

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 February 2024

**Public Authority:** Cabinet Office

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

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to the issuing of COVID-19 vaccine exemption certificates. The Cabinet Office refused to provide the information citing section 42(1) of FOIA (legal professional privilege) as its basis for doing so.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on section 42 to withhold the requested information and he does not require the public authority to take any further steps.

#### Request and response

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

"You will have been informed that the [case reference redacted] brought before the ICO has now been closed. This was in respect of our recent dialogue on matters concerning the provision of Covid 19 exemption certificates. It became clear during the process that questions are still outstanding on the subject, so it will help to clarify matters if I can be provided with more information. This is now even more of an issue of exceptional public interest, and in

order to facilitate an understanding of the Cabinet's decision-making process involved my request is as follows:

Under the Freedom of Information Act 2000 (FOIA), please provide me with copies of all legal advice, both internal and external, sought and received by the Government, concerning the issuing of COVID-19 vaccine exemption certificates, within the last 10 months.

I am aware that you may cite Section 42 (legal professional privilege exemption) however, that exemption is subject to the public interest test. It is more than evident that Covid -19 and the current restrictive measures imposed by government in terms of personal liberties and freedoms, provides as strong and national public interest case as it is possible to have.

It has been brought to my attention that the Public Health (Control of Disease) Act 1984 (section 45E) states that regulations made under that Act may not include provision requiring a person to undergo medical treatment ...which includes vaccinations.

It is perhaps also very relevant that in addition on Jan.27th 2021 the Parliamentary Assembly of the Council of Europe passed Resolution 2361(2021) in which it stated that governments should: "Ensure that citizens are informed that vaccinations are NOT mandatory and that no-one is politically, socially, or otherwise pressured to get themselves vaccinated if they do not wish to do so."

For these reasons, the need for full transparency on the legal advice given to government relating to all aspects of exemptions is now urgently required."

4. The Cabinet Office responded on 6 December 2021 and confirmed that the requested information is held. However, it refused to provide the information citing section 42 of FOIA as the basis for withholding the information.
5. Following an internal review on 5 May 2022, the Cabinet Office maintained its original position to withhold the information under section 42. It stated that it believed that the exemption was appropriately applied and that the balance of the public interest was in favour of maintaining the exemption.

## Scope of the case

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6. The complainant contacted the Commissioner on 8 April 2024 to complain about the Cabinet Office's failure to provide a response to their internal review request of 23 January 2022. The Commissioner contacted the Cabinet Office on 4 May 2022 and asked the public authority to issue its response within 10 working days. The Cabinet Office issued their response to the internal review on 5 May 2022.
7. The Commissioner considers that the scope of his investigation is to determine whether Cabinet Office was entitled to rely on section 42(1) of FOIA to withhold the requested information.

## Reasons for decision

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### Section 42(1) - Legal professional privilege (LPP)

8. Section 42(1) of FOIA states that:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."
9. LPP protects an individual's ability to speak freely and frankly with their legal adviser to obtain legal advice. During these discussions the weaknesses and strengths of a position can be properly considered. For these reasons LPP evolved to make sure communications between a lawyer and their client remained confidential.
10. Section 42 is a class-based exemption. The requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise from disclosing the information. However, this exemption is subject to the public interest test.
11. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect, but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

12. The Cabinet Office explained that in 2021, during the COVID-19 pandemic, the Department for Health and Social Care (DHSC) ran a public consultation on whether to make the COVID-19 vaccination a condition of deployment for staff working in care homes with older adults. The consultation ended on 26 May 2021 and a ministerial decision was then sought to determine whether and how to proceed with the policy. The Cabinet office says it published its guidance on 18 October 2021.
13. The Cabinet Office have confirmed that the withheld information is subject to legal advice privilege. It says that the advice was from a professional legal adviser and was provided to the then Secretary of State for DHSC to inform a decision on COVID-19 vaccination exemption certificates.
14. The Commissioner has seen the withheld information and is satisfied that the information constitutes a confidential communication made for the purpose of seeking or giving legal advice. The exemption provided at section 42(1) of FOIA is therefore engaged in relation to this information. The Commissioner will now go on to consider the public interest test.

