

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 October 2024

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested a copy of any Propriety and Ethics Team due diligence reports relating to the appointment of Chris Pincher as Deputy Chip Whip. The Cabinet Office relied on section 36 (effective conduct of public affairs), section 40(2) (third party personal information) and section 41 (information provided in confidence) of FOIA to withhold the information.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on section 36 to withhold the requested information.
3. The Commissioner does not require the Cabinet Office to take any steps to ensure compliance with the legislation.
4. Some of the Cabinet Office's arguments and reasoning - and the Commissioner's accompanying analysis - is included in a confidential annex due to its sensitivity.

Background

5. The Commissioner is aware that Chris Pincher was elected as an MP in 2010 and was MP for Tamworth until his resignation in 2023.
6. In February 2022, during a Cabinet reshuffle, he was appointed by the then Prime Minister, Boris Johnson, to the role of Deputy Chief Whip in the House of Commons.
7. After an alleged incident of sexual misconduct at the Carlton Club on the evening of 29 June 2022, Mr Pincher resigned as Deputy Chief Whip on 30 June 2022, and had the Conservative whip removed.
8. On 1 July 2022, No 10 Downing Street was asked whether the then Prime Minister was aware of any allegations as to misconduct before appointing Mr Pincher and briefed that he was not. In the same briefing, it went on to say that all ministerial appointments are looked at by the Cabinet Office Propriety and Ethics Team ("PET"), which concluded at the time Mr Pincher was appointed, that there was no basis to stop the appointment "on the basis of unsubstantiated allegations".¹
9. On 3 July 2022, six new allegations against Mr Pincher emerged, involving similar behaviour².
10. On 4 July 2022, No 10's response on the matter was as follows: "Mr Johnson knew of 'allegations that were either resolved or did not progress to a formal complaint', adding that 'it was deemed not appropriate to stop an appointment simply because of unsubstantiated allegations'." However, it emerged that Mr Johnson had been briefed about similar inappropriate behaviour by Mr Pincher in 2019.
11. On 5 July 2022, Lord McDonald - a former Permanent under-Secretary in the Foreign & Commonwealth Office (2015-2020) - wrote a letter to the Parliamentary Commissioner for Standards³. This stated that Mr

¹ <https://www.bbc.co.uk/news/62048687>

² <https://www.bbc.co.uk/news/uk-politics-62025612>

³ <https://www.bbc.co.uk/news/uk-politics-62047757>

Johnson was briefed "in person" about a "formal complaint" which had been upheld into Mr Pincher's misconduct in the summer of 2019, when Mr Pincher was a Foreign Office Minister. In substance, the allegations were similar to those made about his behaviour at the Carlton Club. Lord McDonald's letter said:

"The original No 10 line is not true and the modification is still not accurate. Mr Johnson was briefed in person about the initiation and outcome of the investigation. There was a "formal complaint". Allegations were "resolved" only in the sense that the investigation was completed; Mr Pincher was not exonerated. To characterise the allegations as "unsubstantiated" is therefore wrong."

12. On 5 July 2022, the then Minister for the Cabinet Office, Michael Ellis, made a statement on this topic in the House of Commons⁴. He said:

"With regard to the appointment to the Whips Office in February that the right hon. Lady mentioned, appointments in Government are subject, of course, to advice on matters of propriety — they are not subject to veto, but they are subject to advice. In addition, the usual reshuffle procedures were followed by the Government."

He also stated the following:

"It is the morally fair thing to do, in any case, to assess the situation based on evidence and not unsubstantiated rumour. It is incumbent on all of us in this House, as it is in society generally, to act fairly. If there is no evidence at the time—if there is no live complaint, no ongoing investigation—surely it is not unreasonable to consider making an appointment."

And he further said:

"The Prime Minister was made aware of the issue in late 2019; he was told that the permanent secretary had taken the necessary action, so no issue arose about the Minister remaining a Minister. Last week, when fresh allegations arose, the Prime Minister did not immediately recall the conversation in late 2019 about this incident. As soon as he was reminded, the No. 10 press office corrected its public lines. The position is quite clear. Further inquiries will be made, but the position is that the Prime Minister acted with probity at all times. It is not

⁴ <file:///C:/Users/heyc/Downloads/Commons-2022-07-05.p.pdf>

appropriate, whether in private life or in public life, to act on unsubstantiated rumour.”

