

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 March 2023

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

Decision (including any steps ordered)

1. The complainant has requested full copies of Dominic Cummings' diary appointments from January through to March 2020. The Cabinet Office originally withheld some of the requested information under section 35(1)(a)(formulation or development of government policy) and withheld some other information under section 40(2)(third party personal data). In their internal review, and in the alternative to section 35(1)(a), the Cabinet Office relied upon section 36 (prejudice to the effective conduct of public affairs) to withhold the information in its entirety.
2. During the course of the Commissioner's investigation, the Cabinet Office also applied section 35(1)(b)(Ministerial communications) and section 35(1)(d)(operation of any Ministerial private office) to some of the information held within scope of the request.
3. The Commissioner's decision is that the withheld information is not exempt under section 35(1)(a) but some of the information is exempt under sections 35(1)(b) and 35(1)(d). The Commissioner has found that with respect to the information withheld under section 35(1)(d), the public interest balance favours disclosure of the information. Similarly, in respect of the information withheld under section 35(1)(b) the Commissioner has found that the public interest balance favours disclosure, with the exception of those entries detailed in the Confidential Annex to this notice.
4. The Commissioner has found that sections 36(2)(b)(i) and (ii) apply to the withheld information not otherwise exempt under sections 35(1)(b) and (d) but that section 36(2)(c) is not engaged. With the exception of

a small number of specific entries detailed in the Confidential Annex, the Commissioner considers that the public interest in disclosure of the information outweighs the public interest in maintaining sections 36(2)(b)(i) and (ii).

5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the withheld information, with the exception of the specific calendar entries detailed in the Confidential Annex attached to this notice.
6. 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 FOIA and may be dealt with as a contempt of court.

Request and response

7. On 23 June 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

'I wish to see full copies of Dominic Cummings' diary appointments from January through to March 2020'.
8. The Cabinet Office acknowledged receipt of the request on 24 June 2020 but did not provide a substantive response until 8 October 2020, more than three months later. The Cabinet Office apologised for the delay in response and confirmed that they held *'information in relation to your request'*. The Cabinet Office advised that *'some'* of the information held was exempt from disclosure under section 40(2)(third party personal data) of the FOIA, *'in so far as it relates to engagements that are personal in nature'*. The Cabinet Office stated that the information held which was not exempt under section 40(2) was exempt under section 35(1)(a)(formulation or development of government policy).
9. The Cabinet Office explained that, *'in this case, the exemption is engaged because the information requested relates specifically to engagements held by Mr Cummings in relation to his role in advising the Prime Minister on the subject of live issues of Government policy, rather than relating to data that is of a historic nature'*.
10. In respect of the public interest, the Cabinet Office recognised that *'in all aspects of this request, that there is a general public interest in disclosure of information'* and *'openness may increase public trust in and engagement with the Government'*. The Cabinet Office also recognised

that *'there is a specific public interest in Mr Dominic Cummings' engagements, in his role as chief advisor to the Prime Minister'*.

