

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

### **Decision notice**

**Date:** 31 March 2025

**Public Authority:** Department for Business and Trade  
**Address:** Old Admiralty Building  
Admiralty Place  
London  
SW1A 2DY

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

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1. The complainant submitted a request to the Department for Business and Trade (DBT) seeking information about how it handled a press query he had submitted to it. DBT initially withheld all of the information in scope of the request on the basis of sections 36(2)(b)(i) and (ii) (effective conduct of public affairs) and section 40(2) (third party personal data) of FOIA. It disclosed a redacted version of the information in scope during the course of the Commissioner's investigation.
2. The Commissioner's decision is that:
  - Some of the information DBT withheld on the basis of sections 36(2)(b)(i) and (ii) is the complainant's own personal data and is therefore exempt from disclosure under FOIA on the basis of section 40(1) (first party personal data).
  - The remainder of the information DBT withheld on the basis of sections 36(2)(b)(i) and (ii) is exempt from disclosure on the basis of those exemptions and the public interest favours maintaining each exemption.
  - The information redacted on the basis of section 40(2) (third party personal data) is exempt from disclosure on the basis of this exemption.

3. The Commissioner does not require further steps.

## **Request and response**

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4. The complainant submitted the following request to DBT on 17 September 2024:

"This is a request under the Freedom of Information Act, in relation to the DBT Press Office.

On Sept 5 2024 I emailed the DBT press office with a query about the company Global Counsel and meetings with former minister Lord Johnson. The email's subject line was "Comment request: Global Counsel meetings with Lord Johnson." A story subsequently appeared on [link to article redacted]

Under the FOIA Act I would like to see the following:

1. My press query would have generated documents internally within DBT. Given this I would like to see all emails or other correspondence between the DBT Press Office and other parts of the Department that pertained to my press query about Global Counsel and Lord Johnson.
  2. All emails or other correspondence within the DBT Press Office that pertained to my press query about Global Counsel and Lord Johnson.
  3. All emails or other correspondence within the Department between Sept 5 2024 and Sept 15 2024 that mention the phrase "Global Counsel".
5. DBT contacted the complainant on 14 October 2024 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 36 (effective conduct of public affairs) of FOIA and it needed additional time to consider the balance of the public interest test.
  6. DBT provided him with a substantive response to his request on 1 November 2024. This explained that information falling within the scope of parts 1 and 2 of the request was held but was exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) of FOIA and that the public interest favoured maintaining these exemptions. DBT also explained that some information was exempt from disclosure on the basis of section 40(2) (third party personal data) of FOIA. However, DBT explained that it did not hold any information falling within the scope of part 3 of the request.

7. The complainant contacted DBT on 12 November 2024 and asked for an internal review of this refusal.
8. DBT informed him of the outcome of the internal review on 4 December 2024. This upheld the application of the exemptions cited in the refusal notice.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 3 January 2025 to complain about DBT's reliance on section 36 to withhold information falling within the scope of his request.
10. The information falling within the scope of this request consists of:
  - an email chain between DBT officials regarding the press enquiry sent to the department by the complainant on 5 September 2024; and,
  - two MS Teams conversations between DBT officials regarding the press enquiry sent to the department by the complainant on 5 September 2024.
11. During the course of the Commissioner's investigation DBT contacted the complainant on 11 February 2025 and explained that it had reconsidered the information falling within the scope of his request and had determined that some information previously withheld on the basis of sections 36(2)(b)(i) and (ii) could be disclosed. DBT explained that the remaining withheld information was still exempt on the basis of sections 36(2)(b)(i) and (ii) with further information still exempt on the basis of section 40(2) of FOIA. As result of this change in position, it provided the complainant with redacted versions of the email chain ('annex A') and the Teams chat ('annex B').
12. For the reasons set out below, in the Commissioner's view some of the information redacted on the basis of sections 36(2)(b)(i) and (ii) from annex B is the complainant's own personal data. (During the course of his investigation the Commissioner informed DBT that this was his view. The Commissioner and DBT are in agreement as to the extent of the information contained in annex B which is considered to be the complainant's own personal data.<sup>1</sup>)

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<sup>1</sup> For the avoidance of any doubt, this is the information highlighted in blue in the extracts of annex B provided to the Commissioner by DBT on 17 March 2025.

13. Therefore the Commissioner has not considered whether that particular information, ie information which constitutes the complainant's own personal data, is exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) in this decision notice. This is because, regardless as to the outcome of any decision in respect of those exemptions, such information is exempt from disclosure under FOIA on the basis of section 40(1) as it is the complainant's own personal data. Section 40(1) is an absolute exemption and not subject to the public interest test.
14. Therefore, this decision notice considers:
- Whether the information redacted from annex A on the basis of sections 36(2)(b)(i) and (ii), and section 40(2), is exempt from disclosure on the basis of those exemptions.
  - Whether the information redacted from annex B on the basis of sections 36(2)(b)(i) and (ii) which is not the complainant's own personal data is exempt from disclosure on the basis of these exemptions, and whether the further information redacted on the basis of section 40(2) is exempt from disclosure on the basis of that exemption.