13. Mr Johnson announced on 7 July 2022 that he would resign as Prime Minister.
14. The Commons Select Committee on Standards announced an investigation into Mr Pincher on 24 October 2022.
15. In a report published on 6 July 2023⁵, the Committee found that Mr Pincher’s conduct caused significant damage to the reputation of the Government and to the Prime Minister who appointed him. They also found that Mr Pincher’s conduct was “an egregious case of sexual misconduct” in the presence of witnesses and “an abuse of power” as Mr Pincher held a position of “significant power and authority”. The Committee recommended Mr Pincher be suspended from Parliament for eight weeks.
16. Mr Pincher appealed against the decision recommending suspension.⁶ However, on 4 September 2023 it was announced that an Independent Expert Panel (IEP) had not upheld the appeal.
17. On 7 September 2023, Mr Pincher announced his resignation as an MP.

Request and response

18. On 5 July 2022, the complainant wrote to the Cabinet Office and requested the following information:

“Please provide a copy of any due diligence reports conducted by the Cabinet Office Propriety and Ethics Team into the appointment of Chris Mr Pincher MP as deputy chief whip in 2022.”

⁵ <https://publications.parliament.uk/pa/cm5803/cmselect/cmstandards/1653/report.html>

⁶ <https://www.parliament.uk/globalassets/mps-lords--offices/standards-and-financial-interests/independent-expert-panel/hc-1802---appeal-by-christopher-Mr-Pincher-MP.pdf>

19. The Cabinet Office responded on 4 August 2022 and confirmed that it was refusing to confirm or deny whether the information was held, citing the exemption for personal information in section 40(5) of the FOIA.
20. On 8 August 2022, the complainant asked the Cabinet Office to review its handling of the request.
21. The complainant contacted the Commissioner on 21 October 2022 to complain about the lack of internal review and the way their request for information had been handled.
22. On 24 November 2022, the Cabinet Office provided the outcome of its internal review. This confirmed that it was maintaining the position set out in its initial response and was also relying on the neither confirm nor deny provision of the exemption for prejudice to the effective conduct of public affairs (section 36(3)).
23. The complainant then contacted the Commissioner in order to challenge this response. The Commissioner confirmed that his investigation would consider whether the Cabinet Office was entitled to refuse to confirm or deny whether the requested information was held.
24. On 19 January 2024, in his decision notice IC-198560-H4S3⁷ (the "Decision Notice"), the Commissioner decided that the exemption in section 40(5) does not apply and that, whilst the exemption in section 36(3) was engaged, the public interest in favour of confirming or denying whether information was held is greater than the public interest in maintaining the exemption. As a result, the Commissioner required the Cabinet Office to confirm or deny whether the requested information was held and if information is held, to either disclose it or issue a fresh refusal notice.
25. On 23 February 2024, the Cabinet Office issued a fresh refusal notice to the complainant. It now stated that some information was held that fell within scope of the request. However, it explained that the requested information was being withheld from disclosure because it is exempt under section 36(2)(b)(i)(ii) and (c), and section 40(2) of FOIA.
26. As regards the information that was held, the Cabinet Office said:

⁷ <https://ico.org.uk/media/action-weve-taken/decision-notice/2024/4028109/ic-198560-h4s3.pdf>

"For the avoidance of doubt, the information relates to a broader set of reshuffle procedures, which, as set out by the government on 5 July 2022, were followed in this case."

27. In addition, the Cabinet Office provided a link to Hansard⁸ (see para 12 above) where it was stated that the "usual reshuffle procedures were followed by Government" regarding Mr Picher's appointment to Deputy Chief Whip.
28. The complainant contacted the Commissioner that same day to complain about the way their request for information had been handled.
29. The Commissioner accepted the complainant's second complaint as eligible for investigation without an internal review having been requested. This was due to the amount of time since the complainant originally submitted his information request and because this complaint followed the Cabinet Office's compliance with a previous Decision Notice on the same request in IC-198560-H4S3, prior to which the Cabinet Office took the complainant through the first instance and internal review process. As a result, the Commissioner's view was that this current complaint followed the Cabinet Office's third formal opportunity to consider the request.
30. The Commissioner contacted the Cabinet Office and requested its submissions on the matter and a copy of the withheld information. As part of this, he asked the Cabinet Office what was meant in its fresh response to the complainant when it referred to "a broader set of reshuffle procedures".
31. In addition, the Commissioner provided the Cabinet Office with the complainant's fresh arguments as to why they believed the information should be disclosed.
32. The Cabinet Office duly provided submissions to the Commissioner. In addition to section 36 and 40(2), the Cabinet Office included reliance on section 41 of FOIA (information provided in confidence). In response to the Commissioner's query above, the Cabinet Office explained that "a broader set of reshuffle procedures" referred to in its refusal notice "relates to the overall process carried out by officials on behalf of the Prime Minister when making ministerial appointments".

