

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 September 2023

Public Authority: Department for Science, Innovation and Technology¹

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant submitted a 'meta request' to the Department for Digital, Culture, Media & Sport (DCMS) seeking copies of internal communications concerning its refusal of a previous FOI request he had submitted to it. DCMS withheld the information falling within the scope of the meta request on the basis of sections 36(2)(b)(i) and (ii) (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 these exemptions and that for the majority of the information the public interest in favour of maintaining the exemptions outweighs the public interest in disclosure. However, for some of the information withheld on the basis of section 36(2)(b)(ii) the

¹ The request subject to this complaint was submitted to the Department for Digital, Culture, Media & Sport (DCMS). However, in February 2023 as a result of machinery of government changes responsibility the policy area to which this request relates was transferred to the newly formed Department for Science, Innovation & Technology (DSIT). This decision notice is therefore served on DSIT albeit that the decision notice refers to DCMS as it was the body that handled the request and with whom the Commissioner corresponded with about this complaint.

Commissioner has decided that the public interest in disclosure outweighs the public interest in maintaining the exemption.

3. The Commissioner requires DSIT to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information identified in the confidential annex to this decision notice. In providing the emails identified DSIT can redact the names and contact details of officials on the basis of section 40(2) (personal data) of FOIA.²
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 DCMS on 6 September 2022:

‘Copies of all internal correspondence, including the qualified person’s opinion and the paper trail seeking this opinion, in relation to FOI2022/01822.’³
6. DCMS responded on 31 October 2022. It confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure under sections 36(2)(b)(i) and 36(2)(b)(ii) of FOIA.
7. The complainant contacted DCMS on the same day and asked it to conduct an internal review of this refusal.
8. DCMS informed him of the outcome of the internal review on 29 November 2022. DCMS upheld the application of the exemptions cited,

² It is an established principle that such information is usually exempt on the basis of section 40(2) of FOIA.

³ On 7 February 2022 the complainant submitted the following request to DCMS, its reference FOI2022/01822,: ‘a) How many pieces of social media content the DCMS Counter Disinformation Cell recommended be removed by social media companies in 2021? b) With reference to part (a) how many of these content removal recommendations resulted in enforcement action by social media companies?’. DCMS refused this request on 19 July 2022 citing section 36(2)(c) of FOIA.

and in doing so explained that section 36(2)(b)(ii) had been applied to internal correspondence regarding the processing of the previous request and section 36(2)(b)(i) had been applied to the submission to the qualified person.

Scope of the case

9. The complainant contacted the Commissioner on 19 December 2022 to complain about DCMS' decision to withhold the information falling within the scope of the 6 September 2022 request.

Reasons for decision

Section 36 – effective conduct of public affairs

10. Sections 36(2)(b)(i) and 36(2)(b)(ii) 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
- (ii) the free and frank exchange of views for the purposes of deliberation.”

11. 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.

12. 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.
13. With regard to the process of seeking this opinion, DCMS sought the opinion of the Minister for Tech and the Digital Economy on 17 October 2022 with regard to whether sections 36(2)(b)(i) and (ii) 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 was an appropriate qualified person.
14. 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 24 October 2022.
15. With regard to the substance of the opinion, in relation to section 36(2)(b)(i) the qualified person argued that disclosure of the submission to the qualified person in respect of the request FOI2022/01822 would, or would be likely to, inhibit the ability of policy officials and members of the FOI team to provide candid advice to ministers on FOI issues. This would include advice on the relevant exemptions and policy outcomes and that ultimately this would impact on the department's ability to appropriately respond to FOI requests.
16. With regard to section 36(2)(b)(ii) the qualified person argued that the information withheld under this exemption provided a private safe for officials to deliberate on how best to respond to the FOI request and for officials to advise the Minister and record the Minister's view. The qualified person argued that disclosure of information would be likely to hinder any future review process significantly as it would reduce the likelihood of officials giving similarly candid views for the purpose of deliberation going forward.

