

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 January 2018

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

Decision (including any steps ordered)

1. The complainant submitted a meta-request to the Cabinet Office following on from an earlier request he had submitted to it about the cloud based collaboration tool Slack. The Cabinet Office refused the meta-request on the basis of section 36 (effective conduct of public affairs) of FOIA. The complainant subsequently made a further request for the reasonable opinion record and the correspondence leading up to it which the Cabinet Office used to engage section 36 to the information in the scope of the meta-request. The Cabinet Office argued that the information in the scope of the further request was itself exempt from disclosure on the basis of sections 36(2)(b)(i), (ii) and (c) of FOIA. The Commissioner has concluded that information falling in the scope of the further request is exempt on the basis of these exemptions and that in all the circumstances of the case the public interest favours maintaining the exemptions.

Request and response

2. The complainant submitted the following request to the Cabinet Office on 1 August 2016:

'This is a Freedom of Information Act request. Could you please provide the full history/all information held from the ukgovernmentdigital.slack.com Slack.

This should include messages in both public and private channels, private messages, files shared, archived channels and message edit & deletion logs etc. As you will be aware, this can be achieved through a 'compliance export'

<https://get.slack.help/hc/enus/articles/204897248>.

I am happy for personal data of non-senior persons to be redacted where needed and you will be aware that redaction time will not count towards the cost limit. As this Slack is used across Government departments - I would ask each user to be listed alongside their relevant department and, where possible, job role, including where their name has been redacted.

I would request any redactions be individually annotated or listed with reasons for them. Please let me know if there are any issues, such as any apparent errors or lack of clarity that could make the request difficult to respond to, if you are considering applying any exemptions under the act and wish to discuss or would require the request to be refined for cost purposes.'

3. The Cabinet Office provided the complainant with a response to his request on 20 September 2016 under its reference number FOI323488. The Cabinet Office explained that no information falling within the scope of the request was held for the purposes of FOIA.¹

4. The complainant contacted the Cabinet Office on the same day and asked it to conduct an internal review of this request. When asking for this internal review, the complainant also submitted a 'meta-request' which read as follows:

'Separately to the IR, could you please process a new request in the form of a 'meta request' for all information held relating to this request/reply (e.g.internal & external correspondence, minutes, logs, memos and advice etc).'

5. The Cabinet Office provided the complainant with a substantive response to this meta-request on 1 February 2017 under its reference number FOI323577, having previously extended the time it needed to complete its public interest test considerations. The response explained that some of the information was exempt from disclosure on the basis of section 21 of FOIA on the basis that the correspondence in respect of the original request was already available to him. The response explained that the remaining information was exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) of FOIA and that the public interest

¹ The Cabinet Office's handling of this request was the subject of a separate complaint to the Commissioner. A decision notice in respect of that complainant, [FS50667128](#), was issued on 26 July 2017.

favoured maintaining these exemptions. The Cabinet Office explained that some of this information also attracted the exemption contained at section 40(2) of FOIA.

6. The complainant contacted the Cabinet Office on 9 February 2017 in the following terms:

*'Could you please conduct an IR of this response [on request FOI323577]? **Could I also please see the reasonable opinion record and correspondence leading up to it?** Please be aware I have asked the IC to consider this for decision without Internal Review due to the issues so far but feel free to begin considering the process and start the timescale' (emphasis added)*

7. The Cabinet Office informed the complainant of the outcome of the internal review in respect of request FOI323577 on 5 May 2017. The Cabinet Office concluded that the various exemptions cited in its refusal notice had been properly applied. However, the Cabinet Office explained that the initial refusal under section 36 was based on an opinion of the qualified person in relation to similar information. The Cabinet Office also explained that when considering this case afresh for internal review, and for the avoidance of any doubt, it had submitted the specific information in this case to the qualified person who had confirmed that section 36 was correctly applied.²
8. The Cabinet Office responded to the complainant's new request of 9 February 2017, which sought the reasonable record and correspondence leading up to it, on 28 April 2017 under its reference FOI324244. The Cabinet Office confirmed that it held information falling within the scope of this request but it considered this information to be exempt from disclosure on the basis of sections 35(1)(a) (formulation and development of government policy) and (b) (Ministerial communications) of FOIA.
9. The complainant contacted the Cabinet Office on 17 May 2017 in order to ask for an internal review of this request.
10. The Cabinet Office informed him of the outcome of the internal review on 19 June 2017. The review upheld the application of the exemptions cited in the refusal notice.

