

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2023

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested departmental communications concerning the Government's rebuttal response to a Sunday Times article about the Government response to the emerging Covid-19 pandemic in early 2020. The Cabinet Office maintained that of the information held concerning this matter, only one email fell within the scope of the complainant's request and that this information was withheld under section 36(2)(b)(ii)(prejudice to the effective conduct of public affairs) of the FOIA.
2. The Commissioner's decision is that the Cabinet Office wrongly interpreted the scope of the request and that all of the related information held is within scope of the request. The Commissioner is satisfied that all of the information held is exempt under section 36(2)(b)(ii) but considers that the balance of the public interest favours disclosure of the information.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation:
 - Disclose all of the email chains held within the correct scope of the request (i.e. all the related emails held) subject to appropriate redactions for information exempt under section 40(2)(third party personal data).

4. The Cabinet Office 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 background and context to the complainant's request concerns an article dated 19 April 2020 in the Sunday Times, by the newspaper's Insight Investigation team – '*Revealed – 38 Days When Britain Sleepwalked Into Disaster*'¹. The article was critical of the Government's handling of the then unfolding Covid-19 pandemic emergency. The article included anonymised briefings from senior advisers to Downing Street, and referenced a number of experts and clinicians and their experience of the unfolding emergency.
6. Several hours after the publication of the Sunday Times article, the Government, specifically the Department of Health and Social Care (DHSC) Media Centre, published a six-page blog response. The response sought to rebut 14 of the claims made by the Sunday Times and did so in strongly worded terms:

'This article contains a series of falsehoods and errors and actively misrepresents the enormous amount of work which was going on in government at the earliest stages of the Coronavirus outbreak'.
7. The DHSC response stated that the Sunday Times was '*suggesting that there was a scientific consensus around the fact that this was going to be a pandemic – that is plainly untrue*'. Referring to the newspaper's reporting on the rates of virus infectivity modelled by Professor Neil Ferguson of Imperial College London, the response asserted that '*it is sloppy and unscientific to use this number alone to compare to Spanish flu*'. With regard to the newspaper reporting that the Prime Minister had missed five COBR meetings on the virus emergency, the response stated that, '*it is ridiculous to suggest that coronavirus only reached the UK because the Health Secretary and not the PM chaired a COBR meeting*'.

¹ [Coronavirus: 38 days when Britain sleepwalked into disaster \(thetimes.co.uk\)](https://www.thetimes.co.uk/article/coronavirus-38-days-when-britain-sleepwalked-into-disaster)

8. With regard to other parts of the Sunday Times article, the response was less specific in rebuttal, simply stating that these were 'wrong'.
9. The Government's rebuttal response to the Sunday Times article generated a significant media response.

Request and response

10. On 24 April 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

'Please provide a copy of all messages to and from members of the departmental press team, of rank senior media relations officers and above, and ministers of the department concerning:

- *Drafting comment in response to the Sunday Times Insight story of 19th April: "Coronavirus: 38 days when Britain sleepwalked into disaster".*
 - *Drafting the rebuttal article: [link provided to blog, dated 19 April 2020].*
 - *Any subsequent discussion of the article. If this part of the request risks exceeding the cost limit, please just provide a copy of all emails sent or received by these parties that contains the following link: [link provided]'*
11. The Cabinet Office responded to the request on 8 June 2020, refusing the same under section 12 (cost limit) of the FOIA. That position was upheld at internal review on 26 June 2020.
 12. On 16 January 2021, the Cabinet Office revised their position and advised the complainant (and the Commissioner) that they did not hold the requested information. During the course of the Commissioner's subsequent investigation, it became clear that the Cabinet Office had interpreted the scope of the request differently from the complainant.
 13. Specifically, the Cabinet Office contended that the request did not cover communications between only press officers, or between only ministers, but rather, covered only any communications between the two groups. The complainant contended that his request, as well as covering communications from senior press officials to ministers or vice versa, would also cover communications between the senior press officers, and between the ministers.