## **Reasons for decision**

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### **Section 40(1) – first party personal data**

15. Section 40(1) of FOIA states provides that:

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

16. Section 3(2) of the Data Protection Act 2018 (DPA) defines personal data as:

"any information relating to an identified or identifiable living individual".

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. The Commissioner is satisfied that some of the information redacted from annex B on the basis of section 36 is clearly the complainant's own personal data as he is the focus of this information and he is identifiable from it. Such information is therefore exempt from disclosure on the basis of section 40(1) of FOIA.

### **Section 36 – effective conduct of public affairs**

21. Sections 36(2)(b)(i) and (ii) of FOIA 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
  - (ii) the free and frank exchange of views for the purposes of deliberation"
22. In determining whether these exemptions are engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
  - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
  - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
  - The qualified person's knowledge of, or involvement in, the issue.
23. 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 subject. 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. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

24. The complainant argued that it is not clear, from the responses to his request, whether DBT followed the appropriate process in seeking the opinion of the qualified person.
25. With regard to the process of seeking this opinion, DBT sought the opinion of the Parliamentary Under-Secretary of State, Minister Madders. Qualified persons are described in section 36(5) of FOIA with section 36(5)(a) stating that 'qualified person' means 'in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown'. The Commissioner is therefore satisfied that the Minister was an appropriate qualified person.
26. The submission provided to the qualified person on 9 October 2024 consisted of the background to the case, the recommended approach and reasons for and against implementation of the exemptions.
27. The qualified person subsequently confirmed, via his private office, on 11 October 2024 that the sections contained at 36(2)(b)(i) and (ii) applied.
28. In addition, at the internal review stage, DBT again sought the opinion of Minister Madders on the application of these exemptions on 20 November 2024. The qualified person provided a further opinion on 25 November 2024 confirming that he remained of the view, as per his original opinion of 11 October 2024, that the exemptions question applied.
29. The Commissioner is therefore satisfied that the process of seeking the opinions upon which DBT relied upon was appropriate.
30. Turning to the substance of the opinions, in summary the qualified person argued that disclosure of the information withheld on the basis of section 36 would be likely to inhibit the quality of free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation between officials in the processing of future press enquiries. This was on the basis that there would be a reluctance to engage with the DBT press office over concerns that internal conversations and deliberations about media press lines would be disclosed under FOIA. In addition, there was a concern that officials would be less likely to provide honest, candid or potentially controversial advice and views on the handling of press queries if they considered it likely that

such information would be prematurely disclosed. The qualified person noted that disclosure of the information in this case could provide a precedent for the disclosure of similar information in the future.

31. The complainant noted that the Commissioner's guidance explained that:

"We recognise you may have developed a general approach to releasing or withholding certain types of information, but this must not limit the qualified person's discretion. An opinion formed purely on the basis of a 'blanket ruling' may not be reasonable if it does not take account of the circumstances at the time of the request. The qualified person should consider the facts in each case."<sup>2</sup>

32. The complainant argued that the opinion in this case was not nuanced in any way but was in fact generic and therefore not reasonable. The complainant noted that the reasons given for the engagement of section 36 in this case were identical to those in another request he was aware of, and whilst this also related to the function of the press office, the requests were not identical in nature or subject.
33. Whilst the Commissioner is not aware of the full details of the other request which the complainant has referred to, he appreciates the complainant's point that DBT's, or more accurately the qualified person's, opinions in that case mirrored this one. However, the Commissioner is not persuaded that this makes the qualified person's opinions unreasonable in this case. In the Commissioner's view the opinions are sufficiently focused on the circumstances of this case; whilst the rationale is applicable to other similar requests also seeking information about press office queries, the opinions consider and reflect the background to, and particular circumstances of, the requested information in this case.
34. Furthermore, the Commissioner considers it rational to argue that the disclosure of discussions about how to answer a press query, which the participants assumed were being exchanged for internal purposes only, could lead to a chilling effect on the similar exchanges in the future. This is particularly the case given that the request seeks information which was only generated two weeks prior to the request being received.
35. Sections 36(2)(b)(i) and (ii) are therefore engaged.

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>



## **Public interest test**

36. Section 36 is a qualified exemption and in line 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 the exemptions cited outweigh the public interest in disclosing the information.

### Public interest arguments in favour of disclosure

37. DBT acknowledged that there is public interest transparency in government and that release of the requested information in response to the request would such transparency. DBT noted that boosting transparency is beneficial to society as it helps build and maintain public trust in, and engagement with, Government.