17. The Commissioner does not accept that officials would be put off providing advice and views in full to senior officials or Ministers if the information was disclosed. However, he does accept that it is not unreasonable to conclude that there is a potential risk that the routine disclosure of such advice could result in it being less descriptive and couched in a more cautious manner. The Commissioner accepts that the nature of future discussions and deliberations could be impacted in a similar manner if such information was disclosed. The Commissioner has therefore concluded that the opinion of the qualified person was a reasonable one and that sections 36(2)(b)(i) and (ii) are engaged. In reaching this conclusion the Commissioner is conscious that the complainant has expressed some scepticism as to the likelihood of such harm occurring. However, in terms of determining whether the exemptions are engaged, as explained above in paragraph 12, the Commissioner only has to determine the qualified person's opinion was a reasonable opinion; not necessarily the most reasonable opinion. In considering the balance of the public interest, as explained below in paragraph 31, the Commissioner has greater scope of determining the extent of any prejudice occurring in relation to the specific circumstances of each case.

Public interest test

18. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining either of the exemptions cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

19. The complainant argued that there is a significant public interest in understanding how departments process FOI requests, no matter the topic of the requests. With regard to the particular circumstances of this request, the complainant argued that DCMS had repeatedly refused to disclose any information about the Counter-Disinformation Unit (CDU's) resourcing or details of activities either through FOI requests or to Parliament. The complainant suggested that although this may be compliant with FOIA, even the intelligence services disclose some information about their budgets and staffing levels. He argued that there are serious questions about the FOI process within DCMS relating to the CDU and his meta request sought information about these processes.
20. In support of position that the public interest favours disclosure of the information the complainant cited the Information Tribunal case Home Office & Ministry of Justice v IC (EA/2008/062) and the subsequent High Court decision which found that the information regarding a meta

request was not exempt from disclosure under section 36.⁴ The complainant noted that the judgment found that meta requests are not merely backdoors to the original request. The complainant emphasised this position applied here and argued that DCMS is free to redact genuinely sensitive information if it believes it is exempt under FOIA but the wholesale refusal to disclose anything, was in his view, concerning.

21. Furthermore, the complainant argued that in addition to the presumption of openness in FOIA, the Commissioner and the courts have repeatedly given little credence to the idea that the publication of advice would limit an official's frankness. The complainant has argued that is worrying that DCMS here has simply claimed that case law and Commissioner's guidance did not apply in this case. In support of this point the complainant cited decision notice FS50482167⁵ and guidance on section 36 which states "civil servants and other public officials are expected to be impartial and robust when giving advice and not easily deterred from expressing their views by the possibility of future disclosure".
22. For its part, DCMS acknowledged that there is a general public interest in government transparency and that such transparency makes the government more accountable to the electorate and increases trust. DCMS also acknowledged the current heightened interest in the issue of disinformation.

Public interest arguments in favour of maintaining the exemptions

23. DCMS did not accept the parallel drawn by the complainant to the request which is the focus of decision notice FS50482167. DCMS noted that the information in that case considered a publicly known about competition in which towns were able to bid for an award. By contrast, the request which is the focus of this complaint is a meta request seeking copies of internal correspondence seeking about the handling of a previous FOI request which sought information not in the public domain. DCMS noted that the request in this case involves the operational methods of a team currently protecting the UK public from threats to its security.

⁴ [Home Office & Ministry of Justice v IC \[2009\] EWHC 1611 \(Admin\)](https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2009/1611.html&query=title+(+home+)+and+title+(+office+)+and+title+(+v+)+and+title+(+information+)+and+title+(+commissioner+)&method=boolean)
[https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2009/1611.html&query=title+\(+home+\)+and+title+\(+office+\)+and+title+\(+v+\)+and+title+\(+information+\)+and+title+\(+commissioner+\)&method=boolean](https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2009/1611.html&query=title+(+home+)+and+title+(+office+)+and+title+(+v+)+and+title+(+information+)+and+title+(+commissioner+)&method=boolean)

⁵ https://ico.org.uk/media/action-weve-taken/decision-notices/2013/891854/fs_50482167.pdf