⁸ <https://hansard.parliament.uk/commons/2022-07-05/debates/54A97440-B383-43DE-B948-A508B410A483/StandardsInPublicLife>

33. The Cabinet Office further explained that the information in scope of this request is a document used as part of this ministerial appointments process completed ahead of Mr Pincher's appointment as Deputy Chief Whip in 2022. Further supporting information was provided to the Commissioner in relation to this as set out in the confidential annex.
34. The withheld information was subsequently viewed at the Cabinet Office by a member of the Commissioner's staff. After raising further queries about the withheld information with the Cabinet Office during that visit, further submissions were received by the Commissioner.

Scope of the case

35. The Commissioner therefore considers that the scope of his investigation is to establish whether the Cabinet Office is entitled to withhold the withheld information under sections 36, 40(2) and 41 of FOIA.
36. It should be noted that the Commissioner's role is to consider the application of any exemptions (including the balance of the public interest test) on the basis of how matters stood at the time the request was first responded to by the Cabinet Office on 4 August 2022. By that stage, the then Minister for the Cabinet Office, Michael Ellis, had made a statement on Mr Pincher's appointment in the House of Commons and Boris Johnson had stated that he would resign as Prime Minister. However, the Commons Select Committee on Standards had not yet announced its investigation into Mr Pincher.

Reasons for decision

The withheld information

37. The Commissioner has reviewed the withheld information and sets out the background and details of the withheld information in the confidential annex due to its sensitivity.

Section 36

38. Section 36(2) states 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, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs’.

39. The Cabinet Office is relying on the three exemptions under section 36(2) of FOIA in respect of the withheld information. The Commissioner’s investigation will consider the Cabinet Office’s application of section 36(2), in the first instance. If necessary, he will consider the other exemptions on which the Cabinet Office is relying.
40. In deciding whether section 36(2) is engaged the Commissioner must determine whether the qualified person’s opinion was a reasonable one.
41. 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 matter. 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. Nor does the qualified person’s opinion have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
42. As explained in the earlier Decision Notice, the Commissioner notes that the qualified person in this case, Baroness Neville-Rolfe, the then Minister of State at the Cabinet Office, originally provided her opinion on 17 November 2022 that to confirm or deny whether information exists within the scope of the request would inhibit the free and frank provision of advice and free and frank exchange of views for the purposes of deliberation, and would also otherwise prejudice the effective conduct of public affairs.
43. However, after the Decision Notice, Baroness Neville Rolfe (the “QP”) provided a further opinion on 21 February 2024 – and she confirmed she had access to the withheld information. The Commissioner is satisfied that the submission put to the QP included a clear overview of the request (and its history) and relevant arguments for, and against, the application of the exemptions. The outcome of that process was that the QP decided that disclosing information in scope of this request ‘would’ inhibit the free and frank provision of advice, the free and frank exchange of views and would otherwise prejudice the effective conduct of public affairs.

