

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 September 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking a blank copy of the Ministerial declaration of interests form (both the version that applied in July 2022 and the version applicable at the time of the request in January 2023). The Cabinet Office confirmed that it held the requested information but it considered this to be exempt from disclosure on the basis of sections 36(2)(b)(i) and (c) (effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of sections 36(2)(b)(i) and (c) but that the public interest in disclosing the information outweighs the public interest in maintaining the exemptions.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the two versions of the forms it holds falling within the scope of the request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted the following request to the Cabinet Office on 31 January 2023:

'In Sir Laurie Magnus's letter to the prime minister regarding his investigation into Nadhim Zahawi's tax affairs, he writes:

"I consider by failing to declare HMRC's ongoing investigation before July 2022 – despite the ministerial declaration of interests form including specific prompts on tax affairs and HMRC investigations and disputes – Mr Zahawi failed to meet the requirement to declare any interests which might be thought to give rise to a conflict."

Under the Freedom of Information Act I would like to request the following:

- A blank copy of the version of ministerial declaration of interests form to which Sir Laurie Magnus is referring, as would have applied in July 2022
- A copy of any accompanying guidance containing prompts on tax affairs, HMRC investigations and disputes
- A blank copy of the most recent version of ministerial declaration of interests form available to ministers being appointed as of 31 January 2023

If this information is already available publicly and I have missed it, please could you direct me to it.'¹

6. The Cabinet Office responded on 29 March 2023. It confirmed that it held the requested information but considered this to be exempt from disclosure on the basis of sections 36(2)(b)(i) and 36(2)(c) (effective conduct of public affairs) of FOIA. Under the duty contained at section 16 of FOIA to provide advice and assistance, and outside the auspices of FOIA, the Cabinet Office explained to the complainant that the List of Ministers' Interests, published by the Independent Adviser on Ministers'

¹ A full copy of Sir Laurie Magnus' letter can be viewed here <https://www.gov.uk/government/publications/advice-from-the-independent-adviser-on-ministers-interests-january-2023/letter-from-sir-laurie-magnus-to-the-prime-minister-29-january-2023--2>

Interests, had been updated to include an appendix setting out a guide to the categories of interest to be disclosed on the form.²

7. The complainant contacted the Cabinet Office on the same day and asked it to conduct an internal review of this refusal.
8. The Cabinet Office informed him of the outcome of the internal review on 21 April 2023. This upheld the application of the exemptions cited in the refusal notice.

Scope of the case

9. The complainant contacted the Commissioner on 24 April 2023 in order to complain about the Cabinet Office's decision to withhold the information he requested. His grounds of complaint to support this position are set out below.
10. For clarity, the information falling within the scope of the request consists of two forms, the one in use in July 2022 and the one in use in January 2023. No information contained within the second limb of the complainant's request, ie "A copy of any accompanying guidance containing prompts on tax affairs, HMRC investigations and disputes", is held outside of the forms.

² This can be viewed here <https://www.gov.uk/government/publications/list-of-ministers-interests/list-of-ministers-interests-may-2022-html#appendix-guide-to-the-categories-of-interest-disclosed>

By way of background this publication explains that "The Ministerial Code requires that a statement covering relevant interests be published twice yearly. This takes the form of a List of Ministers' Interests. The List does not include every interest that a Minister has declared; it is not a register. Rather, it provides information about those interests, including of close family, which are, or may be perceived to be, directly relevant to a Minister's ministerial responsibilities. It also provides details of charities where a Minister is a trustee or patron. The List of Ministers' Interests should be read alongside the Parliamentary Registers and any relevant information published by the Electoral Commission. One role of the Independent Adviser is to advise on what is necessary to publish, as directly relevant, within the List."

11. It should be noted the Commissioner's role is limited to considering the application of any exemptions (including the balance of the public interest test) at the point at which the request was submitted.