24. DCMS explained that the withheld information in this case includes emails between officials deliberating on the response to the previous request and discussing the sensitive information in question. It also explained that the submission to the qualified person also provided advice on the material in question.
25. In respect of section 36(2)(b)(ii) DCMS explained that the correspondence withheld on the basis of this exemption contains details relating to content escalated to platforms as the content is violative of a platform's terms of service, and details of any subsequent enforcement action taken by the platforms. DCMS explained that it is important to understand that the CDU does not recommend that social media companies remove content from their platforms. Rather, when the CDU does identify particular pieces of harmful mis- or disinformation content which may violate the platforms' Terms of Service, it refers the content to the platform for consideration, who in turn decides what action to take.
26. DCMS argued that if this information was released, it is considered that it could reveal insights into the scope and scale of HMG's capabilities and operational response to malign actors. In particular, releasing correspondence with the details on the number of pieces of content flagged to platforms could give an indication into the level of resource allocated to the CDU, and risks unnecessary exposure of the government's approach to countering harmful disinformation. Malign actors could exploit this information, such as by tailoring their tactics so they provide more harmful content than the department's perceived capabilities are able to effectively consider, to overwhelm the CDU's capabilities and continue spreading harmful content.
27. DCMS further argued that this information was never intended to be made public, and officials operate with this knowledge, including when exchanging emails which contain views for the purpose of deliberating how best to respond to an FOI request which has asked for sensitive information. In its view is imperative that a safe space is protected for officials to exchange views for the purpose of deliberating courses of action on releasing non-publicly available and sensitive information; releasing this correspondence would erode this safe space and inhibit officials from freely exchanging their views in the future, which could impact the CDU's vital operation. Therefore, in this case, DCMS concluded that the public interest in disclosure does not outweigh the public interest in maintaining the exemption.
28. With regard to section 36(2)(b)(i), and the submission to the qualified person in respect of the original request which had been withheld, DCMS acknowledged the reference to the Commissioner's guidance made by the complainant. However, it did not consider it be applicable in this

case. It emphasised that there is a very strong public interest in protecting the safe space officials have to offer candid, impartial, and robust advice to ministers. This space is especially important in matters of security and protecting the UK public, such as in the case here.

29. In addition DCMS argued that the advice provided to ministers needs to consider a vast array of options and arguments both for and against different courses of action. This ensures that any decisions made can be done so taking into account all of the information. If officials are concerned that any advice they provide to ministers will be released, they may be less likely to contribute candidly to future advice. This would not be in the public interest as the decisions made may not consider all pertinent matters, and decisions are therefore less likely to meet their stated aims. In the future, this could include decisions regarding withholding information that is vital to the operations of the CDU which, if released, could aid malign actors to continue spreading harmful mis- and disinformation.
30. With regard to the complainant's suggestion that DCMS could disclose the information it holds in scope but redact any information not covered by section 36, DCMS suggested that any such approach would not provide anything coherent or intelligible once the relevant exemptions had been applied. Rather, all that would be left would be partial sentences or individual words, and disclosure of such information would not give any kind of picture as to how DCMS processes FOI requests. DCMS argued that this is not in the public interest as the public could jump to the wrong conclusions about how requests are processed whilst not having access to the full picture.

Balance of the public interest arguments

31. 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.
32. In relation to DCMS' public interest arguments to withhold the information, and in particular the language it used in support of these arguments, the Commissioner considers it important to explain his interpretation of the terms 'safe space' and 'chilling effect'. In the Commissioner's view safe space refers to the need to develop ideas, debate live issues and reach decisions away from external interference and distraction. The need for a safe space is strongest when the issue is

still live. Once a decision has been made the argument will carry little weight. Chilling effect arguments are different to this and relate to the view that disclosure of internal discussions inhibits free and frank discussions, and that the loss of frankness and candour damages the quality of advice, leading to poorer decision-making.