² The Cabinet Office's handling of request FOI323577 has also been the subject of a complaint to the Commissioner, reference FS50671517. A [decision notice](#) in relation to that complaint was issued on 30 August 2017.

Scope of the case

11. The complainant initially contacted the Commissioner on 2 May 2017 and asked it to take on a complaint about the Cabinet Office's handling of request FOI324244 without an internal review being completed in light of the delays in his previous related requests being processed.
12. The Commissioner explained to the complainant that having considered the circumstances she was of the view that an internal review would have to be completed before she would accept a complaint about this request.
13. Following the completion of the internal review, the complainant contacted the Commissioner on 3 July 2017 and confirmed that he wanted to complain about the Cabinet Office's handling of request FOI324244.
14. During the course of the Commissioner's investigation of this complaint, the Cabinet Office withdrew its reliance on section 35(1)(a) and (b) of FOIA. Instead it argued that the requested information was exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) and (c) of FOIA.

Reasons for decision

What information is in the scope of the request?

15. It is clear from the complainant's request of 9 February 2017 that he was seeking a copy of the reasonable opinion record and associated correspondence which the Cabinet Office relied on to refuse request FOI323577 on the basis of section 36 of FOIA.³
16. The Cabinet Office's process for engaging section 36, like that of many public authorities, is to make a submission to the qualified person setting out why it wants to rely on section 36, and for the qualified person (or someone acting on their behalf) to then confirm that they agree with the submission and thus the engagement of section 36. Practically then, the process of applying section 36 usually generates two documents a) a submission to the qualified person and b) a record of the qualified person agreeing with the submission.

³ Section 36 requires that, other than for statistical information, the qualified person for the public authority must give their reasonable opinion that the exemption is engaged.

17. However, as explained in paragraph 7, the Cabinet Office actually relied on two separate opinions from a qualified person in order to engage section 36 in respect of request FOI323577. The first opinion concerned a request from a different individual on a different subject matter, albeit that the request, like FOI323577, was a meta-request. The second opinion, which the Cabinet Office sought prior to the completion of the internal review, concerned the specific information which had been requested by request FOI323577.
18. There is some disagreement between the complainant and Cabinet Office as to the actual information falling within the scope of the request. The complainant is of the view that the correspondence concerning both the first and the second section 36 opinion regarding request FOI323577 falls within the scope of request FOI324244. The Cabinet Office is of the view that only the correspondence which specifically concerns Slack falls within the scope of the request, ie the correspondence concerning the second opinion.
19. In the Commissioner's view the original submission to the qualified person and their opinion which the Cabinet Office relied on to cite section 36 in its refusal notice of 1 February 2017 in respect of IR323577 (ie the internal review of request FOI323577) falls within the scope of the request of 9 February 2017. Both the submission and opinion pre-date the complainant's request of 9 February 2017. Furthermore, at the point the complainant submitted his request this original submission was the one which the Cabinet Office were seeking to rely on to engage section 36 and thus on an objective reading of request which read *'Could I also please see the reasonable opinion record and correspondence leading up to it?'* it is hard to conclude that the original submission and opinion somehow fall out of scope.
20. However, in respect of the second submission and opinion, the position is more complicated. This is because both the second submission and subsequent opinion post-date the request of 9 February 2017. The submission is dated 8 March 2017 and the opinion is dated 11 April 2017.
21. In terms of determining what information falls within the scope of a request FOIA requires the Commissioner to consider what information was held by a public authority at the time the request was submitted, or within 20 working days of the date, which in the circumstances of this case was 9 March 2017. Albeit, that the Cabinet Office did not respond until 28 April 2017.
22. In reality, the Commissioner accepts that most public authorities do not deal with a request on the day it is received and as such it may be more practical for a public authority to use the date on which it actually deals with the request as the date on which it considers whether the

requested information is held, as long as this is within the statutory time for compliance of 20 working days.

