

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 August 2022

**Public Authority:** Attorney General's Office  
**Address:** 102 Petty France  
London  
SW1H 9EA

### Decision (including any steps ordered)

---

1. The complainant has requested, from the Attorney General's Office (the "AGO"), emails generated between itself and the "Clearing House" business area at the Cabinet Office. The AGO disclosed most of the requested information (in an anonymised format, in agreement with the complainant), but withheld two email chains citing sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (Prejudice to the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that some withheld information (the requests within the email chains) does not fall within any of the section 36 exemptions cited, but does fall within the scope of the request so should have been disclosed; in failing to do so the AGO breached section 1(1)(b)(General right of access) of FOIA. He also finds that, where section 36 is engaged, the public interest favours disclosure.
3. The Commissioner requires the AGO to take the following steps to ensure compliance with the legislation:
  - disclose the remaining two emails in the format they were presented to the Qualified Person (ie anonymised).
4. The AGO must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Background

---

5. The request relates to an area of business at the Cabinet Office known as Clearing House. The AGO advised the complainant:

“We thought it may assist you to explain the operation of the Clearing House. The Clearing House is based in the Cabinet Office and helps ensure compliance with the FOIA by providing assistance to departments on complex FOI requests and ensuring sensitive information is handled appropriately. The Clearing House ensures consistent approaches across Government for requests for information and provides specialist advice on how to respond to FOI requests. It does not direct departments how to respond to FOI requests. If you are looking for further information about the role of the Clearing House, you may find this page<sup>1</sup> helpful”.

## Request and response

---

6. Following on from an earlier request for a copy of all email communications **from** the AGO office **to** the Cabinet Office Clearing House in 2018 (which was refused on the grounds of burden under section 14(1) of FOIA), on 29 April 2021 the complainant made the following reduced request:

“We acknowledge what you been stated [sic] and would therefore request that you instead supply the first 20 emails (instead of 100) with email addresses and names removed”.

7. On 21 July 2021, the AGO responded. It disclosed 18 emails, with redactions of personal data under section 40 of FOIA, in agreement with the complainant. It withheld the remaining two emails citing sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA.
8. On 28 August 2021, the complainant requested an internal review.
9. On 1 October 2021, the AGO responded. It maintained its position.

---

<sup>1</sup> <https://www.gov.uk/government/publications/cabinet-office-and-freedom-of-information>

## Scope of the case

---

10. The complainant initially contacted the Commissioner on 22 July 2021, but at that time had not requested an internal review.
11. When subsequently requesting an internal review, the complainant raised issues of possible breaches of the Data Protection Act 2018. These concerns are not under consideration in this decision notice which only covers concerns under FOIA. The complainant was advised accordingly.

12. In subsequent correspondence, the complainant confirmed:

"... my remaining concerns were (and still are) that the clearing house is purposely or unintentionally undermining the Freedom of Information Act by telling staff in other departments what they may and may not release ... Evidence of this may be held in the two emails which they are trying to hide from public view. I think this matter can be resolved in this case by them providing you with those two emails so that you can make the determination of whether they should be released, at least in part.

It's easy for me to see how the departments can misuse section 36 to undermine the Freedom of Information Act. Certainly there are many cases where discussions should remain private, but not discussions which I highlighted when requesting this information "**once the response is confirmed, I'll just need [redacted] to sign off on this before it goes out, since (excluded) is a reporter**" as they obviously should not be kept secret and arguably shouldn't even be even taking place. I am not seeking personal information in these emails".

13. The Commissioner will consider the citing of section 36 below.

## Reasons for decision

---

### Interpretation of request

#### Section 1 – General right of access

14. Having viewed the Qualified Person (QP)'s opinion (see below), the Commissioner raised a query with the AGO about the two withheld emails. This is because the rationale provided by the QP appeared to relate only to the internally generated parts of the email exchanges rather than the content of the two FOIA requests being considered, which were also part of each email chain.

15. The Commissioner enquired as to whether the QP's opinion concerned only the text written in the two email chains rather than the copies of the information requests themselves. It wasn't clear whether or not the emails were being fully withheld under section 36.