### **Public interest test**

15. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have, that communications will remain confidential, undermines the ability of parties to seek or provide legal advice appropriately and thus erodes the rule of law and the individual rights it guarantees.

### **The complainant's position**

16. In their internal review request the complainant stated their public interest grounds for disclosure as follows:
  1. "A primary reason for disclosure of legal advice is not only in respect of our current exceptional needs, but for the future. Should such advice remain hidden from the public, no lessons can be learned from the monitoring of any similar attempts to impose proven undemocratic restrictions, and crucially, how relevant past advice would be - if repeated.

2. As only the 'kernel' of the legal advice given is required, and names and all details of those involved in discussions can be redacted, it is unacceptable to cite section 42 as a breach of confidentiality. In fact, public interest is now so strong that the continued use of clause 42 amounts to misuse. No government has the right to inflict harm and loss of liberty upon those it has been elected to serve. Neither does the use of emergency powers permit the blatant removal of basic human rights such as those now enacted in parts of Europe and Australia.
3. Even if restrictions are lifted and so called 'passports' enabling normal life are deemed unnecessary, these can clearly be re-imposed...the right to do this is often 'reserved.' Therefore, once again, provision of the legal advice given to justify action taken becomes a legitimate requirement.
4. Legislation applicable to ordinary legal dealings and confidentiality issues, is neither adequate, nor was it meant to be used in matters of national importance and very serious, rapidly growing public interest. As evidenced by ongoing expressions of outrage from qualified and lay sections of the public, academia, and civil society. It is therefore open to challenge.
5. That judgement concerning the science of Covid has been flawed is being widely recognised by respected scientists around the world - as evidenced by this example: <https://brownstone.org/articles/ehud-qimrons-powerful-letter-to-the-israeli-ministry-of-health/>. It is a sad fact that the vast proportion of those inoculated, have consented to the procedure without being in possession of the full knowledge essential for making an informed decision. All over the world, scientists, and experts in the relevant fields of knowledge are being denied a platform or hearing for their evidence and views – which feeds into the lack of transparency being experienced. This FoI request provides a chance for the UK government to show leadership by recognising the exceptional need - and releasing the advice sought. Only by such action can redress be given to those who have been adversely affected by the current and previous decisions. It was a rare and welcome event for an M.P to speak out as he did in the Westminster Hall debate of 18.01.22. and should be required viewing for all MPs, MSPs and members of the Senedd. See <https://youtu.be/sOM9jWijuH8>
6. Transparency in government is one of the crucial guardians of democracy. Therefore, providing the legal advice which led to the current restrictions, in the form now requested, honours that responsibility. As the overall picture is now in a constant state of

flux politically and scientifically, there is a need to know why government officials have concluded, presumably using the legal advice given, that there was or is a world health emergency that justifies suspension of not only personal liberties, but also *all protections for the expression of those liberties, including the public's right to know*. In a side but relevant issue, now that cases are arising where a French insurance company has refused to pay the claim of a family whose loved one died from being inoculated, the UK government needs to have urgent discussions with the industry here to clarify the status of identical claims here. An assurance of that intention is requested. The French judge is reported to have said (my emphasis): "The experimental vaccine side effects are publicised, and the deceased could not claim not to have known about them when he voluntarily took the jab. There is no law or mandate in France which forced him to be jabbed. Therefore, his death is essentially suicide". As we know that mandate now exists in France and other countries, so once again it is imperative that due to these exceptional circumstances, the British public are party to legal advice given to our own government so that transparency is shown to be not only honoured, but protected as it should be.

7. Releasing the legal advice as suggested, minus personal details etc., is also of great importance for public view as it would reveal just how much note has been taken of the full range of scientific opinion..."