14. In decision notice IC-47340-Y0M6 (May 2021) the Commissioner found that the request clearly described the recorded information that was sought by the complainant, and that the only objective reading of the request was that of the complainant. The Commissioner found that the scope of the request covered any "intra" departmental communications that are held (that is, any recorded communications between senior members of the press team, and also any between ministers) as well as any "inter" departmental communications between the press team and the ministers. The use of the phrase "to and from" in the request did not, in the Commissioner's view, mean that the scope of the request was limited only to any inter departmental communications held.
15. The Commissioner ordered the Cabinet Office to issue a fresh response to the request based on the correct objective meaning.
16. The Cabinet Office duly complied with the Commissioner's decision notice and provided the complainant with a revised response to his request on 14 July 2021.
17. The Cabinet Office confirmed that they held information relevant to the request but that it was being withheld under section 36(2)(b)(ii) of the FOIA because, *'in the opinion of a qualified person, its disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation'*.
18. In respect of the public interest test, the Cabinet Office acknowledged that *'there is a public interest in citizens being confident that decisions are taken on the basis of the best available information'* and that, *'there is a public interest in transparency so as to allow public scrutiny of the manner in which the government communicates its response to media articles'*.
19. However, in favour of withholding the information the Cabinet Office cited the ability of senior officials, such as those specifically referred to in the request, to engage in free and frank discussions with other officials. The Cabinet Office contended that disclosure *'would be likely to limit press officers' ability to engage in similar exchanges in future as it would be likely to cause officials to be more reticent or circumspect in sharing their honest, unfiltered views in similar instances, and thus would be likely to have a prejudicial effect on the way in which discussions take place'*.
20. Taking into account all the circumstances of the case, the Cabinet Office concluded that the balance of the public interest favoured withholding the requested information.

Scope of the case

21. The complainant contacted the Commissioner on 14 July 2021 to complain about the way his request for information had been handled.
22. In submissions to the Commissioner the Cabinet Office contended that information within scope of the request could not include any messages which were emails *'where senior press officers are copied in, but are neither the sender nor the recipient'*. The Cabinet Office sought to rely on the Commissioner's previous decision notice in IC-47340-Y0M6 (referenced above) as support for their position regarding the scope.
23. The Cabinet Office stated that they believed that they had interpreted the complainant's request in accordance with the Commissioner's interpretation (in IC-47340-Y0M6), *'namely that the communications are between (to and from) senior press officers'*.
24. The Cabinet Office advised the Commissioner that regarding the interpretation of the request, they were:

'Strongly of the view that our interpretation is correct. A request for information for a "copy of all messages to and from members of the departmental press team" cannot reasonably be interpreted as a request for all messages received by press officers if they are only on a copy list'.
25. The Cabinet Office gave the following example:

'If Person A and Person B are referred to in a request (even if only by role and grade such as senior press officers) but emails are sent from Person C to Person D (who are not senior press officers) then the emails cannot logically be messages to or from Person A and Person B, regardless of whether Person A or Person B is on the copy list'.
26. The Cabinet Office further stated that:

'The request is clear in indicating the seniority of the sender and recipient. The fact that senior press officers appear on a copy list (along with many others) indicates that they need to be aware of the exchange but are not expected to participate in the discussion. Bringing into scope information that has not been requested is not an approach we wish to adopt'.
27. The Commissioner does not agree with the Cabinet Office's interpretation of the request and does not agree that his previous decision notice in IC-47340-Y0M6 provides any support for the above contention. As noted above, that decision notice found that the scope of the request covered any "intra" departmental communications that are

held (that is, any recorded communications between senior members of the press team, and also any between ministers) as well as any “inter” departmental communications between the press team and the ministers. The decision notice did not find that any such communications were outside the scope of the request because they were copied to the relevant individuals rather than such individuals being the main or primary recipient.

28. The Commissioner considers that a plain reading of *'all messages to and from'* would mean messages sent to the relevant individuals, including messages which an individual was copied into. To contend otherwise, as the Cabinet Office have done, is to suggest that an individual can ignore any message into which they are copied because it has not been sent to them. For example, if a press officer was asked if they had sent an email to a minister, they would not reply 'no' just because the minister had been copied into the email, rather than being the primary recipient. The Commissioner considers that the distinction which the Cabinet Office have attempted to draw in this case is not logical or reasonable.
29. The Commissioner notes that the complainant made the same request for information to the Department of Health and Social Care (DHSC) on 24 April 2020. In response to that request DHSC informed the complainant that their searches had included *'all correspondence sent/received within the media team and any sent/received between the media team and ministers'*. That is to say, DHSC included within the scope of the request, messages copied to the relevant individuals.
30. On 28 September 2021, DHSC disclosed to the complainant copies of the emails which they held within scope of the request. These emails were subject to redactions for information exempt under section 40(2)(third party personal data) of the FOIA. Significantly, DHSC did not withhold any of the information within scope under section 36 (prejudice to effective conduct of public affairs).
31. In submissions to the Commissioner, the Cabinet Office confirmed that DHSC had (post-disclosure) shared this disclosed information with them. The Cabinet Office stated that with one exception, all the DHSC information dates from 18 April 2020 or later. The information which the Cabinet Office holds is all dated 17 April 2020 and concerns the Cabinet Office contribution to the DHSC rebuttal piece.
32. The Cabinet Office further confirmed that the only email disclosed by DHSC dated 17 April 2020 is not contained in the information held by the Cabinet Office, *'and nor is the content (of the information held by the Cabinet Office) reflected in DHSC's disclosure'*. Therefore, the Cabinet Office confirmed that the information which they were seeking to withhold under section 36 was not the same information previously disclosed to the complainant by DHSC. The Cabinet Office noted that at