44. In its submissions to the Commissioner, the Cabinet Office explained why the information requested was exempt under the provisions of section 36 and it referred the Commissioner to its arguments relating to the application of each limb of Section 36(2), including the nature of the prejudice at Section 36(2)(c), contained within the most recent submission to the QP.
45. The Commissioner's guidance on section 36 explains that information may be exempt under section 36(2)(b)(i) and (ii) if its disclosure could inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options when providing advice or giving their views as part of the process of deliberation. The reason for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision-making.
46. These exemptions are concerned with protecting the processes that may be harmed by the disclosure of the information. The issue to be considered is, therefore, future inhibition to the processes of honest expression, providing advice and exchanging views.
47. The Cabinet Office stated that the work that is undertaken to support the Prime Minister's selection of Ministers for appointment is highly sensitive and involves the gathering, assessing and communicating of personal information. The work relies on officials being able to handle, record and communicate and exchange views on sensitive information without the threat of media speculation about the quantity, extent or content of that information, or the processes by which it is gathered and communicated.
48. The Cabinet Office argued that releasing information about this area of work is almost certain to have a chilling effect on those working in this area. Knowledge that information would be routinely going into the public domain would likely result in less information (or deliberation about that information) being recorded and less effective record keeping. This would mean that knowledge retention and the free and frank provision of advice and exchange of views would be inhibited, adversely affecting decision-making. The Cabinet Office did not suggest that such changes in record keeping would be inappropriate, but simply that it would dilute information to a point that would make it less useful and informative for policy and operational decisions.
49. As regards section 36(2)(c), prejudice to the effective conduct of public affairs is concerned with the effects of making the information public, the impact on a public authority's ability to offer an effective public service or to the disruptive effects of disclosure (for example, the diversion of resources in managing the effect of disclosure).

50. In submissions to the Commissioner, the Cabinet Office explained that making the withheld information public would encourage media speculation and comment about the ministerial appointments process.
51. The Cabinet Office also argued that disclosure would erode the ability of future Prime Ministers to perform their constitutional role in ministerial appointments. This was because, as the Sovereign's principal adviser, the Prime Minister has sole responsibility for the organisation of the executive, including recommendations on the appointment, retention and dismissal of Ministers. In line with the constitutional role, it is for a Prime Minister to receive information and advice in the manner he or she determines, and to act on that information and advice according to his or her judgement. The conduct of this aspect of Government relies on provision of information and advice in a range of ways - formal and informal - as suits the Prime Minister and the ability of the Prime Minister to make deliberations in confidence.
52. The Cabinet Office went on to argue that to release information relating to previous appointments made by the Sovereign on the advice of the Prime Minister will generate comment and speculation on the operation of the appointments process, including on why information is not available in certain formats. This type of comment could have the effect of eroding the Prime Minister's flexibility to act in the manner of their choosing on future appointments - an area where they should retain discretion under the UK's constitutional arrangements. In addition, the Cabinet Office argued that Ministerial appointments are made public, along with details of any relevant private interests they may hold. Therefore, the Cabinet Office argued that there is no public interest in publishing information relating to ministerial appointments beyond that published in this case, particularly given the information given to the House of Commons by the then Minister for the Cabinet Office with regard to this particular appointment.
53. It is the reasonableness of the QP's revised opinion (i.e. the opinion which followed the earlier Decision Notice) which the Commissioner must make a finding on in this case.
54. The Commissioner has given careful consideration to whether the exemptions cited are engaged, taking into account the approach set out above as how the QP's opinion should be assessed.
55. In respect of section 36(2)(i) and (ii) the Commissioner accepts that the qualified person's opinion in respect of each of these limbs is a reasonable one.
56. The Commissioner has reached this finding because he accepts that it is not unreasonable to hold the opinion that disclosure of the withheld information would inhibit the ability of officials to advise a future Prime

Minister freely and frankly and inhibit the free and frank exchange of views between ministers and PET during the ministerial appointment process. Further analysis of the Commissioner in relation to this is set out in the confidential annex.

57. In reaching this finding the Commissioner is also prepared to accept that it is reasonable to hold the opinion that disclosure presents some risk to the confidentiality of the process. This is because ministers' trust in the process and its confidentiality would be damaged, thus compromising their ability and desire to freely engage with the process. Further analysis of the Commissioner in relation to this is set out in the confidential annex.
58. Consequently, for the reasons set out above, the Commissioner finds that the qualified person's opinion in respect of each of these limbs of section 36 is a reasonable one and that sections 36(2)(b)(i) and (ii) are therefore engaged.
59. The Commissioner considers that the opinion provided in relation to section 36(2)(c) is also reasonable.
60. In order for section 36(2)(c) to apply, the prejudice claimed must be different to the inhibition claimed under section 36(2)(b) (i.e. would – or would likely – 'otherwise prejudice').
61. The 'otherwise' prejudice claimed in this case is that disclosure would encourage media speculation and comment about the ministerial appointments process (especially about why information was not available in certain formats). It would also prejudice the ability of future Prime Ministers to flexibly perform their constitutional role of making ministerial appointments in manner of their choosing. It was explained that speculation and comment about the process followed would be prejudicial as inaccurate inferences or assumptions could very easily be made based upon the information gathered, its quantity, content and format in individual cases. In addition, the view was put forward that disclosure would be prejudicial to the appointment process overall as, were this information to be released, the process would need to be changed.
62. The Commissioner accepts that disclosure of the information could also lead to an erosion of Ministers' privacy due to targeted public scrutiny of the details contained in the withheld information. The Commissioner also acknowledges that disclosure could hinder the appointment process overall as greater amounts of resource would be taken up responding to future requests by PET officials running the appointment process.
63. On the basis of having had sight of the withheld information and having considered the circumstances of the case, the Commissioner does not

consider the QP's opinion – including the reasons given for it – to be unreasonable.

