

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 November 2023

**Public Authority:** Department for Science, Innovation and Technology<sup>1</sup>

**Address:** 1 Victoria Street  
London  
SW1H 0ET

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Department for Digital, Culture, Media & Sport (DCMS) seeking copies of correspondence it had exchanged with Nominet during February, March and April 2022. DCMS confirmed that it held information falling within the scope of the request but sought to withhold this on the basis of section 36(2)(c) (effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that section 36(2)(c) is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

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<sup>1</sup> The request subject to this complaint was submitted to the Department for Digital, Culture, Media & Sport (DCMS). However, in February 2023 as a result of machinery of government changes responsibility for the policy area to which this request relates was transferred to the newly formed Department for Science, Innovation & Technology (DSIT). This decision notice is therefore served on DSIT albeit that the decision notice refers to DCMS as it was the body that handled the request and with whom the Commissioner corresponded with about this complaint.

- Provide the complainant with a copy of the information which it has sought to withhold on the basis of section 36(2)(c). In doing so it can redact the names and contact details of junior officials.
4. The public authority 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.

## **Request and response**

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5. The complainant submitted the following request to DCMS on 1 December 2022:

“Please provide all emails (or other communications in any format they are held) between DCMS and Nominet during February, March and April of 2022.

Such emails scope are to include but not be limited to those in the subject thread "DCMS/Nominet rescheduled catch up" and known to exist through the ongoing FOI reference IR2022/06574 but have been excluded as out-of-scope.”
6. DCMS contacted him on 4 January 2023 and confirmed that it held information falling within the scope of his request but it considered section 36(2)(c) of FOIA to apply and it needed additional time to consider the balance of the public interest test.
7. DCMS provided him with a substantive response to his request on 30 January 2023. DCMS explained that it had concluded that the balance of the public interest favoured maintaining the exemption.
8. The complainant contacted DCMS on the same day and asked it to conduct an internal review of this refusal.
9. DCMS informed him of the outcome of the internal review on 27 February 2023. This upheld the decision set out in the refusal notice.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 3 March 2023 in order to complain about DCMS' refusal of his request.
11. The Commissioner notes that the complainant had previously submitted a request to DCMS seeking communications between it and Nominet for

the period 28 February to 14 March 2022. Such a period obviously falls within the broader period covered by the request which is the subject of this decision notice. In response to the previous request DCMS disclosed some information and withheld further material. The Commissioner's decision notice in relation to that further material was issued on 21 March 2023, and is now subject to an appeal.<sup>2</sup> Technically, the information caught by the previous request also falls within the scope of this request. However, as part of this present complaint the Commissioner has excluded from the scope of his investigation any material previously considered in his earlier decision notice.

## Reasons for decision

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12. Section 36(2)(c) of FOIA states that:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...

...(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

13. In determining whether section 36(2)(c) is 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.

14. 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

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024755/ic-165170-x2f6.pdf>

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.

15. With regard to the process of seeking this opinion, DCMS sought the opinion of the Minister for Media, Data, Digital Infrastructure on 17 January 2023 with regard to whether section 36(2)(c) of FOIA was engaged. Qualified persons are described in section 36(5) of FOIA with section 36(5)(a) stating that 'qualified person' means 'in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown'. The Commissioner is therefore satisfied that the Minister was an appropriate qualified person.
16. The qualified person was provided with a copy of the withheld information and advice that officials considered section 36(2)(c) to apply to this information. The qualified person provided their opinion that the exemption was engaged on 27 January 2023.
17. With regard to the substance of the opinion (ie the advice to which the qualified person was asked to agree), in the Commissioner's view this does not contain an explanation as to **why** prejudice would be likely to occur if the information was disclosed. Rather the submission to the qualified person consists of a re-statement of the wording of section 36(2)(c); a brief two line factual summary of the information seeking to be withheld; and, the comment that releasing these exchanges would be likely to prejudice the ongoing conduct of affairs between DCMS and Nominet and its capabilities to safeguard public sector organisations. The email from the qualified person's private office simply records that they agreed that the exemption is engaged.
18. In the Commissioner's opinion the submission to the qualified person lacks the type of reasons and rationale which are normally included in such documents which set out **why** disclosure of the particular information would be likely to be prejudicial. In the Commissioner's view there is an absence of any logical argument in the submission to the qualified person which outlines why section 36(2)(c) should apply. On this basis the Commissioner is not prepared to accept that the qualified person's opinion was a reasonable one. This is not say that the Commissioner considers 'an' opinion that section 36(2)(c) is engaged is necessarily an irrational or unreasonable one. Rather, it is the case that the qualified person has done little more than state that the withheld

information should be withheld under section 36(2)(c); there is, in effect, no actual opinion as to why this may be the case for the Commissioner to consider and determine whether this is reasonable.

19. The Commissioner notes that the DCMS' submissions to him do provide detailed reasons as to why it considers section 36(2)(c) to apply. This is the type of analysis and argument that the Commissioner would expect to have been put to the qualified person. However, the Commissioner cannot take such arguments into account when determining whether section 36(2)(c) is engaged. His role is limited to considering the matters considered by the qualified person.
20. For the reasons set out above the Commissioner has therefore concluded that the qualified person's opinion is not a reasonable one and section 36(2)(c) is therefore not engaged.
21. As a result of this finding the Commissioner requires DCMS to disclose the information it has withheld on the basis of section 36(2)(c) of FOIA. However, in doing so it can redact the names and contact details of junior officials. The Commissioner accepts, as he has done in previous cases, that such information is exempt from disclosure on the basis of the section 40(2) (personal data) exemption of FOIA.

### **Procedural matters**

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22. Upon receipt of the withheld information, the Commissioner questioned DCMS as to whether this was the totality of information it held falling within the scope of the request, given the request covered a three month period.
23. In response DCMS explained that the searches undertaken to locate information relevant to the request were email searches by the relevant policy team for emails containing the address "nominet". The Commissioner is satisfied that such searches would have been sufficient to locate any and all information falling within the scope of the request.

## **Right of appeal**

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24. 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)

25. 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.
26. 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 .....**

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