the time of the complainant's request to them (24 April 2020), DHSC had not released any information within scope of the identical request.

33. The Commissioner considers that the fact DHSC interpreted the complainant's identical request to include emails copied to relevant individuals does not support the Cabinet Office's artificially narrowed scope of the request and does support the Commissioner's position that such copied messages are within scope of the complainant's request.
34. In submissions to the Commissioner, the Cabinet Office confirmed that they do not hold any information within scope of the request (however interpreted) between a senior press officer and a minister or ministers.
35. The Cabinet Office advised that the only information which they hold (within their interpretation of the request) and which was exempt from disclosure under section 36, was one email, dated 17 April 2020, between two senior press officers. That email formed part of a wider chain of emails which the Cabinet Office provided to the Commissioner for contextual purposes but which they maintained (for the reasons explained above) were outside the scope of the request.
36. However, having had sight of the wider emails, the Commissioner considers that these are also within scope of the complainant's request on its correct interpretation. This is because senior members of departmental press teams and/or media relations officers were copied into the emails in question. Whilst not identical to the emails disclosed to the complainant by DHSC, they are of a similar nature in that they relate to the Government's rebuttal response to the Sunday Times article.
37. The effect of this finding on the Cabinet Office's use of section 36 is addressed by the Commissioner below.
38. The Commissioner considers that the scope of his investigation is to determine the extent of the relevant information held by the Cabinet Office and to determine whether such information is exempt under section 36(2)(b)(ii) of the FOIA.

Reasons for decision

39. Section 36(2)(b)(ii) states:

'(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 –

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

40. In deciding whether section 36(2)(b)(ii) is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one.
41. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Nor does the qualified person's opinion have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
42. In submissions to the Commissioner the Cabinet Office provided a copy of the reasonable opinion given by the qualified person, Chloe Smith, the then Minister of State for the Constitution and Devolution on 29 June 2021. The Cabinet Office also provided the submissions for the qualified person's consideration which were provided to Ms Smith on 24 June 2021.
43. The submissions to the qualified person included the one email (17 April 2020) between two senior press officers which the Cabinet Office considered to be in scope of the request. The Cabinet Office advised the Minister that *'the remaining information in the email chain is out of scope because senior press officers are only copied in'*, but Ms Smith was provided with this information to put the 'in-scope' information in context.
44. The email highlighted as being within the scope of the request by the Cabinet Office is representative of the information contained in the wider email chain. As the qualified person had sight of that wider email chain,

albeit for contextual purposes, the Commissioner has taken a pragmatic approach and considers that the qualified person's reasonable opinion applies to the information contained in the email chain as a whole. To be clear, the Commissioner is satisfied that the wider email chain is all the relevant information which the Cabinet Office holds on the correct interpretation of the request.

45. The Minister's reasonable opinion was that the exemption was engaged as disclosure of the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. The Minister found that:

'It is important that senior officials, such as those specifically referred to in this request, are able to engage in free and frank discussions with other officials. For this to occur, all parties to the discussion must be free of any inhibitions that might interfere with this ability to be frank and candid. Senior officials must also not be inhibited by the concern that their discussions will be exposed prematurely to public scrutiny or comment. Disclosure would be likely to limit press officers' ability to engage in similar exchanges in future as it would be likely to cause officials to be more reticent or circumspect in sharing their honest, unfiltered views in similar instances'.

46. Having considered the content of the withheld information and taking into account the qualified person's reasonable opinion, the Commissioner is satisfied that section 36(2)(b)(ii) is engaged to all of the information within scope of the request. In respect to the prejudice threshold, the Commissioner considers that disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
47. Section 36 is a qualified exemption and in accordance with the requirements of section 2 of FOIA, the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.
48. 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.
49. It is important to be clear that the exemptions contained in section 36 focus on the processes that may be inhibited, rather than what is in the

withheld information. The issue is whether disclosure would inhibit the process of exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views that are in themselves notably free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the exchange of views.