64. The Commissioner therefore finds that the qualified person's opinion in respect of this exemption is a reasonable one and that section 36(2)(c) is engaged in respect to the withheld information.

Public interest test

65. Section 36 is a qualified exemption and in accordance with the requirements of section 2 of FOIA, the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining each of the limbs cited outweighs the public interest in disclosing the information.
66. It is important to be clear that the exemptions contained in section 36(2)(b) focus on the processes that may be inhibited, rather than what is in the withheld information. The issue, in this case, is whether disclosure of the information would inhibit the free and frank provision of advice, or exchange of views for the purposes of deliberation. Section 36(2)(c) is concerned with the effects of making the information public. However, the fact that it uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(b). The Commissioner has therefore been guided by this as part of his consideration of the public interest test for each limb.

Public interest arguments in favour of disclosing the withheld information

67. The complainant's view is that in relation to the former Prime Minister Boris Johnson's decision to appoint Chris Pincher as deputy chief whip, it is not known what due diligence advice the Prime Minister was given by the Civil Service about the complaint history of this ministerial candidate or what specific advice they gave on the appointment. He said:

"In a functional system, this should have been clearly laid out in writing to a prime minister, so that either they judged the person unappointable and did not proceed, or if they chose to nonetheless to continue with the planned appointment, that the prime minister was doing so in the face of clear written advice, and could be held accountable for that.

If clear written advice was not given, as is possible given the reporting around the Pincher scandal, there are very serious questions about whether the Cabinet Office Propriety and Ethics Team is fit for purpose, given its crucial role in ensuring that governments are starkly aware of the facts when they make appointment."

68. The complainant disputed that disclosure would risk eroding the ability of future Prime Ministers to perform their constitutional role in ministerial appointments, saying: "This is a laughably weak argument. Prime ministers are rightly held to the highest scrutiny in their appointments, given how poor performance of ministers has a real impact on the everyday lives of British citizens. As such, there is a clear interest of transparency, where things have gone wrong, in knowing how that person came to be appointed."
69. He further disputed that there is a public interest in allowing the "free and frank exchange of views" when appointing ministers. He argued that: "Allowing a system where appointments are advised in a secretive manner, with a "free and frank" exchange of views about candidates held internally without having to make public serious concerns, actively harms the public by risking making appointments of clearly unsuitable persons more likely, especially around cases where things have very seriously gone wrong."
70. The Cabinet Office recognise that there are arguments in favour of disclosure in this case. Firstly, they argue there is a public interest in transparency in government, including in government decision making. The specific decision making in question here relates to the Prime Minister's decision to recommend a ministerial appointment to the Sovereign, and they argue there is clearly a strong public interest in how ministers are appointed, given their important roles in the UK's democracy.
71. In addition, the Cabinet Office stated that this particular appointment is of interest to the public, given the unique circumstances relating to Mr Pincher. They accept there is higher than usual public interest in this appointment due both to Mr Pincher's actions and the fact that this appointment directly correlated to the resignation of Boris Johnson as Prime Minister.

Public interest arguments in favour of withholding the information

72. The Cabinet Office argue that there are very strong arguments in favour of maintaining the exemptions:
 - Section 36(2)(b)(i) - It is essential that the Prime Minister has a safe space in which he can consider and make ministerial appointments: this allows him to fully consider all the options, and relies on officials being able to gather, assess and communicate sensitive personal information, free from the threat of media speculation about that information. If officials are unable to advise fully due to the potential for such sensitive advice to be disclosed, there would be a chilling effect on the ability of officials to provide such advice [further supporting

information was provided to the Commissioner in relation to this as set out in the confidential annex]. This would most likely result in less advice being provided, as the ability of individuals to advise the Prime Minister freely and frankly would have been eroded.