### Public interest arguments in favour of maintaining the exemptions

38. DBT explained that there is a real concern that the nature and quality of the advice shared between officials, which is an essential part of the press office process, would be impaired significantly by the risk that the advice and communications might in future be disclosed. This would impair officials sharing ideas and views in a written form.
39. In addition, DBT argued that any impact on the free and frank exchange of views would be against the public interest as it is imperative that decisions are taken following a well-informed risk assessment and consideration of the press enquiry.
40. DBT argued that disclosure of the information would have an impact on the functionality of the press office and the department's reputation as a reluctance to share open and honest opinions would reduce the press office's effectiveness and ability to craft effective responses in defending the department's reputation, one of its critical roles which relies on candid deliberation to function effectively.
41. Furthermore, DBT argued that any self-censorship exercised by officials if they thought their contributions to a press enquiry would be disclosed would be likely to cause officials to withhold concerns or alternative viewpoints, diminishing the quality of advice on media-related matters and impairing decision-making, an outcome which would be against the public interest.

### Balance of the public interest

42. In considering complaints regarding section 36, where the Commissioner finds that the qualified person'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 severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.

43. With regard to attributing weight to the chilling effect arguments, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure.
44. However, although there are a number of restraints on the chilling effect, such arguments cannot be dismissed out of hand. The real issue is the weight they attract. They are likely to be strongest if the issue in question is still live, but it is also relevant to take into account the timing of the request and the actual content and sensitivity of the information in question.
45. In attributing weight to these arguments in this case the Commissioner would take the view that DBT's handling of this particular press query was essentially complete at the point the request was submitted on 17 September 2024, as the article in question was published on 8 September 2024. The decision making in relation to this matter was therefore arguably not live at the point of the request.
46. However, in terms of the timing of the request, as the above dates make clear, the information was still only very recently created. The Commissioner accepts that those involved in the discussions in question would not have expected the sensitive or candid parts of these to be disclosed, under FOIA, so soon after their creation. Furthermore, in respect of the content of the withheld information the Commissioner accepts that whilst it appears to be a relatively routine discussion of a press query, it clearly contains a candid discussion of matters relevant to the query. Moreover, the Commissioner accepts that the risk of an impact on the handling of future press handling could be considerable if officials involved in dealing with these thought there was a real risk of their discussions being released in what effectively amounts to 'real time'. The Commissioner accepts that this risks having a material impact on the effectiveness of DBT's press office, an outcome which is against the public interest. Therefore, in the circumstances of this request the Commissioner considers that the chilling effect arguments attract considerable weight.
47. With regard to attributing weight to the public interest in disclosure of the information the Commissioner accepts that there is a public interest in providing the public with an insight into how press queries are

handled in order to improve transparency of DBT's processes in this regard. However, the Commissioner recognises that the disclosure of the information during the course of the Commissioner's investigation goes some way to meeting this interest. Furthermore, he is not aware of any particular pressing or specific need for the information in this case to be disclosed.

48. In view of the above the Commissioner has concluded that the balance of the public interest favours maintaining each of the exemptions contained at sections 36(2)(b)(i) and (ii) of FOIA.

### **Section 40(2) – third party personal data**

49. DBT explained that on the basis of section 40(2) it has redacted the names and contact details of junior officials.
50. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
51. In this case the relevant condition is contained in section 40(3A)(a).<sup>3</sup> This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
52. It is common practice for a public authority to argue that the names and contact details of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the GDPR. Furthermore, unless there are very case specific circumstances, the Commissioner accepts that the names and contact details of the junior officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with the approach taken in the Commissioner's section 40 guidance.<sup>4</sup> Therefore, in this case the Commissioner adopts the reasoning set out in these previous decision notices which found that the personal data of junior

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<sup>3</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

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[https://ico.org.uk/media/fororganisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/fororganisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf) - see page 12

officials was exempt from disclosure on the basis of section 40(2) of FOIA.<sup>5</sup>

## Other Matters

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53. With regard to the information contained in annex B which the Commissioner has concluded is exempt from disclosure on the basis of section 40(1), whilst he recognises that the complainant stated that he was making his request under FOIA, given that such information is clearly the complainant's own personal data, the Commissioner would have expected DBT to handle this as a hybrid request under both FOIA and as a subject access request under data protection legislation.
54. The Commissioner now expects DBT to consider the information contained in annex B which is the complainant's own personal data under subject access request provisions and provide the complainant with an appropriate response under data protection legislation.

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<sup>5</sup> IC-114449-B7P7 <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022310/ic-114449-b7p7.pdf> paragraphs 49-71 and IC-110922-T9R1 <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022447/ic-110922-t9r1.pdf> paragraphs 39-62

## Right of appeal

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55. 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)

56. 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.
57. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**