The position of the Cabinet Office

50. In submissions to the Commissioner, the Cabinet Office acknowledged the general public interest in disclosure of public information and they recognised that openness in government may increase public trust in and engagement with the Government. It might deepen public understanding and therefore lead to more informed public consideration of how government responds to media stories.
51. However, in favour of withholding the information, the Cabinet Office contended that there is a strong public interest that senior press officers are able to exchange views openly with colleagues inside and outside the department in order for the process of deliberation to be of any use. The Cabinet Office stated that, *'whilst the requester may have an interest in the content of these discussions, we do not consider this to be equivalent to a compelling public interest that would override the very strong public interest in maintaining the confidentiality of this information'*. The Cabinet Office contended that in order to be valuable, senior officials such as those mentioned in the request must be free from any inhibitions that might preclude provision and recording of honest views.
52. The Cabinet Office provided the Commissioner with some confidential information which they considered was evidence that the 'chilling effect' was a real possibility in this case and that disclosure of the information would be likely to be detrimental to the way in which such senior officials discuss iterative versions of media rebuttals and other responses. This information is contained in a Confidential Annex attached to this notice.
53. In considering all the factors in the case, the Cabinet Office considered that the public interest *'would be better served by withholding the requested information to preserve the "safe space" in which senior press officers can provide candid advice and views'*.
54. The Cabinet Office highlighted that the rebuttal blog was published by DHSC and not by the Cabinet Office. They suggested that if the complainant had any concerns about the content of the blog then this is something he may wish to take up with DHSC in the first instance through normal press office channels. The Cabinet Office noted that the

experts during their investigation, as well as unnamed Whitehall sources.

59. The Commissioner notes that the Government (specifically DHSC) response to the Sunday Times article was unusually fast, coming only hours later, and extremely combative in both language and tone. As noted in para 6 above, the response accused the journalists of committing not only errors but '*a series of falsehoods*' and of '*actively*' misrepresenting the work being undertaken by the Government to deal with the unfolding pandemic.
60. The Commissioner concurs with the complainant's contention that these were extremely serious allegations, particularly as they were being levelled at what is considered a highly respected and experienced investigative team of journalists (Sunday Times Insight Team). Although the Government response purported to rebut some of the 'claims' made in the Sunday Times article, commentators (i.e. journalists and healthcare professionals) noted that it did not cogently do so and indeed the response made a number of claims of its own which could be considered open to question and scrutiny.
61. Given the serious allegations of dishonesty made against the Sunday Times Insight Team and the newspaper, reporting as it was on one of the most grave national emergencies to face the UK since the Second World War, the Commissioner considers that information which would help explain or shed light on why the Government decided to issue the strongly worded rebuttal response that it did, carries a very strong and important public interest of transparency and accountability.
62. The Commissioner would note that it was perhaps recognition and appreciation of this public interest case for disclosure which led DHSC to disclose the similar email chains which they held concerning this matter. That is to say, the information contained in the email chains disclosed by DHSC could have potentially engaged section 36 (as the emails held by the Cabinet Office do in this case) but significantly DHSC did not seek to withhold the information under this exemption, deciding instead to disclose the information to the complainant (and the world at large) with redactions only for information exempt under section 40(2).
63. In their revised response of 14 July 2021 to the complainant's request, the Cabinet Office recognised the public interest in transparency so as to allow public scrutiny of the manner in which the government communicates its response to media articles. That public interest is clearly strengthened and heightened where the Government accuses journalists of falsehoods and of actively misrepresenting the Government's actions.