- Section 36(2)(b)(ii) - It is an essential principle for the effective functioning of government that individuals can provide free, frank views in private, with the expectation that publicly a united front will be maintained [further supporting information was provided to the Commissioner in relation to this as set out in the confidential annex].
- Section 36(2)(c) - There is a strong public interest in the Prime Minister being able to effectively allocate ministerial roles at his discretion, whilst fully understanding any relevant interests that prospective ministers might hold [further supporting information was provided to the Commissioner in relation to this as set out in the confidential annex]. The release of this information could also lead to targeted efforts to obtain this information in relation to other specific ministers. Taken together, this would weaken the ministerial interests process and officials' ability to fully and frankly provide the Prime Minister with all of the information needed to make appointments. Releasing this information would therefore have a detrimental effect on the overall ability of the Prime Minister in his role as the Sovereign's principal adviser, including on the appointment, dismissal and acceptance of resignation of other ministers. It would erode the Prime Minister's ability to perform this vital role within the UK's constitutional arrangements, and could damage the Prime Minister's ability to understand the potential risks associated with individual appointments.

In addition to this, information relating to ministerial appointments is made public: meaning the public interest in this is met by the outcome of the process being published. Relevant interests of ministers are also published through the List of Ministers' Interests and the relevant Parliamentary Register of Interests, meaning there is a high volume of material already in the public domain relating to each and every ministerial appointment.

Furthermore, in support of maintaining the exemptions, there is already an unusually high volume of information in the public domain relating to the appointment of Mr Pincher through the aforementioned statement of 5 July 2022 to the House of Commons made by the former Minister for the Cabinet Office, Rt Hon Michael Ellis MP. As is set out above, Mr Ellis explained in

this statement that appointments in government are subject to propriety advice; and that the usual ministerial appointment procedures were followed by government. Therefore we do not believe that what is contained in the information in scope adds much to the information already in the public domain: it simply confirms what Mr Ellis set out in his statement: which is that the government followed the usual ministerial appointment procedures.

Whilst the complainant asserts that it is still not known what advice the Prime Minister was given by the Civil Service about Mr Pincher, and that there is a clear public interest in knowing “what has gone wrong”; it is public, as explained above, that the usual ministerial appointment procedures were followed. It would not in any circumstance be appropriate to reveal any specific advice the Prime Minister received as part of ministerial appointments on a specific individual, and to release such information would have severe consequences for the Prime Minister’s overall ability to exercise discretion in making ministerial appointments.

Balance of the public interest arguments

73. In considering complaints regarding section 36, where the Commissioner finds that the QP’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 timing of the request, and the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
74. The QP in this case was Baroness Neville Rolfe, the Minister at the Cabinet Office; as such she had the requisite knowledge of how the Cabinet Office works and the consequences of any disclosure. Her opinion that the envisioned inhibition and prejudice would happen – and which the Commissioner accepts as reasonable – therefore carries weight.
75. The Commissioner has next considered the timing of the request. The public interest in being able to provide advice and exchange views about an issue freely and frankly, for example, will be greater if the issue is ongoing and live at the time of a request. In addition, 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.
76. In this case, at the time of the request in July 2022, Mr Pincher’s appointment to Deputy Chief Whip had been made some five months

earlier - although the incident at the Carlton Club was more recent (late June 2022). However, the envisioned prejudice is focussed on inhibiting officials' and ministers' willingness to provide frank advice and share candid views about possible appointments in the course of the ministerial appointments process generally. Because such processes will continue to happen in the future, that is an ongoing going 'live' concern. Accordingly, the Commissioner accepts that the Cabinet Office needs a safe space in which to consider matters about ministerial appointments, away from external interference, distraction and significant public and media commentary.