### **The Cabinet Office's position**

17. The Cabinet Office has pointed out that the legal advice in question was provided to inform a decision on COVID-19 vaccination exemption certificates. It confirmed that the withheld information has not been made public and the privilege attached to it has not been waived.

### **Public interest factors in favour of disclosure**

18. The Cabinet Office acknowledges that there is a general public interest in disclosure of the information. It says that openness in government may increase public trust and engagement with the government. The Cabinet Office also recognises the concerns raised at the time about the nature and extent of COVID-19 vaccination as a condition of working in a care home for adults. It admits that there is a public interest in understanding the legal justification for decisions taken by the government and that there is public interest in public authorities and ministers being accountable for the quality of their decision making. It submits that disclosure will ensure that the decisions on exemption

certificates were made on the basis of good quality advice and therefore demonstrate accountability.

### **Public interest factors in favour of maintaining the exemption**

19. In its original response to the complainant, the Cabinet Office argued that the balance of the public interest favoured maintaining the exemption. It stated that there is an inherent public interest in protecting the confidentiality of communications between lawyers and their clients and that the confidentiality encourages clients to seek legal advice and allows for full and frank exchanges between clients and their lawyers.
20. It explained that it is particularly important for government to seek legal advice in relation to sensitive and difficult decisions and for any advice given to be fully informed and fully reasoned. It argued that without confidentiality, clients might fear that anything they say to their lawyers, however sensitive or potentially damaging could be revealed at a later date. The Cabinet Office asserted that this would deter clients from seeking legal advice or from disclosing all relevant material to their lawyers and the advice provided may not be as full and frank as it ought to be.
21. In its submission to the Commissioner, Cabinet Office relied on the First-tier Tribunal judgment in the case of *National Highways Ltd v The Information Commissioner*<sup>1</sup> and urged the Commissioner to also consider the Upper Tribunal judgment in *DCLG v Information Commissioner*<sup>2</sup>, alongside its arguments in favour of maintaining the exemption.
22. The Cabinet Office considered the complainant's request where they stated that: "It is more than evident that Covid-19 and the current restrictive measures imposed by government in terms of personal liberties and freedoms, provides as strong and national public interest case as it is possible to have." The Cabinet Office argued that LPP is not simply one public interest to be weighed in the balance like any other, but that it carries a different order of weight from that attached to other exemptions. It added that LPP plays a crucial role in our justice system and so a compelling reason has to be shown to justify denying any public authority the right to rely on its protection in any particular case.

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<https://caselaw.nationalarchives.gov.uk/ukftt/grc/2023/895?query=%5B2023%5D+UKFTT+00895+%28GRC%29>

<sup>2</sup> <https://www.bailii.org/uk/cases/UKUT/AAC/2012/103.html>

In the current case, the Cabinet Office did not consider that the complainant's personal view was a compelling reason to justify the disclosure of privileged legal advice. It stated that even though vaccination as a condition of deployment or an exemption from it may have had an impact on particular groups, it does not justify the disclosure of privileged advice. It contends that case law confirms that any arguable attempt to circumvent LPP must rest on a special factor or circumstance relating to the advice and not to any wider controversy surrounding the advice.

23. The Cabinet Office argued that if the requested information were to be disclosed, this would undermine DHSC's ability to seek and be provided with legal advice in future. It says that at the time of the request, the advice was relatively recent and the policy to which the advice relates was live and current. The Cabinet Office asserted that disclosure would depart from the core principle that LPP will protect the confidentiality of legal advice, unless there is a weighty and compelling reason to the contrary.
24. The Cabinet Office argued that if the withheld information were to be disclosed, LPP would be waived, and it would not be able to claim privilege for the disclosed material and its ability to protect the UK Government's position might be adversely affected.