16. In responding, the AGO said [Commissioner's emphasis] :

"The Solicitor General's conclusion that the three limbs of s.36 applied was based on the content of the requested emails rather than their accompanying chains [interpreted as meaning the requests] ... Redacting or removing the accompanying chain would therefore not have affected the Solicitor General's opinion on withholding the information in the emails themselves.

In dealing with [name removed]'s request, AGO tried to be as helpful as possible by not rigidly supplying only the narrow ambit of the information requested. Once it was determined that there was no reason to withhold 18 of the 20 emails, we decided to send her the chains preceding those 18 emails (which themselves were unobjectionable for FOIA purposes) so that the information [the complainant] actually requested was contextualised and comprehensible. In the interests of consistency, in case the Solicitor General disagreed with officials' recommendation in the submission to withhold the remaining two emails, officials put them up as they would be sent to [the complainant], i.e. with their accompanying chains. However, to repeat, **those accompanying chains had no impact on the Solicitor General's decision to withhold the emails themselves.** It would be regretted if AGO's good faith attempt to be as helpful as possible with the information disclosed to [the complainant] were to count against AGO in any way".

17. The complainant has clearly requested 20 emails, she has not restricted her request to only certain parts of each email (other than agreeing to anonymisation). Based on this response, it appears that the AGO does not consider that the information requests which form part of those email chains are caught within the scope of the request (albeit they were included with the information which had been previously disclosed with the other 18 emails).

18. The Commissioner guidance clearly states<sup>2</sup>:

---

<sup>2</sup> [https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/the-right-to-recorded-information-and-requests-for-documents/#\\_What\\_about\\_email](https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/the-right-to-recorded-information-and-requests-for-documents/#_What_about_email)

"If the requester asks for a copy of an email, and that email contains an electronic attachment, then the attachment also falls within the scope of the request.

This means you need to consider releasing all the recorded information in the email **and** all the recorded information in the attached document. The same principle also applies to enclosures to letters".

19. The Commissioner considers that the information requests, contained within the email chains, are both covered in the scope of this request.
20. Section 1 of the 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.
21. As the AGO did not disclose this recorded information within 20 working days of the request, or by the completion of the internal review, the Commissioner has found it to be in breach of section 1(1)(b) FOIA.
22. The requests should be anonymised and disclosed.

### **Section 36 – Prejudice to the Effective Conduct of Public Affairs**

23. The AGO has relied on these three limbs of this exemption - 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c)
24. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
  - (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.
25. Section 36 is a unique exemption within FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure himself that that

opinion is “reasonable” and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

### **Who is the Qualified Person and have they given an opinion?**

26. The AGO provided the Commissioner a copy of its submission, dated 13 July 2021, that had been presented to the Solicitor General setting out a case for applying the section 36 exemption. It advised the Commissioner that, enclosed with its submission and therefore before the Solicitor General when reaching his decision were:
- a copy of the request;
  - a copy of the two withheld emails (these copies had personal information redacted); and
  - a draft response to the complainant for the Solicitor General’s approval.
27. The Solicitor General responded to this submission, via his Assistant Private Secretary, on 21 July 2021 and approved the application of the exemptions in relation to the two emails put to him, as well as the draft response to the complainant.
28. The Commissioner is satisfied that the Solicitor General is an appropriate Qualified Person for the purposes of the exemption. In approving and dating the submission the Commissioner is satisfied that he gave an opinion and that he did so on 21 July 2021.

### **What was the Qualified Person’s opinion and was it reasonable?**

29. In making this determination, the Commissioner will consider all of the relevant factors. These may include, but are not limited to:
- whether the prejudice or inhibition 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; and
  - the qualified person’s knowledge of, or involvement in, the issue.
30. 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. 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.

