

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 October 2022

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information from the Cabinet Office as to whether the Cabinet Secretary had requested any advice or guidance before making a determination regarding the legal and constitutional issues relating to the United Kingdom Internal Market Bill. The Cabinet Office confirmed that it held information falling within the scope of the request but that it considered this to be exempt from disclosure on the basis of section 35(1)(a) FOIA (formulation and development of government policy), 35(1)(c) FOIA (Law Officers' advice) and section 42(1) FOIA (legal professional privilege). Section 21 FOIA (information accessible to the applicant by other means) was also cited which the complainant accepted.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on the exemptions at section 35(1)(a), section 35(1)(c) and section 42(1) in respect of the withheld information. However, the Cabinet Office breached section 10(1) FOIA by responding to the complainant beyond the legislative timeframe.
3. The Commissioner does not require the Cabinet Office to take any further steps.

Request and response

4. On 8 October 2020 the complainant wrote to the Cabinet Office and requested information in the following terms:

'On Thursday 10 September, Sir Jonathan Jones, sent the following email:

"Dear colleagues, I know many of you will be rightly interested in the legal and constitutional issues with the UK Internal Market Bill. The Government has today published a statement on the legal position of certain provisions of the Bill which are contrary to our legal obligations under the Withdrawal Agreement with the EU.

In addition, staff will wish to note that the Cabinet Secretary has determined that, notwithstanding the breach of international law, in executing this course of action agreed collectively by ministers and to be put to Parliament, ministers and civil servants are operating in accordance with their obligations under the Ministerial Code and Civil Service Code. This applies to civil servants in GLD.

If you have questions you should raise them in the first instance with your line manager

Best wishes,
Jonathan Jones'

Please may you confirm or disclose the following:

- 1) Did Simon Case, the Cabinet Secretary, request any advice on guidance before making this determination.
 - 2) If so, please may the individuals (or their job titles) who provided that advice be disclosed.
 - 3) If such advice was commissioned, please may it be published.
 - 4) Did the Cabinet Secretary produce a note or report laying out his reasoning for making these determinations.
 - 5) If so, please may such a note or report be disclosed."
5. On 15 October 2020 the Cabinet Office asked the complainant for clarification over the Cabinet Secretary's name.
6. The complainant clarified on the same day and agreed that Sir Mark Sedwill was the Cabinet Secretary at the time and not Simon Case.

7. On 2 February 2021 the Cabinet Office confirmed that it held some information the complainant had requested but that it was exempt under sections 35(1)(a)(formulation and development of government policy) or, if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice (section 35(1)(c)). The Cabinet Office stated that, in withholding information under section 35(1)(c), it was not confirming whether or not the Law Officers' advice was requested or provided. It explained that disclosure of the requested information may reveal whether or not advice was requested or provided which is exempt under that section. The requested information was also withheld under section 42(1)(legal professional privilege) and section 21 (information accessible to the applicant by other means).
8. The complainant made a request for an internal review on the same day.
9. On 26 May 2021 the Cabinet Office sent its internal review, maintaining its position.

Scope of the case

10. The complainant contacted the Commissioner on 12 June 2021 to complain about the way their request for information had been handled.
11. On 6 April 2022 the complainant confirmed to the Commissioner that they did not wish to pursue the Cabinet Office's citing of section 21.
12. The Commissioner wrote to the Cabinet Office on 6 April 2022, 26 July 2022, 29 July 2022 and 5 September 2022 to clarify exactly what exemptions were being cited and to obtain further argument.
13. The Cabinet Office confirmed on 3 October 2022 that it was relying on the exemptions contained in section 35(1)(a), 35(1)(c) and 42(1) FOIA and that these exemptions applied to all the requested information. The Cabinet Office also relied on section 21 but acknowledged that this exemption was not being challenged by the complainant or the Commissioner.
14. The Commissioner considers therefore that the scope of this case is the Cabinet Office's citing of sections 35(1)(a), 42(1) and 35(1)(c) and any procedural matters that may have occurred.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

15. Section 35(1) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it relates to-

(a) The formulation or development of government policy... The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

16. The Commissioner's guidance¹ states that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated and developed within a single government department and approved by the relevant minister.

17. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet or the relevant minister;
- the government intends to achieve a particular outcome or change in the real world;
- and the consequences of the decision will be wide-ranging.

18. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.