Reasons for decision

Section 36 – effective conduct of public affairs

12. Sections 36(2)(b)(i) and 36(2)(c) of FOIA state 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...

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

13. In determining whether sections 36(2)(b)(i) and (c) are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

14. Further, 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 subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position

could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

15. With regard to the process of seeking this opinion, the Cabinet Office sought the opinion of the Minister for State on 15 March 2023 with regard to whether sections 36(2)(b)(i) and (c) of FOIA were engaged. Qualified persons are described in section 36(5) of FOIA with section 36(5)(a) stating that 'qualified person' means 'in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown'. The Commissioner is therefore satisfied that the Minister of State was an appropriate qualified person.
16. The qualified person was provided with a rationale as to why the exemptions could apply and copies of the withheld information. The qualified person provided their opinion that the exemptions were engaged on 21 March 2023.
17. With regard to the substance of the opinion, in relation to section 36(2)(b)(i) the qualified person argued that the form in question is still in current use. Disclosure of the information contained within the form could lead to alterations to the blank form. (The qualified person elaborated briefly on why this could be the case but Cabinet Office has requested that such rationale is not included in the decision notice.)
18. In relation to section 36(2)(c), the qualified person argued that the effective functioning of the Ministerial interests process requires Ministers to have confidence that the process is confidential. Disclosure of the blank forms, albeit not containing personal data, could still undermine the confidence in the process. The qualified person did not argue that Ministers would fail to take their duties to report interests less seriously following disclosure of the form, but that the process could take longer to complete or that the process could be more burdensome on Ministers, officials and the Independent Adviser if the confidentiality of the process was undermined and more advice and assurance was required.
19. The qualified person also advanced a number of further arguments in relation to section 36(2)(c). Firstly, that the disclosure of the blank form could also lead to pressure put on the Independent Adviser (or individual Ministers) to publish completed forms in full. The qualified person argued that it would undermine the process by which the Independent Adviser considers the declaration, advises Ministers, and decides on the public interest which sections of the form to publish. Secondly, that this disclosure of the information could also lead to an unacceptable erosion of Ministers' privacy due to targeted public scrutiny of their personal or

private details. Thirdly, such erosion could hinder the interests process overall as greater amounts of resource would be taken up responding to future (potentially vexatious) requests by officials running the interests process.

20. For his part, the complainant advanced a number of reasons why he considered that disclosure of withheld information would not have the prejudicial effects envisaged above.
21. He emphasised that he had asked for a blank copy of the form and that no confidential information was being asked for. As a result, he did not accept that a reasonable person could conclude that release of this information could lead to a lack of confidence in the confidentiality of the declaration process. He noted that declarations under the Code of Ministerial Interests are not optional and that as a result he did not accept that any reporting in the media of a blank form used to make declarations could in any way impede the disclosure of information that ministers are duty bound to make in any case. Finally, the complainant noted that the Commissioner's guidance on section 36 states that "if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views". He argued that his request did not even ask for statements, let alone 'neutral ones'; rather it simply sought a blank form.
22. The Commissioner has given careful consideration to whether the two exemptions cited are engaged, taking into account the approach set out in paragraph 14. In respect of section 36(2)(i) whilst the Commissioner has some reservations regarding the likelihood of such harm occurring (which are discussed further below in the public interest analysis) he nevertheless accepts that the qualified person's opinion in respect of this exemption is a reasonable one. The Commissioner has reached this finding because he accepts that it is not unreasonable to suggest that disclosure of the blank version of the form could potentially result in amendments to a future version of it if officials deem that the current version of the form contains sensitive information.
23. With regard to section 36(2)(c) the Commissioner also has some reservations (again, discussed below) about the qualified person's position as set out at paragraph 18. However he accepts that this aspect of the qualified person's opinion in respect of section 36(2)(c) is a nevertheless a reasonable one. In reaching this finding the Commissioner is prepared to accept that it is reasonable to hold the opinion that disclosure of the form presents some risk to the confidentiality of the process, at least in comparison to the current position where the blank form is not published. In turn this could potentially impact on the effectiveness of the process if it takes

additional time to allay any concerns about the confidentiality of personal information and thus result in some 'other' prejudice, namely an impact on the efficiency of the Ministerial Interests process.