23. As FOIA provides a 20 working day long-stop for a public authority to respond to a request, the Commissioner will accept an authority considering whether the requested information is held at any point between the date of the request and the date for statutory compliance. The Commissioner acknowledges that this approach leaves the flexibility to determine which date to use with the public authority which means that it could use it to its advantage by claiming that the requested information is not held if it was created in the period between the date of the request and the time for compliance. The Commissioner would uphold this technical application of FOIA when considering a section 50 complaint made to her. However, the Commissioner would emphasise to public authorities that this might lead to a waste of public resources (a complainant may now just make a new request for the information), deterioration in relations between the authority and the complainant, and complaints of poor customer service. Accordingly, in such scenarios, the Commissioner would encourage public authorities as a matter of good practice to consider what information is held at the time of dealing with the request, or within 20 working days of the request, whichever is sooner.
24. The Commissioner welcomes the Cabinet Office's decision to accept that the second submission falls within the scope of the request. She therefore agrees with the complainant that the second submission falls in the scope of the request. However, as the second opinion post-dates the request and is dated outside of 20 working days long-stop for responding to requests, then it is not possible to conclude that this opinion falls within the scope of the request.
25. In summary then, the Commissioner has concluded that the first submission and corresponding opinion falls within the scope of the request as does the second submission. However, the opinion given in response to the second submission does not.

Section 36 – effective conduct of public affairs

26. The Cabinet Office argued that the information falling within the scope of this request is exempt from disclosure on the basis of sections 36(2)(b)(i), (ii) and (c) of FOIA. These sections state 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'

27. 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.
28. 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.
29. With regard to the process of seeking this opinion, the Cabinet Office sought the opinion of the qualified person on 8 November 2017. The qualified person gave their opinion on 15 November 2017. In the Commissioner's view public authorities have the right to raise section 36 exemptions for the first time at internal review or during her investigation, albeit in each case they are still required to obtain the reasonable opinion of the qualified person. Therefore, the Commissioner does not consider that the Cabinet Office's delays in citing section 36, and thus its delays in seeking an opinion from the qualified person undermines its application on section 36 to the complainant's request of 9 February 2017.
30. Turning to the reasonable opinion itself, the qualified person argued that if the submissions used to engage section 36 of FOIA were routinely

disclosed this would affect the candour of officials when drafting submissions. This would have the knock-on effect of undermining the quality of advice to Ministers. More specifically, the qualified person noted that the second submission in respect of FOI323577 referred directly to the disputed information and if this information had been disclosed in response to the request this would have undermined the appeals process as the Commissioner, at the time of request FOI324244, had yet to issue her decision in respect of request FOI323577. To be clear, the reasonable opinion covering request FOI324244 sets out the Cabinet Office's concerns about the release of section 36 submissions in general albeit that it also specifically discusses the need - in the Cabinet Office's view - to withhold the second submission and opinion in respect of request FOI323577 in order not to prejudice the effective conduct of public affairs.

31. Consequently, although the Commissioner and Cabinet Office have a different view as to the information falling within the scope of the request, the Commissioner accepts that the qualified person's opinion in relation to FOI324244 is sufficiently broad that it covers not simply the information which the Cabinet Office considers to be in scope, but also extends to the information which the Commissioner considers to be in scope.
32. In reaching this conclusion the Commissioner wishes to emphasise that in many circumstances she would have some concerns with a public authority engaging a section 36 exemption on a class based approach. That is to say, arguing that disclosure of a particular type of information would be likely to prejudice the effective conduct of public affairs. However, in her view although section 36 submissions and opinions will be used in relation to a broad range of requested information, the content of submissions and opinions will share certain common elements, namely a candid discussion as why the disputed information is exempt and often direct reference to the same information.
33. In respect of the opinion given by the qualified person and the exemptions contained at section 36(2)(b), the Commissioner accepts that it is reasonable to argue that disclosure of the material could potentially lead to a chilling effect on officials' contributions to section 36 submissions in the future if the information which she considers to be in scope was disclosed. Sections 36(2)(b)(i) and (ii) are therefore engaged.
34. In respect of section 36(2)(c) in the Commissioner's view the fact that section 36(2)(c) uses the phrase 'otherwise prejudice' means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b). It would appear to the Commissioner that the chilling effect envisaged

would in the qualified person's opinion have the further prejudicial effect of undermining the effectiveness of Ministerial decision making. The Commissioner accepts that this is not an unreasonable position to take and therefore she accepts that section 36(2)(c) is also engaged.

