

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 October 2024

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information linked to the Covid-19 Strategy committee meetings held from 2020 to 2021. The Cabinet Office initially refused the request in reliance on FOIA section 35(1)(b) – Ministerial communications. The UK Covid-19 Inquiry published information in the scope of the request which led to the Cabinet Office also relying on FOIA section 21 – information accessible to the applicant by other means.
2. The Commissioner’s decision is that some of the information has been appropriately withheld under FOIA section 35(1)(b) whilst the public interest favours disclosure of other information. The Commissioner finds that the Cabinet Office correctly relied on FOIA section 21 to withhold some of the information in the scope of the request.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Disclose the information set out in the confidential annex to this notice.
4. The public authority must take these steps within 30 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. On 1 November 2023, the complainant wrote to the Cabinet Office and requested information in the following terms:

“Under the Freedom of Information Act 2000 I wish to see full copies of all minutes, agendas, action logs and briefing materials for the COVID-19 Strategy (Covid-S) committee meetings held from 2020 to 2021.

Please also include any other materials that were handed out or received during the meetings, such as presentations, reports, etc.”

6. The Cabinet Office responded on 29 November 2023 confirming that information was held in the scope of the request but was being withheld in reliance of FOIA section 35(1)(b) – Ministerial communications.

7. The complainant requested an internal review on 30 November 2023. Following an internal review the Cabinet Office wrote to the complainant on 28 February 2024. It stated that it was upholding the initial response and is additionally relying on FOIA section 21 – information accessible by other means, to withhold the information.

8. During the course of the Commissioner’s investigation the Cabinet Office disclosed information and provided the complainant with that information, in accordance with section 35(2)(b):

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

(b) for the purposes of subsection 1(b), as relating to Ministerial communications.”

Scope of the case

9. The complainant contacted the Commissioner on 28 February 2024 to complain about the way their request for information had been handled. They explained:

“I believe that the CO was wrong to refuse my request under Section 35 and 21 of the FOI act. I don't accept their assertion that the disclosure of these records would hamper Ministers’ ability to [sic] sensitive topics as parts of the requested information (but not all) have already been made public through the COVID-19 inquiry. In addition the public interest in disclosing how the government responded in the early days of the COVID pandemic is of paramount public interest.”

10. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office was correct in its application of FOIA sections 35(1)(b) and 21(1) to the remaining withheld information, following the disclosures made during his investigation.

Background

11. The UK Covid-19 Inquiry has been set up to examine the UK's response to and impact of the Covid-19 pandemic, and learn lessons for the future. The Inquiry's work is guided by its Terms of Reference.
12. The Modules of the Inquiry are announced and then are opened in sequence, after which Core Participant applications are considered. Each module has corresponding preliminary hearings and full public hearings, details of which are published by the Inquiry.
13. Module 1 opened on 21 July 2022 and looked into the UK's resilience and preparedness for the pandemic. It considered whether the pandemic was properly planned for and whether the UK was ready for that eventuality. This module touched on the whole system of civil emergencies including resourcing, risk management and pandemic readiness. It scrutinised Government decision-making relating to planning and produced a set of recommendations.¹
14. The Inquiry published its first report and recommendations following its investigation into the UK's 'Resilience and preparedness (Module 1)' on 18 July 2024. Currently there are a further nine active modules along with a future module on the impact of the pandemic.
15. The Cabinet Office confirmed that all the information in the scope of the request had been disclosed to the Inquiry.

Reasons for decision

16. Section 35(1)(b) of FOIA states that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(b) Ministerial communications"

¹ <https://covid19.public-inquiry.uk/modules/resilience-and-preparedness/>

13. Section 35(5) defines 'ministerial communications' as any communication between a Minister of the Crown and;

"includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive committee of the Northern Ireland Assembly, and proceedings of the Cabinet or any committee of the Cabinet of the Welsh Assembly Government".

14. 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, and it also includes meetings and telephone conversations between ministers. Section 35(5) specifically includes meetings of the Cabinet or Cabinet committees.

15. The exemption covers information which 'relates to' ministerial communications. Again, this is interpreted broadly which means that information does not have to be a ministerial communication itself. For example, letters between civil servants which refer to a previous letter between ministers will relate to that previous ministerial communication, and will be covered.

16. The Cabinet Office provided the Commissioner with the information held in the scope of the request which included minutes from the Covid-19 strategy committee; agenda documents; actions and decisions documents; chair's briefs and all papers including presentations and reports. It also provided full submissions explaining why the withheld information falls within the class of ministerial communications.

17. Regarding disclosure of materials by the Inquiry, either in disclosure to Core Participants or publication, the Cabinet Office advised the Commissioner that this decision-making responsibility is a matter for the Inquiry chair. It went on to explain that the Cabinet Office has not waived its right:

"to seek to protect documents from onward disclosure on the basis of Cabinet Collective Responsibility through the formal routes available to it under section 19 of the Inquiries Act 2005."

18. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

19. Having reviewed the withheld information, the Commissioner is satisfied that the withheld information to which this exemption has been applied by the Cabinet Office engages section 35(1)(b).