¹ [government-policy-foi-section-35-guidance.pdf \(ico.org.uk\)](https://ico.org.uk/government-policy-foi-section-35-guidance.pdf)

19. The Cabinet Office responded to the Commissioner's investigation letters by confirming that the requested information related to the United Kingdom Internal Market Bill (now Act) which had been undergoing passage through Parliament at the time of the request. The information included the legal interactions between the UK Internal Market Bill and the Ministerial and Civil Service Codes, specifically relating to Civil Service support to ministers on the Bill. The Cabinet Office argued that the,

"...information in scope of the request contains free and frank exchanges of views between officials and ministers on a major policy issue where maintaining the space to conduct such exchanges freely was (and remains) vital."

Its view is that disclosure would affect the vital safe space for ongoing policy work, international negotiations and legal advice.

20. The Commissioner asked the Cabinet Office to explain when it considered the formulation or development of this policy to which this information related to have been completed, or why it considers the policy to have been ongoing at the time the request was submitted. The Cabinet Office explained that the complainant submitted their request on 15 October 2020 (the Commissioner notes that this was actually the date when clarification was sought and received) at which time the UK Internal Market Bill was undergoing passage through Parliament. It contends that parliamentary passage involves policy development (particularly for controversial pieces of legislation) and the final Bill had yet to become law. Therefore, the Cabinet Office argues that the development of policy was ongoing at the time of the request.
21. The Commissioner accepts that the withheld information relates to the formulation and development of government policy as it satisfies the bullet points set out in paragraph 17 of this decision notice.
22. The Commissioner's guidance² provides examples of different processes that might involve policymaking and this includes – "White Papers, bills and the legislative process". The guidance states that, "formulation can continue all the way up to the point the bill finally receives royal assent and becomes legislation". The final Bill had not yet become law at the time of the request and could have been subject to further development.

² [government-policy-foi-section-35-guidance.pdf \(ico.org.uk\)](https://ico.org.uk/government/policy-foi-section-35-guidance.pdf)

The Commissioner has not been able to include all the Cabinet Office's arguments here for reasons of confidentiality but he can confirm that they underpin this argument. The exemption is therefore engaged.

Public interest test

23. Although the exemption is engaged the Commissioner needs to consider if it is in the public interest for the requested information to be disclosed.

Public interest factors in favour of disclosing the requested information

24. The Cabinet Office acknowledges that openness in government may increase public trust in and engagement with the government and that the requested information related to a matter of considerable and legitimate interest to the public.

Public interest factors in favour of withholding the requested information

25. However, the Cabinet Office argues that disclosure of this information would weaken the ability to discuss sensitive topics free from premature public scrutiny. There is a strong public interest in decision-makers being able to receive, consider and interrogate advice and to outline their thinking or decisions in ways that lead to more durable policy-making and implementation, having considered all the options.
26. It further argues that the quality of debate underlying collective decision-making would decline and be poorer as a result of discussions and advice (and individuals' specific roles in its provision) being routinely made public. The Cabinet Office again supported its views with argument(s) that cannot be reproduced here. There is a strong public interest in officials having the freedom to fully consider options and to freely and frankly express their views without impediment.
27. The premature disclosure of information would, in the Cabinet Office's view, undermine the exchange of free and frank communication and undermine the deliberations on such policy. It contends that officials would not be so readily able to express themselves candidly if their views were disclosed prematurely to the public. This inhibition may limit the expression of views to each other and to ministers. They may feel inhibited from sharing with officials who might benefit in their own decision-making and ability to contribute to policy development. All this

is likely to undermine internal debate and result in less well-informed decision-making.

Balance of the public interest

28. The Commissioner understands the complainant's view that it is in the public interest to release the requested information. He accepts that the disclosure of the requested information might assist public understanding and trust in government but at the cost of the "safe space" outlined in the previous paragraphs. In all the circumstances of the case, the content and sensitivity of the requested information at the time of the request and the potential effect of its release outweigh the public interest in disclosure.