Public interest test

35. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining either of the exemptions cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

36. The complainant argued that in order for him to be able to properly understand the Cabinet Office's reliance on section 36 to refuse to disclose the information sought by his meta-request, FOI323577, it was necessary for the Cabinet Office to be transparent about the reasonable opinion upon which it decided to engage section 36. The complainant emphasised that the public interest in disclosing this information is heightened by the Cabinet Office's procedural failures and the manner in which it went about applying section 36 to request FOI323577 ie by relying on the two separate opinions.

Public interest arguments in favour of maintaining the exemption

37. The Cabinet Office argued that prejudice which it envisaged occurring if this information was disclosed was real and significant. It was firmly of the view that any benefit to the requester – or the general public – of releasing this information was significantly outweighed by the harm that would be caused to the ability of officials to draft sufficiently candid submissions and the resulting negative impact on the effective of Ministerial decision making.

Balance of the public interest arguments

38. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, she 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 she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.
39. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when giving advice. They should not easily be deterred from expressing their views by the possibility of future disclosure.

Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

40. At the time of the request the Cabinet Office was arguably only seeking to rely on the second submission to engage section 36 to the meta-request information FOI323577. Therefore, the Commissioner would accept that this information concerned a live and ongoing decision making process to the extent that the request in question, FOI323577, was the subject of an internal review and indeed subsequent appeal to the Commissioner. In terms of the original submission and opinion, given that this was superseded by the second submission in request FOI323577 it was no longer being relied on by the Cabinet Office. Furthermore, the Cabinet Office's consideration of the actual meta-request to which the original submission and opinion had been applied to was also complete. However, the Commissioner recognises that although the Cabinet Office's consideration of that request had concluded, the section 36 correspondence was still recently dated.
41. Taking this into account, the Commissioner considers that the chilling effect arguments could carry notable weight, especially in respect of the second submission. However, the weight which such arguments will attract will depend on the content of the information itself. On this point, the Commissioner accepts the Cabinet Office's position that all of the section 36 correspondence in the scope of the request does include some candid assessment of its position in respect of the various requests and also make direct reference to the disputed information in the scope of the requests. The Commissioner therefore accepts that the chilling effect arguments attract notable weight and the potential consequential prejudice to the effectiveness of Ministerial decision making is, as the Cabinet Office suggests, real and significant.
42. In terms of the public interest arguments in favour of disclosing the withheld information, the Commissioner considers that there is an inherent public interest in public authorities being transparent about their decision making processes. This extends to public authorities being transparent about how they consider and reach decisions in respect of FOI requests. Disclosure of the withheld information would provide the complainant with a more detailed understanding of the Cabinet Office's basis for relying on section 36. Albeit that the Commissioner notes that the internal review in respect of that request provided an accurate summary of the Cabinet Office's rationale for relying on that exemption.

The Commissioner also appreciates that the complainant has argued given the manner in which the Cabinet Office sought to engage section 36 to FOI323577, ie by relying on a qualified person's opinion in respect of a different meta-request before seeking a specific opinion in respect of meta-request about Slack, then this increases the public interest in disclosure. In theory the Commissioner does not disagree with this. However, the Commissioner notes that in its internal review response to FOI323577 the Cabinet Office did offer some explanation to the complainant as to why it had taken that approach. In the Commissioner's view disclosure of the withheld information would not greatly add to the complainant's understanding as to why the Cabinet Office initially relied on a section 36 submission concerning an earlier request.

43. On balance the Commissioner has concluded that the public interest favours maintaining the exemptions. She has reached this conclusion because she accepts that disclosure of the withheld information would be likely to have a significantly detrimental effect on the Cabinet Office's process for seeking the opinion of the qualified person's opinion when it wishes to cite section 36 of FOIA in the future by impacting the candour of officials. In the Commissioner's opinion this would be disruptive to the effect conduct of public affairs and clearly against the public interest. Furthermore, for the reasons discussed above she considers that the extent to which complying with the request would serve the legitimate public interests in disclosure is limited.

Right of appeal

44. 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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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