77. The Commissioner considers that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. The disclosure of official information assists the public in understanding how public authorities make their decisions and carry out their functions, and this, in turn, fosters trust in them.
78. The Commissioner also considers (as the Cabinet Office has recognised and accepted) that there is a specific public interest in understanding the details underpinning the appointment of minister's generally and here specifically in the appointment of Mr Pincher as Deputy Chief Whip, given the impact that matters relating to his conduct had on the resignation of a former Prime Minister. The Commissioner further recognises that there is a public interest in activities undertaken and provided to the Prime Minister relating to the suitability of ministerial appointments ahead of such ministerial appointments being made.
79. The Commissioner is of the view that disclosure of the withheld information will further public understanding and transparency in relation to Mr Pincher's appointment and the relevant processes involving the Civil Service in that respect more generally. However, the question to be considered is whether the public interest is better served by permitting such public scrutiny, or by protecting the integrity of high level advisory and decision-making processes. In the circumstances of this case, and particularly given the specific nature of the withheld information, the Commissioner considers that the Cabinet Office has advanced persuasive arguments in favour of maintaining the exemptions cited to all the withheld information in this case.
80. Regarding severity of the prejudice, the Commissioner's analysis and further reasoning is provided in the confidential annex.
81. For completeness, the Commissioner is not persuaded that disclosure would necessarily have the chilling effect contended by the Cabinet Office regarding record keeping per se. It would be known by officials that the disclosure of the information would be unlikely to have a chilling effect in those officials engaging with the relevant processes. Indeed the

Cabinet Office admit this in its submissions to the QP by saying "Irrespective of the release of this information, the Propriety and Ethics team should continue to conduct and record [redacted but relates to type of withheld information]." However, the Commissioner accepts that there is a risk that they may dilute their advice and possibly be more guarded if they felt that such information was to make it into the public domain.

82. In addition to accepting the reasonableness of the QP's opinion, the Commissioner accepts the Cabinet Office's arguments that disclosure of the withheld information would inhibit the provision of advice and the free and frank exchange views in the future.
83. Regarding severity for section 36(2)(c), the Commissioner also accepts that disclosure of the withheld information would result in the prejudice explained earlier.
84. Taking the above into account, the Commissioner considers that significant weight should be given to the public interest arguments in maintaining each of the exemptions. The Commissioner considers the public interest in protecting good decision making by the Cabinet Office and the Prime Minister to be a compelling argument in favour of maintaining the exemptions.
85. The Commissioner recognises that the complainant has advanced arguments about a matter of important and legitimate public interest. Indeed the Commissioner is of the view that the public interest in disclosure carries particular weight given the particular issues around Mr Pincher. One of the central arguments in the complainant's public interest case for disclosure is that it is still not known what advice the Prime Minister was given by the Civil Service about Mr Pincher at the time of his appointment to Deputy Chief Whip, and that there is a clear public interest in knowing "what has gone wrong" given the recent controversies regarding Mr Pincher.
86. The Commissioner is also of the view that there is a public interest in the process regarding Ministers' appointments being a transparent one and in being able to access information that allows for greater understanding and participation around whether the appointment process is being managed effectively. The Commissioner further accepts that disclosure of the withheld information would contribute to this public interest.
87. However, having had regard to the content of the withheld information and also the context in which it was produced, the Commissioner does not consider that disclosure of the information would appreciably serve the public interest to the extent that this outweighs the public interest in

maintaining each of the exemptions [further supporting reasoning is provided in the confidential annex].

88. The Commissioner also considers that the information relating to ministerial appointments – both generally and in relation to this case - which was in the public domain prior to the Cabinet Office's initial response does go *some* way to satisfy the due and proportionate public interest in transparency and accountability in this matter. Therefore he does not agree that the public interest in disclosure of the withheld information has already been sufficiently met by that information.
89. However, in light of this public information, and taking into account the content and context of the withheld information, any additional public interest weight and value of the specific withheld information in this case is outweighed by the stronger and wider public interest in providing officials with the freedom to frankly advise and exchange views without the fear of publication, and to not otherwise prejudice the operation of the ministerial appointment process, the work of PET officials in this regard, and the ability of future Prime Ministers to perform their constitutional role in ministerial appointments in a manner of their choosing.
90. In conclusion the Commissioner is satisfied that section 36 applies to the entirety of the withheld information and finds that the public interest in maintaining each of the exemptions relied upon under this section outweighs the public interest in disclosure in respect of the same.
91. In view of that finding, the Commissioner has not proceeded to consider if section 40(2) or section 41 of FOIA were correctly applied to withhold the same information.
92. For completeness, the Commissioner wishes to explain that, in reaching his conclusion as to the balance of the public interest on section 36, he reflected on whether it was appropriate to order partial disclosure of the withheld information. However, for reasons set out in the confidential annex, he did not consider this to be viable.

Right of appeal

93. 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

94. 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.

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

Alexander Ganotis
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