11. However, the Cabinet Office advised that these public interests needed to be weighed against the strong public interest that policymaking and its implementation are of the highest quality, and informed by a full consideration of all the options. The Cabinet Office contended that, *'there is a very strong public interest in maintaining a protected space in which to allow Ministers, with the support of their advisors, to develop government policy'*.
12. The Cabinet Office also contended that there is a strong public interest in Government *'being able to explore ideas, whether internally in the form of discussions between officials, or externally with third parties, to gauge the attitude and reaction to a proposed policy idea, which is a task often performed on the Minister's behalf by officials'*. The Cabinet Office stated that the removal of this space where advisors are free to seek input into Government policy development, could lead to a chilling effect where officials and third parties are less willing to engage in exploration of new policy ideas. As a result, the quality of debate underlying collective decision making would decline, leading to worse informed and poorer decision making.
13. The Cabinet Office further stated that:
'The task of advisors is to provide the highest quality advice to Ministers, and there is a very strong public interest in ensuring that the Prime Minister's chief advisor has the ability to ascertain the genuine views of both officials and third parties in relation to the matters of policy development that he is engaging in on the Prime Minister's behalf'.
14. Taking into account all the circumstances of the case, the Cabinet Office confirmed that they had concluded that the balance of the public interest favoured withholding the information requested.
15. The Cabinet Office also informed the complainant that whilst all of the information held that was not exempt under section 40(2) was exempt under section 35(1)(a), they could neither confirm nor deny (NCND) whether they held any information in relation to the request which, if it were held, would engage sections 24 (national security) and 27 (international relations) of the FOIA.
16. The complainant requested an internal review on 8 October 2020 and this was provided by the Cabinet Office on 13 November 2020.
17. The review found that the Cabinet Office had correctly dealt with the request. In respect of section 35(1)(a), the review largely repeated the wording of the original response, and stated that the strong public interest in ensuring that Mr Cummings *'has the ability to ascertain the*

genuine views of both officials and third parties in relation to the matters of policy development that he is engaging in on the Prime Minister's behalf was a decisive factor weighing in favour of withholding the requested information.

18. The Cabinet Office advised the complainant that they could, in the alternative to section 35(1)(a), rely on section 36(2)(b)(i) and (ii) and (c)(prejudice to effective conduct of public affairs) to withhold the requested information, on the grounds that its disclosure, in the opinion of the qualified person, would, or would be likely to inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.
19. The review advised that the public interest factors in favour of disclosure which were relevant to section 35 were equally relevant to section 36 but that the public interest factors in favour of withholding the information requested were stronger under the latter.
20. The Cabinet Office contended that it is strongly in the public interest that senior officials are able to engage with those who assist the Prime Minister, *'to understand the Prime Minister's requirements in the shaping of government policy, and to ensure that the Prime Minister is equipped to provide full and frank advice in order to support the Prime Minister's decision making'*. The Cabinet Office stated that the disclosure of the requested information *'may reveal information that could inhibit the free and frank provision of advice and views by special advisers to the Prime Minister as it would indicate those topics on which the Prime Minister was being advised'*.
21. The review contended that there is a strong public interest in the ability of Government officials to explore ideas with colleagues or third parties in order to gauge the attitude and reaction to a proposed policy idea. If advisers could not freely contribute to Government policy development it could lead to a chilling effect in which officials and third parties were less willing to engage in the exploration of new policy ideas. The quality of debate which underlay collective decision making would decline as a result.
22. Finally, the review found that the Cabinet Office had been correct to apply section 40(2) to exempt some of the information requested, and correct to neither confirm nor deny whether they held any information under sections 24(2) and 27(4) of the FOIA. The Commissioner addresses this NCND at the end of this notice.

Scope of the case

23. The complainant contacted the Commissioner on 17 November 2020 to complain about the way his request for information had been handled.
24. During the course of his investigation the Commissioner had sight of the withheld information, which comprised Mr Cummings' electronic calendar for the period covered by the request.
25. In submissions to the Commissioner, the Cabinet Office advised that staff in the Prime Minister's Office manage their engagements through the use of an electronic calendar function. This is accessible to the individual, and to any other party that they choose to share it with. A calendar records what engagements the individual was invited to attend or otherwise intended to have on a particular given day. Because the entries are made prior to the engagements occurring and are not retrospectively altered, it therefore follows that such entries do not necessarily accurately record what any individual actually did day to day.
26. The calendar is not intended to, and does not function as a definitive record as to what meetings etc the individual in question actually attended or with whom. The Cabinet Office advised that relevant information pursuant to that point might be held, for example, in wider records generated after a meeting, such as set out in minutes, or in a readout of a call, and held within their official records. However, the Commissioner considers that any such wider records would be outside the scope of the complainant's request, and if the complainant wished to obtain such information, he would need to make an appropriately worded request for the same.
27. Therefore, whilst not an actual 'diary' as such, the Commissioner is satisfied that the electronic calendar held by the Cabinet Office is sufficiently similar so as to fall within the scope of the complainant's request, and that the Cabinet Office were correct to treat it as such (i.e. as opposed to providing a 'not held' response to the request).
28. The Commissioner considers the scope of his investigation to determine whether the Cabinet Office correctly applied the stated exemptions to the information requested by the complainant.