24. However, in relation to the further arguments advanced by the qualified person at paragraph 19, the Commissioner does not accept that it is reasonable to argue that prejudice would be likely to occur in the ways suggested. Whilst disclosure of the form may perhaps lead to pressure on the Independent Adviser to publish full forms, given the seniority (and indeed independence) of the official holding this position, the Commissioner would expect any such pressure to be easily rebuffed. Moreover, the Commissioner notes that disclosure of the forms in full would have to be done in line with the requirements of data protection legislation. Given the nature of the information captured on any completed full form, such legislation would provide, in theory, some safeguards against the wholesale disclosure of such forms (noting of course that each request would need to be considered on its own merits).
25. Similarly, the Commissioner considers it unsustainable to argue that disclosure simply of the blank form could result in the erosion of Ministers' privacy. In the Commissioner's view it is not clear how disclosure of information contained in the blank form, beyond what is already in the public domain in respect of the categories of information Ministers are required to include in the completed form, would necessarily lead to such targeted or focused scrutiny. In event, even without access to the blank form, individuals have the option of submitting FOI requests for copies of Ministers' completed forms, or parts of those forms informed by the guidance published in May 2022 (see footnote 2). Furthermore, the Commissioner is not persuaded that privacy is eroded simply on the basis of questions being asked about the content of a completed form. Rather, the potential erosion of privacy comes from the disclosure of the completed versions of the form but these are obviously not subject to this request. It follows that as the Commissioner does not consider it reasonable to argue that such erosion would occur, he also does not accept the third argument in paragraph 19 is reasonable.

Public interest test

26. Section 36 is a qualified exemption and in line 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 exemptions cited outweigh the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

27. The complainant noted that that there had been no Independent Adviser on Ministers' Interests for six months in 2022 and therefore in his view the government has been manifestly unable to make good on its duty to transparency to satisfy the public interest in matters during this period.³
28. The complainant argued that the last report of the former Independent Adviser in May 2022 contains insufficient information about the categories of interest covered by the form. It does not, for example, mention the 'prompts' which Sir Laurie Magnus said Nadhim Zahawi failed to follow around 'HMRC investigations and disputes'. The complainant also argued that the appendix cited in the refusal notice to the May 2022 report contained similarly scant details and also failed to mention the 'prompts' cited by Sir Laurie Magnus.
29. The complainant argued that in his view the public interest in the 'transparency' around the interests process and disclosure of the information clearly outweigh the interests cited by the Cabinet Office. In support of this position the complainant referred to the number of stories that have emerged over the past year about disclosures that have - or should have been made - under this process (eg Nadhim Zahawi's negotiations with HMRC and the 'non dom' status of the then Chancellor's wife) but which otherwise would not have been revealed. In light of this the complainant argued that there is an overwhelming public interest that the blank form used by Ministers to make declarations is made public.
30. For its part, the Cabinet Office recognised that the declaration of interests by government ministers is a high interest area and there is a strong public interest in ensuring there are effective processes in place to enable the management and scrutiny of relevant interests. It also recognised the importance of transparency in this area.

Public interest arguments in favour of maintaining the exemptions

31. The Cabinet Office explained that in it light of its position set out in paragraph 30, this is why the Independent Adviser's April 2023 List of Ministers Interests includes detailed information about the categories of interest ministers disclose and descriptions of what was included in the

³ Lord Geidt resigned as the Independent Adviser on 15 June 2022. His replacement, Sir Laurie Magnus, was appointed on 22 December 2022.

public list.⁴ The Cabinet Office noted that there has also been transparency on the specific case of the former Minister without Portfolio via the publication of the advice from the Independent Adviser on Ministers' Interests to the Prime Minister (ie the letter cited at footnote 1).

32. The Cabinet Office emphasised the disclosure of the information would be likely to result in harm to the process in question and in turn a negative impact on the wider public interest in the Ministerial Interests process. The Cabinet Office argued that it is essential that Ministers have confidence in the confidentiality of the process itself: publication of the internal forms used to assess interests is likely to erode expectations of confidence and hinder the overall interests process as a result. The Cabinet Office stressed that its position was not that Ministers would take their duties in relation to the interests process less seriously, but that the process could become more burdensome and time-consuming as a result.
33. The Cabinet Office argued that given that the relevant information contained in the blank declaration forms has already been made public, and taking into account the above points, it was of the view that the public interest favoured withholding the requested information.