64. Whilst the Commissioner recognises and acknowledges that the rebuttal blog was published by DHSC and not by the Cabinet Office, he does not consider that this reduces the public interest weight or value of the information within scope held by the Cabinet Office. The submissions to the qualified person noted that the emails '*contain deliberations in the course of which views are exchanged between Cabinet Office press officers, No 10 press officers, and policy officials in the Cabinet Office and DHSC*'. Therefore, it is not the case, as the Cabinet Office appears to imply, that they had no involvement in the preparation of the published blog.
65. In respect of the Cabinet Office's contention that the complainant's complaint to the ICO is not '*an appropriate forum for airing views on the content of information that is already published, particularly when it is published by a different public authority to the one the ICO complaint relates to*', the Commissioner notes that at the time when the complainant provided the Commissioner with submissions in this case, DHSC had not published the similar information which they held.
66. In any event, the Commissioner does not agree with the Cabinet Office contention that disclosure of information held by one public authority, makes it inappropriate for a complainant to submit arguments for disclosure in a case involving a separate public authority but where the request is identical and the information within scope is very similar and linked. The Commissioner would also note that the Cabinet Office have in any case confirmed that the withheld information in this case is not the same information as that disclosed by DHSC.
67. The Commissioner recognises and appreciates the important and legitimate public interest in government departments having a 'safe space' within which to consider their response to press articles or enquiries and media reporting. The Cabinet Office have contended that disclosure of the requested information in this case would be likely to result in a 'chilling effect', i.e. it would be likely to inhibit free and frank discussions in future, and that the loss of such frankness and candour would damage the quality of deliberations and lead to poorer decision making.
68. The Commissioner notes that in *Davies v Information Commissioner and the Cabinet Office (GIA) [2019] UKUT 185 (AAC)*³, the Upper Tribunal stated that there is a substantial body of case law which establishes that assertions of a 'chilling effect' are to be treated with some caution. There are two main reasons for this. Firstly, since FOIA was introduced

³ [IN THE UPPER TRIBUNAL \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/guidance/2019-07-18-ukut-185-aac)

in 2005, public officials now recognise that it is not possible to guarantee the confidentiality of their deliberations (or advice). Secondly, civil servants and other public officials are expected to be impartial and robust in such matters, and not be easily deterred from expressing their views by the possibility of future disclosure. There is also the possibility that disclosure could actually lead to deliberations (or advice) of better quality in future.

69. However, although there are a number of restraints on the chilling effect, the Commissioner recognises that such arguments cannot be dismissed out of hand. The real issue is the weight they attract in the individual case. They are likely to be strongest, if the issue in question is still live.
70. In this case the withheld information concerns a very specific and discrete matter, namely the Government's rebuttal of a particular piece of investigative journalism. The Sunday Times article was published on 19 April 2020, and the Government's rebuttal response was published only hours later. Therefore, at the time of the request (24 April 2020), the (extremely brief) deliberation process had been concluded. Whilst the rebuttal response generated a significant media response and commentary, the process of deliberation which had led to it was no longer live and had been concluded (i.e. with the publishing of the rebuttal response).
71. The Commissioner recognises that some of the content of the withheld information is frank and strongly worded, though no more so than the actual rebuttal response which the Government subsequently and speedily published. The Commissioner considers that the unusually strongly worded rebuttal response not only invests the withheld information with a particularly strong public interest in disclosure but also weakens the chilling effect arguments which the Cabinet Office have made in this case.
72. As the Commissioner's guidance to public authorities makes clear, it is more difficult to make reasonable arguments about a generalised chilling effect on all future discussions, not least because each case has to be dealt with in light of its own particular circumstances. Therefore, a decision to disclose information in one case should not establish an expectation that such deliberations/exchanges will necessarily be disclosed in other cases.
73. The Commissioner has nevertheless agreed with the reasonable opinion of the qualified person that disclosure of the requested information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. However, given the very specific and contained nature of the information within scope, the Commissioner considers that any such inhibiting effect on officials future deliberations

is not likely to be strong. Indeed, given the criticism which the rebuttal response attracted, it is quite possible that disclosure of the information in this case (as with that held by DHSC) might have a further positive public interest outcome, in that it might influence the approach taken to future such responses to media reporting.

74. At the time of the request the Cabinet Office no longer needed a safe space within which to deliberate the Government's rebuttal response to the Sunday Times article (the rebuttal response having already been published). That fact, and the limited impact of any chilling effect on future deliberations, means the Commissioner is satisfied that in this particular case the public interest arguments for maintaining section 36(2)(b)(ii) are clearly and comfortably outweighed by the public interest factors favouring disclosure of the requested information.
75. However, the Commissioner recognises (as did DHSC in their disclosure) that some of the parties whose names/details are contained in the requested information may be otherwise exempt from disclosure under section 40(2) of the FOIA (i.e. junior or non-public facing officials).
76. It is important to be clear that even if the Commissioner had accepted the Cabinet Office interpretation of the scope of the request - that it comprises one email only - he would still have found that the public interest attached to that email favoured disclosure. That is to say, the outcome, within the context of section 36(2)(b)(ii), would have been the same.

Right of appeal

77. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

78. 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.
79. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF