve the “safe space” in which employees can provide their honest views at a point in time ... It is also possible that disclosure of the withheld information in this case may mean senior leaders in any department would be less likely to run this type of survey in future if they believed this type of information would be made public.”
39. The Cabinet Office also noted that the Commissioner recently upheld the application of section 36(2)(c) in a similar case IC-132100-F9X5² relating to an internal pulse survey within the Cabinet Office HR team.

Balance of the public interest arguments

40. In considering complaints regarding section 36, where the Commissioner finds that the qualified person’s opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur, but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
41. The Commissioner considers (as the Cabinet Office has recognised and accepted) that there is a public interest in disclosure of the information and that openness in government may increase public trust in, and engagement with the government. He also accepts that the public interest in transparency around issues concerning the work of the BOU is significant.
42. As the Upper Tribunal recently confirmed in *Montague v The Information Commissioner and The Department of Trade* (UA – 2020-000324 & UA[1]2020-000325) [13 April 2022]³, the time for judging

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024450/ic-132100-f9x5.pdf>

³ [Montague v The Information Commissioner and Department for International Trade: \[2022\] UKUT 104 \(AAC\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/court-judgments/ukut-104-aac-2022)

the competing public interests is the time when the public authority should have given a response in accordance with the timeframe required by FOIA. Therefore, the appropriate time in this case is 15 November 2021 (i.e., 20 working days after the complainant's request of 18 October 2021).

43. At the time of the Cabinet Office's response to the request the information contained in July staff survey was just over four months old and the August staff survey was 3 month's old. The request was therefore made very close to the staff surveys in question. The questions were subject specific to the small BOU team and, having seen the withheld information (including the written staff feedback from the August survey), the Commissioner accepts that the responses were a detailed, personal, honest expression of views and opinions by a small number of BOU staff. By extension, the Commissioner also accepts that his reasoning in this regard would also apply to the survey questions and to BOU staff's qualitative responses to the survey. The Commissioner cannot describe this information in detail since to do so would defeat the purpose of applying an exemption.
44. The survey results were therefore still very much live and ongoing at the time of the request and the Commissioner considers there was a continuing need for a safe space at the time of the request to manage and address the survey results. The Commissioner accepts that disclosure would have been likely to detract the BOU away from dealing with the work and tasks entrusted to it. Disclosure at the time of the request would have been premature, would have been likely to hinder and prejudice the ongoing working relationships at BOU and been detrimental to delivery of corporate objectives. It may also have attracted significant media interest and the BOU may have been diverted away from matters that required attention to dealing with that and the additional work and challenges that resulted.
45. The Commissioner considers that the Cabinet Office has advanced clear and persuasive arguments in favour of maintaining the exemption cited at the time of the request and that there is public interest in officials having the freedom to respond to staff surveys confidentially, openly, honestly and without fear of publication. The Commissioner accepts that BOU staff completed this survey in the confidence that results would not be shared beyond the Senior Leadership Team, and that only summaries would be shared with leadership so that individuals could not be identified. Given the very small team, the Commissioner also accepts that if responses were disclosed it could lead to individuals at BOU being identified.
46. Despite the Commissioner recognising the strong argument for transparency, there is a strong public interest in maintaining the

confidence owed to individuals who contributed to the staff surveys. The Commissioner accepts that Cabinet Office's argument that disclosure would be likely to otherwise prejudice the effective conduct of public affairs (i.e., it would have a detrimental impact upon the effectiveness and delivery of corporate objectives by likely making staff less willing to participate in and to inhibit open/honest responses in, staff surveys in future) carries significant weight.

47. The Cabinet Office noted that the Commissioner had previously upheld a section 36(2)(c) refusal for a similar request, specifically citing the Commissioner's decision in a case involving the Cabinet Office: IC-132100-F9X5. The Cabinet Office have relied for support and comparison on this case. The request, in that case, was for the analysis from an internal pulse survey within the Cabinet Office HR team, relating to Bullying, Harassment and Discrimination. In that case, the Cabinet Office argued that "the requested information is an internal document not written with the intention to publish and that the value of the report lies in its frankness." It argued in that case that "the value will diminish if in future the content of internal reports is written with disclosure in mind, which would impact on the provision of honest assessment and conclusions." The Commissioner agreed with the Cabinet Office in that case that "the disclosure of the information would affect the openness of future surveys...". The Commissioner acknowledges that the reasoning in that case is directly applicable to this current case.
48. The Commissioner has had regard to the specific content of the requested information in this current case, and he appreciates that the complainant cannot have sight of it in order to make submissions. The Commissioner considers that the requested information does not contain substantive detail about the areas of work of the BOU. It is largely administrative in nature and provides insight into staff wellbeing.
49. The Commissioner does recognise that the complainant in this case has advanced arguments that the operation of the BOU was a matter of important and legitimate public interest. However, having had sight of the withheld information, the Commissioner considers that the public interest weight and value of the withheld information is outweighed by the stronger and wider public interest in providing staff with the safe space to provide their honest views at a point in time in order to shape team working and culture to strengthen team delivery. It is the Commissioner's view that it is important for officials to be able to utilise the means of gathering staff feedback in a confidential manner to improve internal ways of working without concern that such information expected to be subject to public disclosure.

50. In conclusion the Commissioner is satisfied that the Cabinet office is entitled to rely on section 36(2)(c) to withhold the information.
51. However, the Commissioner notes that the decision in this case has been reached on the very particular facts of this case. Exemptions cannot be relied on in a blanket manner and must be considered on a case by case basis. This decision notice should not therefore be considered as a precedent for all future cases or in subsequent decision notices relating to staff surveys.
52. Having found that the Cabinet Office is entitled to withhold the disputed information under section 36, the Commissioner has not proceeded to formally consider the applicability of section 40(2) to the same.

Other Matters

53. FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances. In this case the Cabinet Office took just under 80 working days to complete its internal review response and only did so once the Commissioner intervened.

Right of appeal

54. 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

55. 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.
56. 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

Victoria Parkinson
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