### **Balance of the public interest**

25. Although section 42 comes with a significant 'in-built' public interest in non-disclosure, it remains a qualified exemption and it is for the public authority to demonstrate that the public interest balance lies in favour of withholding the information. This means that – building on the 'in-built' public interest in non-disclosure – the authority will need to identify any additional public interest factors in favour of withholding the information, all the relevant public interest factors favouring disclosure and then weigh them appropriately in order to establish whether or not the information can be disclosed. Each case has to be considered on its own merits.
26. When balancing the public interest in favour of disclosure against the public interest in favour of maintaining the exemption, the Cabinet Office stated:

"Our position is that, as per the Tribunal decision referred to above, LPP plays a crucial role in our justice system, and we have not identified any compelling reasons that justify disclosure in this case.

We note the Tribunal in National Highways cited the judgment in *Reg v Derby Magistrates Court, Ex p. B*, [1996] AC 487 and quoted the following guidance from it at paragraph 37:



“once any exception to the general rule [of maintaining legal privilege] is allowed, the client’s confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had “any recognisable interest” in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined.”

“This judgment pre-dates the implementation of the Act, and the Upper Tribunal in DCLG found that:

“LPP has an in-built weight derived from its historical importance, it is a greater weight than inherent in the other exemptions to which the balancing test applies, but it can be countered by equally weighty arguments in favour of disclosure. If the scales are equal disclosure must take place.”

In the present case, we consider that the balance of the public interest favours maintaining the exemption because (i) there is no compelling reason to the contrary, and (ii) disclosure would be likely to erode the confidential ‘safe space’ in which legal advice is sought and provided. Disclosure would therefore not be in the public interest”.

### **The Commissioner’s position**

27. The Commissioner is mindful that, while the in-built weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information may only be withheld if that public interest actually outweighs the public interest in disclosure.
28. In reaching a conclusion the Commissioner considered his previous decision, and those of the Tribunal, in relation to LPP. He has also had regard to the content of the withheld information, and balanced this against information that has been published in order to keep the public informed without the need to disclose the advice itself.
29. The Commissioner has considered the arguments presented by the complainant and the Cabinet Office above. Having had sight of the withheld material, he accepts that the information is legal advice provided to a client by a professional legal adviser and that disclosure of the information will defeat the importance of the principle behind LPP.

30. The Commissioner finds that there are legitimate public interest arguments in favour of disclosure. He acknowledges that there is a considerable public interest in maintaining public confidence in government decisions surrounding public health and COVID-19 vaccination certificates. The Commissioner is of the view that disclosure of the requested information would provide some assurance to the public as to how the Government considered the complex and sensitive matter of Covid-19 vaccination certification. He also acknowledges that the issue had the potential to affect a large number of people across the UK.
31. The Commissioner has attached significant weight to the fact that, at the time of the request, the case was live, and the matter was still recent. Therefore, the disclosure of the legal advice received to inform decisions surrounding vaccination would have undermined the Department of Health and Social Care's ability to obtain and receive legal advice at this time. The Commissioner is not persuaded that this would be in the best interests of the public. Nor does he accept that it would be in the public interest to impede DHSC's ability to communicate in an open and candid manner in regard to decisions surrounding public health.
32. The Commissioner has taken full and careful account of the circumstances of this case. He has attached appropriate weight to the public interest in disclosing the requested information in the interests of transparency and accountability. However, the Commissioner finds that the public interest in maintaining the exemption, and protecting the principle of LPP, is sufficiently strong to outweigh the public interest in disclosure. He has therefore concluded that the Cabinet Office was not obliged to disclose the information.

## **Other matters**

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33. The complainant has complained to the Commissioner that they are dissatisfied by the significant delay by the Cabinet Office in responding to their request for internal review.
34. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days, and reviews in exceptional cases to be completed within 40 working days.
35. In this case the complainant submitted their request for internal review on 23 January 2022. The Cabinet Office informed them of the outcome

of the internal review on 5 May 2022, some 73 working days later. The Commissioner clearly considers this to be an unsatisfactory period of time.

## Right of appeal

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36. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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 .....**

**Esi Mensah**  
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