33. Having considered DCMS' arguments, in the Commissioner's view although they refer to the concept of a safe space they actually focus instead on the risk of a chilling effect occurring if the withheld information was disclosed both on future advice and on future deliberations. With regard to attributing weight to the chilling effect arguments, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most cases. If the decision making in question is still live, the Commissioner accepts that arguments about a chilling effect on any ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the decision has been taken, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
34. With regard to whether the matter in question, ie the processing of the previous request, was still live at the point of the meta request the Commissioner notes that DCMS have not argued that this was the case. Nevertheless, having considered the content of the withheld information for the majority of it, the Commissioner accepts that the disclosure of it risks having an impact on the candour of future deliberations and provision of advice. This is because such information includes a frank consideration of the issues concerning previously withheld information and the rationale and basis to withhold this. In particular, such discussions include reference to the content of the previously requested information which DCMS withheld on the basis of section 36(2)(c). The Commissioner also notes that whilst DCMS may have completed its handling of the previous request, the meta request was submitted less than two months after DCMS had issued its refusal notice. In the Commissioner's view such proximity, and thus relatively recent provenance of the withheld information, arguably adds to this risk of such a chilling effect.
35. Given this, and despite the general scepticism towards chilling effect arguments, the Commissioner accepts that in respect of the severity, extent and frequency of prejudice there is likely to be a genuine risk to the frankness of future discussions in respect of similar FOI requests. In

turn this would be likely to undermine the effectiveness of DCMS' FOI processes, an outcome which the Commissioner accepts is against the public interest.

36. In reaching this finding the Commissioner has taken into account the caselaw cited by the complainant. However, he does not find that this undermines his findings in the previous paragraph. Whilst the cases concerned meta requests, they do not set a precedent for how all future requests such requests could or should be handled by public authorities. Rather, each request needs to be considered on its own merits, and for the reasons set out above the Commissioner considers that the chilling effect arguments in this case do attract weight, even taking into account the rationale of the cases cited by the complainant.
37. In attributing weight to the public interest in maintaining the exemptions the Commissioner wishes to emphasise that he has noted DCMS' points in paragraph 26. However, these appear to focus more directly on the reasons why, under section 36(2)(c), the information which was the focus of the previous request was withheld, rather than reasons to uphold the different exemptions which were applied to the meta request. Albeit that the Commissioner accepts that the meta request does encompass the information withheld in response to the previous request.
38. Furthermore, in attributing weight to the public interest in maintaining the exemptions the Commissioner has given careful consideration to the whether a partial disclosure of information is possible. The Commissioner notes DCMS' position on this point. However, in his view some parts of the information in the scope of the request could be disclosed without any real risk of a chilling effect occurring. This is because such information focuses on the administrative aspects of the processing the previous request. The Commissioner does not accept that disclosure of such information would result in the public being likely to jump to the wrong conclusions about how requests are processed. Moreover, the Commissioner's position is that in disclosing information under FOIA public authorities have the option of setting such information into context in order to prevent any such possible misunderstanding.
39. Turning to the public interest in disclosure, the Commissioner agrees that there is a clear public interest in disclosure of information in order to provide accountability and transparency in respect of how a public authority considers and processes FOI requests. Such accountability and transparency can lead to greater confidence in a public authority's handling of requests, and more broadly to the FOI regime in general.
40. In the specific circumstances of this case the Commissioner acknowledges the complainant's point that information regarding the

CDU has often been refused in response to FOI requests. Whilst such refusal of requests may well be perfectly legitimate – as the complainant himself notes – such interest in this subject matter, and such previous refusals, arguably adds to the public interest in disclosure of the withheld information falling within the scope of the meta request. In the Commissioner's view disclosure of the information falling in scope of the request would directly address these public interest factors. The public interest in disclosure of the information should not therefore be underestimated.

41. Taking the above into account, the Commissioner has concluded that for the majority of the information the public interest favours maintaining the exemptions contained at section 36(2)(i) and (ii). However, for some information which has been withheld on the basis of section 36(2)(b)(ii), for the reasons noted above, the Commissioner is of the view that this could be disclosed without any significant risk or impact on the nature and candour of deliberations about FOI requests in the future. For such information the Commissioner has concluded that the public interest in its disclosure outweighs the public interest in maintaining the exemption. The Commissioner has identified such information in the form of a confidential annex which will be sent to the public authority only.

Right of appeal

42. 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

43. 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.
44. 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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