

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 March 2024

**Public Authority:** Cabinet Office

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

#### **Decision (including any steps ordered)**

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1. The complainant requested minutes of meetings relating to discussions on the use of face coverings during the COVID-19 pandemic. The Cabinet Office withheld the minutes, citing section 35(1)(b) (ministerial communications) of the FOIA as its basis for doing so.
2. The Commissioner's decision is that section 35(1)(b) is engaged, but that the public interest favours disclosure of the withheld information.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information, as identified separately to the Cabinet Office.
4. The Cabinet Office 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 FOIA and may be dealt with as a contempt of court.

## **Request and response**

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5. On 29 June 2022, the complainant wrote to the Cabinet Office and requested information in the following terms:

“The minutes of the meetings on which the two policy decisions to make face masks compulsory in shops and public transport were finalised. Clarification: Therefore, for the decision regarding compulsory face coverings on transport, I am seeking the specific minutes of the meeting in which that policy was finalised and agreed by the government, and likewise for the policy decision to make face coverings compulsory in shops. The time frame for these two meetings would presumably be within the same months the policies were implemented (June 2020 and July 2020).”

6. The Cabinet Office responded on 26 August 2022, stating that it held information within the scope of the request, but that section 35 of FOIA was engaged in relation to this information. It advised the complainant that it was extending the timescale to respond in order that it could properly consider the public interest test.
7. On 26 September 2022, the Cabinet Office wrote to the complainant explaining that it had revised its position, and that it did not hold information falling within the scope of the request. This finding was upheld at internal review.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 6 January 2023, to complain about the way their request for information had been handled. The complainant stated that they were unhappy with the contradictory positions of the Cabinet Office.
9. In its submissions to the Commissioner, the Cabinet Office revised its position again, and stated that it does hold information falling within the scope of the request, but that it considers it to be exempt under section 35(1)(b) (ministerial communications) of FOIA.
10. The Cabinet Office identified relevant information within minutes of a meeting of the Cabinet held on 2 June 2020, and a meeting of a Cabinet committee held on 16 July 2020.

11. Having reviewed the withheld information, the Commissioner has identified content relating to face coverings within the minutes which falls within the scope of the request. The Commissioner does not consider the content within the minutes which does not relate to face coverings to be within the scope of the request, therefore that content is not covered in the analysis below.
12. The following content analyses whether the Cabinet Office was correct to apply section 35(1)(b) to withhold the information falling within the scope of the request.

### **Reasons for decision**

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13. Section 35(1)(b) of FOIA provides that information held by a government department is exempt from disclosure if it relates to ministerial communications. Consideration of this exemption involves two stages. First the exemption must be engaged because the information in question falls within the class described in section 35(1)(b) and second, the public interest in the maintenance of the exemption must outweigh the public interest in disclosure.
14. Section 35(5) of FOIA explains that 'ministerial communications' includes any communications between Ministers of the Crown and, in particular, proceedings of the Cabinet or any committee of the Cabinet.
15. Communications do not have to be exclusively between Ministers for section 35(1)(b) to be engaged. The exemption covers communications between two or more Ministers even if others are copied in.
16. The concept of a communication is broad. It includes written communications such as letters, memos, emails and any other documents written to convey information between Ministers.
17. In particular, Cabinet minutes (or minutes of Cabinet committees) are covered as they relate to the communications taking place between Ministers at the Cabinet, or Cabinet committee, meeting.
18. As the withheld information is within two sets of minutes, one for a meeting of the Cabinet and one of a committee of the Cabinet, they fall under the definition of Ministerial communications and the Commissioner is satisfied that section 35(1)(b) is engaged.

## **Public interest test**

19. As the Commissioner is satisfied the exemption is engaged, he has gone on to consider the balance of the public interests.

## **Arguments in favour of withholding the information**

20. The Commissioner considers that there is a weighty argument that Ministers should have a protected space in which to discuss extreme and highly charged scenarios freely and frankly in Cabinet, and that they are able to do so with the assurance that such discussions will not routinely be made public. He also recognises the importance of preserving collective cabinet responsibility and that there is a valid public interest in a safe space for proceedings of the Cabinet on this basis.
21. The Commissioner considers that these arguments are particularly relevant in this case. This is because, as there were widely differing views about the use of face coverings during the pandemic, it was important that Ministers discussing their mandatory use should have been able to do so without being concerned about public reaction to their individual opinion on this highly debated topic.
22. Within its submissions to the Commissioner, while acknowledging the public interest in decision making during the pandemic, the Cabinet Office has stated that it considers the COVID-19 Inquiry a more appropriate means by which Cabinet minutes should be examined than by their general disclosure.
23. The Commissioner recognises that the ongoing COVID-19 Inquiry, is relevant to the balance of the public interest test. As his guidance on the [public interest test](#) explains, where other means of scrutiny are available, these may go some way to satisfying the public interest that would be served by disclosure.
24. Further, the guidance says that if the other investigation is ongoing, the public interest may be better served by allowing it to continue without interference, rather than disclosing information prematurely.
25. The Commissioner recognises that there is some weight to the public interest in withholding the information so that it can be scrutinised by the COVID-19 Inquiry, rather than releasing it into the public domain well before that Inquiry reaches its conclusion.

## **Arguments in favour of disclosure**

26. The subject matter and content of the withheld information is key here. This concerns discussion on measures taken to mitigate the impact of the COVID-19 pandemic. In terms of immediate impact upon the daily lives of the entire population, these discussions were exceptional. The date of the withheld information is also significant: June and July 2020, a time when the pandemic was dominating the national discourse. The Commissioner's view is that the subject matter and content of the withheld information leads to an exceptionally weighty public interest in disclosure, in order to serve transparency about the discussions within Cabinet on the pandemic at that time.
27. The Commissioner does note that at the date of the request, 29 June 2022, around two years had passed since the meetings recorded in the withheld information, and neither the Cabinet or the country were working under the same constraints by the date of the request. This could be cited as a basis for arguing that the public interest in favour of disclosure is less strong than it would have been closer to the time of the withheld information. The Commissioner's view, however, is that the public interest in understanding more about Cabinet and Government discussions on the pandemic remained very high at the time of the request.

## **The Commissioner's decision**

28. The Commissioner recognises that this is a case in which there are very strong arguments both for and against disclosure of the withheld information.
29. The conclusion of the Commissioner is that the arguments favouring disclosure outweigh those favouring withholding the information, given the truly exceptional nature of the subject matter of the withheld information.
30. The Commissioner therefore finds that while section 35(1)(b) of FOIA is engaged, the balance of the public interest favours disclosure of the withheld information.
31. The Commissioner requires the Cabinet Office to disclose the entirety of the paragraphs within the minutes which specifically mention face coverings. The specific content that the Commissioner is ordering disclosure of has been identified to the Cabinet Office separately from this decision notice.

## **Right of appeal**

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32. 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)

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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