Balance of the public interest test

34. 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.
35. With regard to attributing weight to the public interest in maintaining the exemption, in respect of section 36(2)(b)(i), as noted above the Commissioner accepts that it is plausible that disclosure of the blank form could potentially lead to some revisions to future versions of it. However, having considered the content of the form, alongside the information about categories on the form already published (as set out

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1151367/List_of_Ministers_Interests_April_2023.pdf Pages 4 to 6, Published on 19 April 2023

in appendix to the May 2022 report), and taking into account details of how the process works described in Sir Laurie Magnus' letter of 29 January 2023, the Commissioner is sceptical about the extent of any actual harm to the advice part of the process that would be likely to occur. Consequently, whilst the Commissioner appreciates the Cabinet Office's point that the form is live, he is not persuaded that there is a significant risk of alternations being made to the form in future. As a result, in the Commissioner's view the likelihood of a future version of the form being less helpful to Ministers seems remote.

36. With regard to the attributing weight to the public interest arguments in respect of section 36(2)(c), the Cabinet Office's central contention is that the confidentiality of the process would be harmed by disclosure of the blank form. The Commissioner, for the reasons set out in the final sentence of paragraph 23, accepts that disclosure could have some impact on the efficiency of the process as a result of the perceived loss of confidentiality. However, the Commissioner considers such an impact to be relatively limited and short term once it is understood that the availability of the blank form is the norm. Moreover, the Commissioner also shares the complainant's scepticism as to the extent to which disclosure of the information could genuinely affect the confidentiality of the process. The Commissioner would also reiterate the point made in the previous paragraph that the content of the form does not differ markedly from information already in the public domain about the interests that need to be declared. Taking these points into account, in the Commissioner's view any potential mitigations and assurance needed as a result of the disclosure of the blank version of the form are unlikely to be significant, and thus the impact on the efficiency of the system in disclosing the form, is, in the Commissioner's view, likely to be limited in severity.
37. Taking the above into account, the Commissioner considers that limited weight should be given to the public interest arguments in maintaining each exemption.
38. In contrast the Commissioner considers there to be a strong public interest in ensuring that the process regarding Ministers' interests is a transparent one. In the Commissioner's view disclosure of the blank forms would contribute directly to such transparency. More specifically it would allow the public to understand not simply the categories of information which Ministers have to declare but the format and manner in which this is actually done. In the Commissioner's view such additional transparency could improve public confidence in the process. In the Commissioner's view such arguments attract particular weight given the recent controversies regarding the declaration of Ministerial interests as referenced by the complainant. More specifically, the Commissioner notes the complainant's point about 'prompts' referred to

in Sir Laurie Magnus' letter. Whilst the guidance published in May 2022 does make reference to a Minister's tax affairs⁵, the Commissioner accepts that disclosure of the blank forms would provide greater clarity about the information Ministers have to provide in respect of this issue.

39. In conclusion, the Commissioner considers that the severity, extent and frequency of any prejudice following the disclosure of the blank forms would be limited. In contrast, he considers there to be significant public interest in ensuring that the process regarding Ministerial interests is as transparent as possible. Disclosure of the blank forms would contribute directly to this and could provide the public with greater confidence in the process beyond simply the availability of the guidance contained in the report of May 2022. The Commissioner has therefore decided that the public interest in disclosing the blank forms outweighs the public interest in maintaining the exemptions.
40. The Commissioner notes that the Cabinet Office has also referenced the revised version of this guidance which was published on 19 April 2023. However, as such information was published after the date of the request this cannot be taken into account in his consideration of the public interest arguments for the reason noted at paragraph 11 above. In any event, even if the Commissioner could consider the availability of this revised version of the guidance, his decision in relation to the balance of the public interest test would be the same.

⁵ 'In addition, Ministers are asked to confirm that: their tax affairs are up to date and that the arrangement of their affairs is consistent with the overarching duty to comply with the law.'

Right of appeal

41. 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

42. 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.
43. 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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