

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2024

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested any emails to the Cabinet Secretary about Covid testing of Ministers or significant civil servants over a stated time period. The Cabinet Office disclosed some information but withheld other information in scope of the request on the basis of section 36(2)(b)(i) and (ii) of FOIA.
2. The Commissioner's decision is that the Cabinet Office has appropriately relied on the section 36(2)(b)(i) and (ii) and the public interest favours maintaining the exemptions.

Request and response

3. On 19 November 2022, the complainant wrote to the Cabinet Office and requested information in the following terms:
 - "The email trail following on from the Cabinet Secretary's receipt of protocol from the CMO on 26th March 2020 at 16:06 – if one exists. You can use a partial exact quote to easily locate this.
 - Any emails relating to testing of Ministers or "significant individuals" held in the Cabinet Secretary's email account from 25th March 2020 – 27th March 2020.
 - Any notes or memos issued by the Cabinet Secretary relating to testing of Ministers from 25th March 2020 – 27th March 2020."

4. The Cabinet Office responded on 19 December 2022 confirming some information was held but refusing to provide this under section 40(2) – personal data.
5. Following an internal review the Cabinet Office wrote to the complainant on 8 March 2023 disclosing some information but with redactions made under section 40(2). The Cabinet Office also withheld other information under sections 36(2)(b)(i) and (ii).

Scope of the case

6. The complainant contacted the Commissioner to challenge the use of section 36(2)(b)(i) and (ii) to withhold information in scope of their request.
7. The Commissioner considers that the scope of his investigation is whether the Cabinet Office is entitled to rely on section 36(2)(b)(i) and/or (ii) to withhold any remaining information within scope of the request.
8. The Cabinet Office has confirmed that any redactions made to the document already provided to the complainant were made under section 40(2) and this does not form part of the Commissioner's investigation.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

9. Section 36(2) of FOIA states:

“(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,”

10. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.

11. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.
12. The Cabinet Office advised the Commissioner that the qualified person in this instance is Baroness Neville-Rolfe, Minister of State at the Cabinet Office. The Commissioner is satisfied that, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA.
13. The Cabinet Office's submission to the qualified person, dated 17 February 2023 sought the Minister's approval for the use of section 36(2)(b)(i) and (ii) to withhold the information in scope of the request which comprised an email exchange. The qualified person approved the application of section 36(2)(b) on 21 February 2023. The Commissioner has seen the submission to the qualified person and their response.
14. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person could hold and not whether it is the most reasonable opinion. As stated, the critical issue is that the arguments being advanced by the qualified person not only link to the factors described in the exemption but also relate to the information to which the exemption has been applied.
15. In seeking the advice of the qualified person, the Cabinet Office prepared submissions which quoted the request, provided some context to the requested information, explained the operation of the exemptions cited and gave recommendations that supported the application of the exemptions. By agreeing to the application of the exemptions, the qualified person effectively supported the arguments included in the submissions, including the acceptance that the prejudice described in sections 36(2)(b)(i) & (ii) would be likely to occur through disclosure.
16. The Commissioner notes that these exemptions are about the processes which would or would be likely to be inhibited, rather than the specific content of the information. He considers that the issue is whether disclosure would or would be likely to inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably freise and frank.

17. The Cabinet Office explained that it considered both limbs of section 36(2)(b) applied to the withheld information as the information comprises part of a box note for the then Cabinet Secretary Lord Sedwill. The Cabinet Secretary's box will often contain live policy issues from across Government on which frank advice is provided and officials will exchange frank views.
18. The Commissioner is satisfied that the arguments presented are ones that relate to the activities described by the exemptions cited. He also considers the opinion that disclosure of the information would be likely to result in the prejudice being claimed, to be one that a reasonable person could hold. He has therefore found that sections 36(2)(b)(i) and (ii) are engaged.

Public interest test

19. Section 36 is a qualified exemption, which means that, even when the qualified person has given their opinion that the exemption is engaged, the public authority must still carry out a public interest test. The purpose of the public interest test is to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The public interest test is separate from the qualified person's opinion. The qualified person need not carry out the public interest test themselves, but may do so.
20. The Commissioner's guidance explains that the qualified person's opinion will affect the consideration of the arguments for withholding the information, and appropriate weight should be given to their opinion that the prejudice or inhibition would or would be likely to occur.
21. However the Commissioner will consider the severity, extent and frequency of the inhibition that would be likely to occur when forming a view on this.