31. As noted above, the Commissioner considers that, in order for the qualified person to form a reasonable opinion, the public authority should provide them with all relevant material, together with arguments and any evidence on what the effects of disclosure would be. He also notes that his guidance states that the record of the qualified person's opinion should include whether the prejudice or inhibition would or would be likely to occur and the reasons for this.
32. In this case, the Commissioner is satisfied that the submission to the qualified person clearly related to the request that was made by the complainant. He is also satisfied that they were provided with a copy of the withheld information.
33. The information being withheld comprises two short email chains between the AGO and the Cabinet Office, along with a copy of the information request that they each relate to (which has been considered separately above). The AGO advised the complainant that they were being withheld because:

"... they provide more detailed correspondence between the AGO and Clearing House, express views on how the FOI request should be handled and seek further advice from the Clearing House. These emails therefore engage section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c)".

34. In his opinion, the Qualified Person was of the view that disclosure of these emails would be prejudicial to these different limbs of section 36 as follows:

**36(2)(b)(i)**

"... the disclosure of the emails [attached] would be likely to inhibit the free and frank provision of advice for the purposes of s.36(2)(b)(i). [The emails] concern AGO officials' views on how to respond to two FOI requests, and a discussion regarding if particular information requested is contentious for AGO. These frank discussions are for the purposes of the Clearing House providing free and frank advice. Honest advice from the Clearing House is required to provide vital guidance for other Government departments on how to respond to requests. It is important that when particularly sensitive information is requested, the FOI request is particularly complex, or has many handling options, the Clearing House can provide uncensored advice. Disclosing the information ... is likely to inhibit this provision of advice – both being sought and being given – due to the self-censoring which would occur if the emails like those ... could end up in the public domain".

**36(2)(b)(ii)**

“The information ... [is] of AGO and Clearing House officials exchanging views on how to handle the FOI requests. It is important that when advice is being sought from the Clearing House that both parties can express themselves openly, honestly and completely, can explore all options on how to handle an FOI request and can express their views on how the request should be handled. AGO and other Government departments may need to speak frankly on an issue to the Clearing House if the information requested is in a contentious area. All options on how to handle the FOI need to be discussed to ensure the FOIA is complied with and sensitive information is not disclosed. If the information was disclosed, parties may feel unable to freely and frankly express their views, meaning that decision making will likely be impaired as not all options and views will be candidly explored”.

**36(2)(c)**

“The Clearing House has an important role in advising on and co-ordinating responses to FOI requests and ensures that departments are giving consistent and high-quality responses to FOI requests. This process ensures that members of the public receive the information which they are entitled to under the FOIA, and also ensures that Government departments protect themselves from disclosing information which is exempt under the FOIA. Disclosing the information ... would dissuade Government departments from expressing candid views such as those contained in [the emails] on how to handle the FOI request, and would lead to poorer quality advice and decisions as a result. This would prejudice the effective conduct of public affairs as AGO and other Government departments would be less equipped to handle FOI requests”.

35. Regarding the actual email correspondence generated between the AGO and Clearing House, the Commissioner has considered the description of the withheld information above and the withheld information itself. He is of the view that the opinion given reflects what has been withheld.
36. The Commissioner accepts that it is neither an absurd nor irrational opinion to consider that disclosure of the contents of the emails might result in the prejudice argued. He therefore accepts that section 36 is engaged at the lower bar that disclosure “would be likely to” cause prejudice.

**Public interest test**

37. Even where the Qualified Person has identified that disclosure of information would be likely to cause prejudice, a public authority must



still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.

38. Given that the Commissioner has accepted the possibility that disclosure of the two email chains might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.
39. The Qualified Person's submission has stated – and the Commissioner accepts as reasonable – that the lower bar of prejudice is engaged, ie would be likely to / would otherwise be likely to. This means that the chance of prejudice occurring doesn't have to be more likely than not, but there must still be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.

### **Public interest in favour of disclosure**

40. The complainant has argued that disclosure would evidence whether or not the AGO was acting on its own volition rather than being 'told' what it can and can't release by Clearing House. She believes that evidence may be held in the two emails which is why the AGO is 'hiding' them.
41. The AGO recognised that disclosure would promote transparency and would provide information to the public on how in handles FOIA requests and how the Clearing House operates.
42. The Qualified Person's submission also recognised that the information was from 2018 and therefore not 'new', which it considered favoured disclosure.