20. Section 35(1)(b) is a qualified exemption which means that it is subject to the balance of the public interest. The Commissioner has therefore gone on to consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

21. The Cabinet Office acknowledged the public interest in understanding the government's decision-making in response to the Covid-19 pandemic. It agrees that there is a public interest in examining the Government's actions in responding to the pandemic, including the proceedings of the Covid-19 Strategy committee. It explained that it is for this reason the accountability for the Government's response is being considered by the Inquiry. It added that the public interest in rigorously examining the actions of the state concerning the pandemic in order to learn lessons for the future is acknowledged.
22. The Cabinet Office confirmed that all the material in the scope of the request in this case has been provided to the Inquiry. It explained that, consequently, documents protected by the Cabinet Collective Responsibility have been provided. The Government has stressed the exceptional nature of this process.
23. Furthermore the Cabinet Office's view is that any:
- "...onward disclosure of material protected by Cabinet Collective Responsibility by the UK Covid-19 Inquiry does not alter the importance or applicability of the convention in other contexts, or the weight that it should be accorded in determining the public interest in disclosure of such material."
24. The Cabinet Office considers that the establishment and on-going investigations of the Inquiry weaken the public interest in disclosure under FOIA. It considers that it is for the Inquiry Chair to determine which material should be published and when, subject to any Restriction Orders or Notices made under the Public Inquiries Act.
25. The Cabinet Office has concluded that because the Inquiry has published only limited information from the information provided to it, the Inquiry has judged that the public interest in disclosing the information in the scope of this request does not outweigh the public interest in withholding the material.

26. The Cabinet Office outlined the role of the Cabinet as set out in paragraph 4.1 of the Cabinet Manual². This covers the purpose of Cabinet and its committees to provide a framework for ministers to make collective decisions on policy issues. Central to the functioning of the Cabinet and its committees is the convention of "Cabinet Collective Responsibility".

27. The Commissioner notes the principle of collective responsibility as set out in the Ministerial Code³:

"The principle of collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained."

28. The Cabinet Manual makes explicit reference to the public interest in collective responsibility and the maintenance of the ability of ministers to debate and develop policy freely and frankly.

29. The Cabinet Office explained that prior to arriving at collective decisions about the development of policies that are binding across Government, Cabinet committees' operation is reliant on a 'safe space' for ministerial deliberation. It explained:

"If this safe space was compromised, and Ministers approached Cabinet and Cabinet committee discussions in the expectation that their materials would be disclosed, then the frankness and candour with which Ministers approached discussions would decrease. Ministers would be incentivised to adjust their behaviour in line with optical concerns - like future public comment on their individual contributions - rather than the effective, efficient scrutiny of policy options, upon which Cabinet government relies and Cabinet Collective Responsibility protects. As a result of this, the quality of decision-making would decrease, leading to worse outcomes for the public."

30. The Cabinet Office further explained that if Cabinet or Cabinet committee minutes were routinely disclosed "unhelpful attention" would

² <https://assets.publishing.service.gov.uk/media/5a79d5d7e5274a18ba50f2b6/cabinet-manual.pdf>

³

https://assets.publishing.service.gov.uk/media/63a4628bd3bf7f37654767f2/Ministerial_Code.pdf

be drawn to the contributions of individual Ministers instead of the eventual collectively agreed decision. In addition it considered that if other Cabinet or Cabinet committee documents were disclosed:

"...undue attention would be paid either to the structure of the relevant Cabinet committee meetings or lead to causal inferences regarding the contributions of individual Ministers."

31. The Cabinet Office concluded that although the minutes are the only documents that directly contain individual attributable contributions of Ministers attending, the disclosure of other documents would compromise the safe space for ministerial deliberation and invite premature public scrutiny into the space for ministerial discussion. It advised:

"The release of this material would contribute to this chilling effect, compromising the candour, detail and quality of future deliberations on the effectiveness of response options, and would limit the ability of the Government to manage future national emergencies effectively."

32. Furthermore, the Cabinet Office's view is that disclosure in this case could create a heightened chilling effect on how ministers approached similar high-profile issues with potential impacts on the quality and rigour of ministerial decision-making which would be against the public interest.

33. The complainant explained his view, as set out in paragraph 9, that the public interest in disclosing how the government responded in the early days of the pandemic is of paramount public interest. The Cabinet Office advised the Commissioner that it agrees that investigating the Government's response and central decision making in the early months of the pandemic is of the utmost importance. It advised that Module 2 of the Inquiry (on 'Core UK decision-making and political governance) was set up with the intention to examine and report its findings on these points.

Balance of the public interest

34. The Commissioner accepts the importance of the convention of Cabinet Collective Responsibility and does not disagree with the significant weight attributed by the Cabinet Office in protecting the safe space resulting from the convention which enables Ministers to engage in free and frank discussions.
35. The Commissioner acknowledges that the Inquiry into the UK's response to and impact of the Covid-19 pandemic remains on-going. He also acknowledges that disclosure of material will be determined by the Inquiry during its investigations. However, he does not agree with the

Cabinet Office that disclosure under FOIA would necessarily create an "...external influence to disclose more information than required."