The complainant's view

22. The complainant has pointed to the public statement by Matt Hancock MP that the then Prime Minister Boris Johnson was tested for Covid on 25th March 2020. The complainant states a protocol for testing was created on 26th March 2020.
23. The complainant therefore argues the protocol for testing was created after the Prime Minister had been able to get tested for Covid. The complainant states at this time individuals could not be tested via the NHS without hospital administration and the general public were told if they had symptoms to self-isolate at home.
24. As such the complainant argues preferential treatment may have been given to members of the Government and their families as they may

have been able to get tested for Covid when the general public were unable to.

25. The complainant therefore considers there is a public interest in seeing any email exchanges during this time.

The Cabinet Office's view

26. As has already been noted the information in scope is part of a box note for the Cabinet Secretary. The Cabinet Office states the box note system relies on trust and candour between officials and their principals. If this kind of material was routinely published there would be likely to be a chilling effect on future advice given to principals in box notes, and in the exchange of views through the medium of box returns.
27. The Cabinet Office argues that in order to advise Ministers and senior officials effectively, it is important that those providing the advice are uninhibited by risks of premature disclosure, should they lead to a chilling effect. Releasing the information in scope of this request would be likely to have a detrimental, chilling effect on the future ability of officials to provide advice to their seniors or Ministers, and subsequently the quality of any future advice may deteriorate. Consequently, the effectiveness of deliberations and decision making would be harmed generally.
28. The Cabinet Office considers that officials must be able to engage in these types of frank exchanges with each other in order to debate options and reach a decision in all manner of situations. For this to occur, all involved in those discussions must not be inhibited by the concern that their discussions will be exposed prematurely to public scrutiny or comment - particularly when they want to provide frank views on what might be contentious situations.
29. It is argued disclosure would be likely to limit officials' ability to engage in similar exchanges in future as it would be likely to cause officials to be more reticent or circumspect in sharing their candid views in similar instances. The Cabinet Office also notes that this safe space is particularly important considering the sort of national and international events that are likely to need to be flagged and discussed with the Cabinet Secretary at any given time. It would not be in the public interest to harm this space, particularly in light of some of the geopolitical issues currently of interest to the UK.
30. The Cabinet Office also points to the ongoing UK Covid Inquiry's Terms of Reference that states it will provide a factual narrative of preparedness and resilience, how decisions were made, communicated, recorded and implemented and decision making between the governments of the UK. Therefore, through the Inquiry, the public will be provided with more informed and detailed insight into the decisions

taken and management of the pandemic in due course, including on decisions made about who should have access to testing during the early stages of the pandemic. The Inquiry will investigate major concerns and scrutinise the government's response.

31. The Cabinet Office believes that it is arguable that greater detail will be explored and disclosed during the course of the Inquiry, in contrast to this request which would lack vital explanation and will only provide a partial snapshot of how decisions were made about testing for critical individuals, in relation to one very senior official's views. The coverage of the Inquiry has thus far provided a greater understanding of the workings of Government during this period, and will continue to serve the public interest with its thorough independent scrutiny and analysis.

The Commissioner's view

32. The Commissioner considers that there is always public interest in government departments operating in an open and accountable manner. He believes that greater transparency leads to better public understanding of particular issues and enables the public to participate in the decision making process where possible. It therefore follows that transparency of government departments' actions must carry weight when balancing the public interest.
33. The Commissioner has considered the complainant's comments and understand the concerns raised. He understands the public interest to demonstrate transparency and accountability of government decision-making at a time when there was significant concern from the general public.
34. The Commissioner considers that the Cabinet Office has made a strong case in favour of withholding the requested information. He accepts that disclosure of the information would be likely to result in inhibiting free and frank exchange of views which would not serve the public interest. He accepts that a forthright exchange of views is important to achieve effective decision-making.
35. The Commissioner understands the importance of the Cabinet Secretary having access to free and frank advice and views and being able to offer free and frank views and debate options. He considers that this advice process should not be inhibited or undermined to the detriment of the public interest in providing effective, fully informed and timely decisions.
36. The Commissioner notes that civil servants are expected to be robust in meeting their responsibilities and not easily deterred from expressing their views or sharing information by the possibility of future disclosure of information. Nevertheless he accepts that civil servants may be more guarded in their exchanges. Such inhibition or reluctance to engage would not assist with successful interaction.

37. After consideration the Commissioner has concluded the benefit to the public in disclosure of what is limited information is not sufficient to outweigh the public interest in maintaining the exemption.

Right of appeal

38. 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

39. 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.

40. 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

Jill Hulley
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