### **Public interest in favour of maintaining the exemption**

43. The AGO has argued that there is already information in the public domain about the Clearing House, how it interacts with departments and a broad overview of its approach to providing advice. It therefore considered that disclosure would not materially add to the public's understanding of how the Clearing House works.
44. The AGO considered that it is in the public interest for free and frank advice and discussions to be had between the Clearing House and the AGO (and other Government departments) to ensure there is good decision making in relation to how to handle FOIA requests. It found that good decision-making benefits the public by ensuring that the public receive the information they are entitled to.
45. The AGO argued that disclosure would be likely to inhibit the exchange of frank advice meaning that requests for advice would be censored, as

would the responses. It also found that "officials are likely to be less open and honest in how they express their views or seek views from the experts at the Clearing House" which would be likely to inhibit the free and frank exchange of views and "reduce the quality of the connected deliberations".

46. It added: "... it is likely that the release of these email chains would reduce the clarity, frankness and openness of requests for advice to, and responses from, the Clearing House. This will prevent the most accurate and nuanced advice being available to departments and a corresponding diminution in the quality of FOIA decisions taken across Whitehall. This reduction in the quality of responses would prejudice the effective conduct of public affairs".

### **Balance of the public interest**

47. Bearing in mind that he cannot divulge their content, the Commissioner would first like to comment on the two emails chains as follows. In both cases, disclosure would only reveal what the AGO has asked about, because the request only asks for email communications **from** the AGO to the Clearing House, **not** the Clearing House response. Whilst these two chains do contain a brief response from the Clearing house, the Commissioner does not consider either response to contain any advice.
48. As a general rule, the Commissioner expects civil servants and government officials to be robust. They should not easily be dissuaded from giving or seeking candid and frank opinions or from challenging prevailing orthodoxies. However, there are some circumstances in which officials may be justified in being reticent if they believe that their views will shortly become public knowledge.
49. The AGO has referred to a need to obtain free and frank advice when handling particularly complex requests and "candid views" being expressed in the email chains. However, the Commissioner is not persuaded that either of these requests is particularly complex and the AGO has not provided any arguments to support why they consider them to be so – rather they have indicated that they do not think that those requests actually fall within the scope of this request.
50. Furthermore, the advice being sought is not presented in any depth. Were either the advice sought or the response provided more detailed, then the Commissioner may take a different view. Additionally, if the Clearing House's ultimate response to the enquiries was included (presuming there is one), then there may be more details which could fall to be harmful in the ways stated by the AGO. However, as it stands, the Commissioner considers that, whilst the emails contain a limited rationale from the AGO asking for advice on two topics, the result of this is not known. In both cases, the advice sought is not of a detailed or

technical nature, and the responding email from Clearing House contains very little commentary.

51. The complainant hopes that disclosure will reveal something about the Clearing House and how it may have influenced the AGO when responding to those requests. However, this is not captured within the withheld information as it is not what she actually asked for. Disclosure would however show the type of request where advice was sought and the types of subject areas where the AGO seeks advice.
52. Whilst the Commissioner recognises the need to protect deliberations where disclosure could be harmful to the conduct of public affairs, he finds there is a very limited prejudice and inhibition in this case which has the effect of limiting the public interest in withholding the requested information. He does not agree that disclosure on this occasion would, realistically, be likely to have a harmful effect. There is no actual advice within either email chain, with the request only indicating a subject matter where advice has been sought. This has been disclosed in the other email chains which were provided and the Commissioner is not persuaded that there is any realistic prejudice which can be specifically attributed to the disclosure of these two particular email chains. If there is some other reason why the AGO did not wish to disclose these two particular email chains, having disclosed the others, then this is not readily apparent.
53. On this occasion whilst the benefit of disclosure to the public is only limited, the Commissioner considers that this outweighs the limited perceived prejudice and inhibition envisaged by the AGO.
54. The AGO is required to disclose the requested information, with appropriate anonymisation.

## Right of appeal

---

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.

**Signed .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**