Section 42(1) - legal professional privilege

Section 35(1)(c) - law officers' advice

29. Section 42(1) of FOIA provides an exemption from disclosure if the information in question is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings. The Cabinet Office maintained that all the withheld information attracted LPP and thus engaged the exemption at section 42(1).
30. Section 35(1)(c) of FOIA provides an exemption if the information in question relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. Although the complainant did not explicitly refer to advice from Law Officers, the Cabinet Office explained to the complainant that it was not confirming whether or not Law Officers' advice was requested or provided but rather that disclosure of the requested information may reveal whether or not it had been, which in itself is exempt under section 35(1)(c).
31. Section 35(5) explains that the Law Officers include the Attorney General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland. The Cabinet Office contends that the convention around not disclosing whether Law Officer advice was requested or provided is engaged in this case.
32. Both sections 35(1)(c) and section 42(1) are class based exemptions, so the information only has to fall within the scope of the exemption for it to be engaged. There is no need to consider the harm that would arise by disclosing the information, although this may be relevant when considering the public interest test.

33. The Commissioner has seen the information the Cabinet Office has withheld.
34. In *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry* (EA/2005/0023, 4 April 2006) the FTT described LPP as:

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation.” (paragraph 9)
35. LPP protects an individual’s ability to speak freely and frankly with their legal adviser to obtain legal advice. During these discussions the weaknesses and strengths of a position can be properly considered. For these reasons LPP evolved to make sure communications between a lawyer and their client remained confidential.
36. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
37. The Cabinet Office has confirmed that the requested information that falls under this exemption is legal advice privilege.
38. Not all communications from a legal adviser attract advice privilege but, having seen the withheld information, it is clear to the Commissioner that the legal advice was provided in a professional capacity regarding the client’s request for that advice. He also accepts that the communications were made for the sole or dominant purpose of obtaining legal advice. The Cabinet Office has also confirmed that the advice has not been disclosed to the public at large and remains confidential.
39. The Commissioner has seen no evidence that privilege has been lost or waived in this case. Consequently he finds that the exemption at section

42(1) of FOIA is engaged in respect of the information that was withheld under this exemption.

40. Referring specifically to the application of section 35(1)(c), the Cabinet Office quotes from the Commissioner's guidance,

“Section 35(1)(c) reflects the longstanding constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any such advice. The underlying purpose of this confidentiality is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.”³

41. The Cabinet Office also supports its citing of section 35(1)(c) from the same guidance:

“If a request encompasses legal advice which could realistically have been given by either Law Officers or other government lawyers, a department should be able to confirm that some legal advice is held and use section 35(1)(c) to conceal whether or not it is Law Officers' advice. In these circumstances the Commissioner considers that any information revealing who advised will reveal whether advice was obtained from the Law Officers, and therefore will 'relate to' the provision of advice. Note that this is not technically an NCND response, but a reason to withhold the content of the advice.”⁴

42. The Commissioner is also satisfied that the exemption at section 35(1)(c) is engaged.

Public interest factors in favour of disclosing the requested information

³ [government-policy-foi-section-35-guidance.pdf \(ico.org.uk\)](https://www.ico.org.uk/government-policy-foi-section-35-guidance.pdf)

⁴ *ibid*

43. Since section 35(1)(c) and section 42(1) provide qualified exemptions, information may only be withheld if the public interest in maintaining the exemption in question outweighs the public interest in disclosure.
44. The complainant has contended that the Cabinet Office had not conducted a public interest balancing exercise when relying on section 42.
45. The complainant also explained that they were seeking information "in relation to the advice from Lord Sedwell (sic) over whether it was consistent with the Civil Service Code for civil servants and ministers who wished to break international law".
46. They questioned the Cabinet Office's reliance on the "chilling effect" of disclosure as they argued that,

"There is a significant and legitimate public interest in advice that (sic) from the Cabinet Secretary that Civil Servants are free to aid Ministers in breaking international law given their obligation to act with 'integrity' under the Civil Service Code as well as an obligation to 'comply with the law and uphold the administration of justice'. The ICO has consistently advised that such chilling effect arguments should be met with scepticism."
47. The Cabinet Office states that there is a definite public interest in understanding the legal justification for decisions taken by the government. It acknowledges that there may be a broad interest in reassuring the public about the quality of policy advice discussed and provided to Ministers. The Cabinet Office notes, however, that the policy issue that is the subject of the request received significant public attention at the time.
48. The Cabinet Office also acknowledges that there is a general public interest in disclosure of information and recognises that openness in government may increase public trust in and engagement with government and removes any suspicion of manipulating the facts, or 'spin'.