36. The Commissioner considers his role to be different to that of the Inquiry. He is not examining the UK's response to the pandemic nor is he making any assessment or judgement on the conduct of the Government in the early days, or indeed at any time, of the pandemic. Scrutiny and accountability of the Government decision making in those respects is clearly for the Inquiry to investigate. He is not able to judge whether the Inquiry has assessed material in terms of the balance of the public interest before publishing the particular documents or excerpts which have been made public. The Commissioner would also point out that the existence of the Inquiry and any information released by it does not result in there being no public interest in the disclosure of further information under FOIA and does not alter his role in considering the public interest in disclosure of information in the scope of this request.
37. The Commissioner notes that the Government continues to work closely with the Inquiry regarding the disclosure of documents to Core Participants and the public. As set out above by the Cabinet Office in paragraph 23 the Commissioner accepts that disclosure resulting from the Inquiry does not alter the importance of the Cabinet Collective Responsibility convention in the context of disclosure under the FOIA.
38. Notwithstanding this, the Commissioner is cognisant of the very weighty public interest in the public having an opportunity to consider the Government's handling of a pandemic which severely impacted their lives – and society more broadly - over such a prolonged period of time.
39. Clearly the Commissioner would not wish to create detriment to the handling of any future national emergency by a chilling effect created by disclosure of information on how Ministers approached an emergency where their effective deliberations are of paramount importance. He accepts that some of the content of the withheld information, particularly minutes, identifies individual ministers and disclosure may reasonably be considered to negatively impact future emergency scenarios.
40. Nevertheless the Commissioner considers that some of the withheld information could be disclosed without revealing the specific contributions of individual Ministers and therefore without the detriment described above. The Commissioner accepts that the Cabinet Collective Responsibility convention applies to both material which reveals Ministers' attributable contributions and material which could compromise the safe space for ministerial deliberation and free and frank discussion. However, in terms of the safe space and premature public scrutiny arguments set out by the Cabinet Office in paragraph 31, he does not accept that in those respects detriment would result from

the disclosure of some of the withheld information. The Commissioner has taken into consideration the specific content and the age of the information at the time of the request, which post-dates the pandemic and as such weakens any detriment to the convention, along with information already in the public domain and available for public scrutiny. In regard to the information which the Commissioner has determined should be withheld, he considers that the importance of the convention and its applicability to that information is sufficiently strong to outweigh the public interest in disclosure.

41. He has given significant weight to the public interest in protecting the principle of Cabinet Collective Responsibility for the reasons set out by the Cabinet Office. However, in the particular circumstances of this case, which covers the exceptional event of the pandemic, and taking into account the specific content of the information, the Commissioner considers that the withheld information carries a legitimate and substantial public interest value and weight in terms of transparency and accountability, due to the factors explained above. He has decided that, on balance, there is a weightier public interest in disclosure of some of the withheld information. And for the remainder, the public interest in maintaining the exemption, in the circumstances of this case outweighs that substantial public interest value in disclosure.
42. The Commissioner has therefore set out in a confidential annex the information he has decided should be disclosed.

Section 21 – information accessible to the applicant by other means

43. Section 21 of FOIA states:

“(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

44. Section 21 is an absolute exemption which means there is no requirement to carry out a public interest test if the requested information is exempt.
45. It is reasonable for a public authority to assume that information is reasonably accessible to the applicant as a member of the general public until it becomes aware of any particular circumstances or evidence to the contrary.
46. In its internal review response to the complainant the Cabinet Office relied on section 21(1) to refuse to provide information which had been

published by the Inquiry via its website⁴. The Cabinet Office provided an internet link to the website. The Commissioner notes that this information was published after the complainant's request for information but was nevertheless available within 20 working days of the request and prior to the Cabinet Office's refusal notice.

47. The complainant has not provided any arguments regarding why the Cabinet Office's reliance on section 21 to refuse part of their request is "wrong", as they stated and is cited above in paragraph 9.
48. In the circumstances the Commissioner accepts that some information disclosed by the Inquiry forms a limited amount of the information in the scope of the request. He also accepts that this information was publicly available prior to the Cabinet Office's response to the complainant with a link to that information provided at internal review and is therefore exempt from disclosure under section 21(1).

Other matters

49. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice⁵ explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view⁶ it is reasonable to expect most reviews to be completed within 20 working days and there should be legitimate reasons for a longer extension, particularly where longer than a further 20 working days has been taken.
50. The complainant asked for an internal review of the outcome of his request on 30 November 2023. The Cabinet Office did not provide a response until 28 February 2024. From his assessment of this case, the Commissioner considers that this internal review will likely have been complex to address but nevertheless finds this length of time to be excessive.

⁴ [INQ000184589_0001, 0002, 0006 - Extract of a briefing for Covid Strategy Committee \(Covid-S\), regarding Circuit Breaker, Hospitality restrictions, Mass Events and Joint Bio-Security Centre - Local/Regional interventions, dated 21/09/2020. - UK Covid-19 Inquiry \(covid19.public-inquiry.uk\)](#)

⁵

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

⁶ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Right of appeal

51. 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

52. 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.
53. 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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