Public interest factors in favour of maintaining the exemption

49. Set against this, the Cabinet Office stresses the inherent public interest in protecting the confidentiality of communications between lawyers and their clients. Confidentiality encourages clients to seek legal advice and it allows for full and frank exchanges. Without this, those wanting legal advice might be deterred from seeking advice at all or disclosing all the relevant material and the advice provided might not be as full and frank

as it ought to be. The Cabinet Office's view is that it is particularly important for the government to seek legal advice in relation to sensitive and difficult decisions and for any advice given to be fully informed and fully reasoned.

50. The Cabinet Office has weighed the assumption in favour of disclosure, and the significant potential economic impact and the large number of people affected, against the concept of legal professional privilege. However, the Cabinet Office does not accept that the public interest in disclosure in this case outweighs the clear interest in protecting communications between lawyer and client which the latter suppose to be confidential and it refers the Commissioner to [EA/2007/0136](#) in support of its argument.
51. In its response to the complainant the Cabinet Office did not confirm whether or not any Law Officer advice had been requested or provided. This was in line with the longstanding constitutional convention that, whether a law officer has given advice or not, nor the substance of any such advice, is disclosed outside government. This has been observed by successive Governments and recognised in paragraph 2.13 of the Ministerial Code, as well as by the Courts.
52. Referring again to the ICO's guidance, the Cabinet Office stresses that the underlying purpose of confidentiality around Law Officers' advice is to protect fully informed decision-making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or whether it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases. There is a strong public interest in maintaining an environment where civil servants can discuss sensitive policy issues confidentially and retain the ability to discuss, commission and receive Law Officer advice without fear of a chilling effect.
53. The Cabinet Office underpinned its argument by referencing the Commissioner's guidance which states that, where the Law Officers' convention is engaged, "this 'will carry significant weight in the public interest'"⁵(para 138). Such advice may be sought in relation to issues of a particular complexity, sensitivity and constitutional importance. The Cabinet Office states that it is in the public interest that the seeking of

⁵ *ibid*

and provision of legal advice in these circumstances should be facilitated and protected.

54. Finally, the Cabinet Office explained in its original response to the complainant that the government had already set out its legal argument for proceeding with the provisions in the United Kingdom Internal Market Bill. Consequently, the Cabinet Office's view is that the government has already met the legitimate public interest in transparency in a proportionate way that protects the policy-making process (specifically the Law Officer convention) whilst adding to the public's understanding of the policy.

The balance of the public interest

55. The inbuilt weight in favour of the maintenance of LPP is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if it is equalled or outweighed by the factors favouring disclosure.
56. The fact that sections 42(1) and 35(1)(c) are qualified is because it is considered that there are cases where information should be disclosed in the public interest, despite engaging these exemptions.
57. Although the Commissioner has considered the complainant's strongly worded views, he does not accept that this is one of those cases. He is unable to set out all the argument provided by the Cabinet Office here for reasons of confidentiality. However, he is not satisfied that there is sufficiently "clear, compelling and specific justification"⁶ for disclosure. The government has published its legal position⁷ which goes some way to satisfying the public interest. In all the circumstances of the case, the public interest in disclosure is not sufficient enough to equal or outweigh the established interest in maintaining confidentiality between legal adviser and client.
58. The Commissioner therefore finds that the public interest in maintaining the exemptions at section 42(1) and 35(1)(c) outweighs the legitimate public interest in the disclosure of the withheld information.

Section 10(1) – timeliness

⁶ [EA/2007/0136](#), paragraph 37

⁷ [UKIM legal statement \(publishing.service.gov.uk\)](#)

59. Section 1(1) of FOIA states that:

'Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) If that is the case, to have that information communicated to him'.

60. Section 10(1) of FOIA states that a public authority must respond to a request promptly and 'not later than the twentieth working day following the date of receipt'.

61. The complainant clarified their information request to the Cabinet Office on 15 October 2020 but the Cabinet Office did not provide the complainant with a substantive response until 2 February 2021, over three months later. The Cabinet Office therefore breached section 10(1) FOIA.

Other matters

Section 45 – internal review

62. The length of time it takes a public authority to conduct an internal review cannot be considered in a decision notice because it is not a formal requirement under the FOIA. However, the Commissioner considers it to be good practice to do so. Where a public authority chooses to do so, the code of practice established under section 45 of the FOIA sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.

63. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.

64. The complainant asked for an internal review on 2 February 2021 and the Cabinet Office provided an internal review on 26 May 2021, nearly four months later. The Commissioner notes, however, that the delay may have been prolonged due to the coronavirus pandemic.

Right of appeal

65. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

66. 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.
67. 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

Janine Gregory
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