Background

29. Dominic Cummings served as Chief Adviser¹ to then Prime Minister, Boris Johnson, between July 2019 and November 2020. Mr Cummings then left the Civil Service. Special advisers are temporary civil servants who can provide a political dimension to the advice and assistance available to Ministers.

Reasons for decision

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

30. Section 35(1)(a) of the FOIA states that:

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –

(a) The formulation or development of government policy'.

31. Section 35 is a class-based exemption. Therefore, if information falls within the description of a particular sub-section of 35(1) then such information will be exempt; there is no need for a public authority to demonstrate prejudice to these purposes.
32. The Commissioner is of the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
33. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
34. Ultimately, whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
35. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
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¹ [Prime Minister's former adviser Dominic Cummings to appear before joint inquiry on coronavirus - Committees - UK Parliament](#)

- 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.
36. The withheld information in this case consists of 16 pages of Mr Cummings' calendar. The calendar contains a number of appointments and meetings. The majority of these appointments and meetings (approximately 245) have been withheld by the Cabinet Office under section 35(1)(a).
37. In submissions to the Commissioner, the Cabinet Office stated that the exemption was engaged '*as it relates to engagements held by Mr Cummings in relation to his role advising the Prime Minister on live issues of Government policy*'. The Cabinet Office provided no further details or information as to how and why each relevant meeting or appointment related to the formulation or development of a particular Government policy or policies.
38. The Commissioner has considered the information to which the Cabinet Office has applied section 35(1)(a). Most of the appointment and meeting entries comprise two or three words. For the majority of this information, it is difficult for the Commissioner to identify any particular Government policy and it is certainly not possible for the Commissioner to determine the stage of formulation or development that each policy is at even where a policy is identifiable.
39. The information simply records the fact that a meeting or appointment has been scheduled between Mr Cummings and other individuals in respect of a particular issue or matter. The appointment and meeting listings provide no information or details as to what might have been discussed (or was scheduled to be discussed) at the same in terms of any given policy or policies.
40. Essentially, the listings in the calendar do not relate to the formulation and development of Government policies in any significant way beyond the fact that Mr Cummings was scheduled to attend a meeting or appointment which touched upon a policy in some unspecified way.
41. The Commissioner acknowledges that his guidance on section 35(1)(a) does refer to the broad interpretation of the term 'relates to'. However, the guidance states that:

'Information which relates to any significant extent to the formulation or development of policy will be covered, even if it also relates to policy implementation or other issues. Policy formulation does not have to be

the sole or main focus of the information, as long as it is one significant element of it'.

42. In the Commissioner's view it is the 'significance' of the withheld information which is key to a determination of whether section 35(1)(a) is engaged.
43. On examination of the calendar listings where the exemption has been applied, the Commissioner finds that the withheld information is lacking a necessary degree of significance to provide a sufficient enough link between the information itself and how a particular policy, whether specified in the entry or not, is formulated or developed.
44. The information which the Cabinet Office seeks to withhold under section 35(1)(a) merely records the fact that Mr Cummings may have attended a meeting or appointment. That information has been recorded in his calendar under a very brief and generalised description. The Cabinet Office have failed to make any attempt to identify the government policies in question and it is not for the Commissioner to undertake this role and work out how the exemption may apply. The Commissioner considers that the information to which the exemption has been applied lacks significance to the formulation or development of any particular policy and therefore the Commissioner considers that section 35(1)(a) is not engaged.
45. The Commissioner finds support for this position in the decision of the First Tier Tribunal in *Department of Health v The Information Commissioner EA/2013/0087*². In that case the FTT stated that:

'The proper application of these exemptions depends upon the nature of the connection intended by the use of the statutory phrase 'relates to'. The phrase 'relates to', read literally, is capable of indicating a very remote relationship. But in s35, as in s23, the function of the phrase 'relates to' is to demarcate the boundary of an FOIA exemption. It is clear, therefore, that it should not be read with uncritical literalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context, and,

A merely incidental connection between the information and a matter specified in a sub-paragraph of s35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter'.

² As subsequently upheld by the Upper Tier Tribunal and Court of Appeal

46. Having decided that the exemption provided by section 35(1)(a) is not engaged, the Commissioner is not required to consider whether it is in the public interest for the information to continue to be withheld or to be disclosed.

Section 35(1)(b)

47. The Cabinet Office has applied section 35(1)(b) to approximately 20 calendar entries.
48. Ministerial communications are defined by section 35(5) of the FOIA as being:

'any communications –

(a) Between Ministers and the Crown

(b) Between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(c) Between Assembly Secretaries, including the Assembly First Secretary,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales'.

49. The exemption covers information which 'relates to' ministerial communications, and this is interpreted broadly. This means that information does not have to be a ministerial communication itself; it will also be covered if it recounts or refers to a ministerial communication.
50. In this case, none of the calendar entries to which the Cabinet Office have applied section 35(1)(b) are ministerial communications in themselves. Rather, they simply record the fact that a meeting was scheduled to take place between the Prime Minister and one or more of his Ministers. However, since the entries refer to a ministerial communication, the Commissioner is satisfied that they are covered by the exemption, in the broad extent of its interpretation.
51. Section 35(1)(b) is subject to the public interest test, which means that the Commissioner must consider how much public interest there is in maintaining the exemption in this particular case, and balance this against the public interest in disclosure.

Public interest factors

52. There is no inherent or automatic public interest in withholding all information falling within this exemption. The relevance and weight of the public interest arguments depends entirely on the content and sensitivity of the particular information in question and the effect its disclosure would have in all the circumstances of the case.
53. Public interest arguments under section 35(1)(b) focus on protecting ministerial unity and effectiveness, and protecting ministerial discussions and collective decision making processes. This reflects the underlying purpose of the exemption.
54. The Cabinet Office provided the Commissioner with detailed submissions as to why they considered that the public interest supported withholding the relevant calendar entries under this exemption. However, as the Commissioner cannot discuss these submissions without revealing the withheld information, his analysis is contained in a Confidential Annex attached to this notice.
55. The Commissioner's finding as to the public interest balance in respect of those entries exempt under section 35(1)(b) is set out further in this notice, after his analysis of those entries exempt under section 36.

Section 35(1)(d)

56. Section 35(1)(d) covers information relating to the operation of ministerial private offices.
57. The Commissioner's guidance on this exemption explains that:

'All government ministers have their own private offices comprising a small team of civil servants. They form the bridge between the minister and their department. The private office's role is to regulate and streamline the ministerial workload and allow the minister to concentrate on attending meetings, reading documents, weighing facts and advice, and making policy decisions'.
58. Section 35(5) defines 'ministerial private office':

'Ministerial private office' means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister, or any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government'.

59. The Commissioner's guidance explains that the exemption covers information which 'relates to' the operation of the private office. This is generally interpreted broadly. However, this does not mean that all information with any link to a ministerial private office is covered. Section 35(1)(d) refers specifically to the operation of a ministerial private office, which itself is defined as providing administrative support. In other words, it covers information about administrative support to a minister.
60. Therefore, the exemption is interpreted fairly narrowly. In effect, it is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about ministerial priorities and similar issues.
61. The exemption is likely to cover information such as routine emails, circulation lists, procedures for handling ministerial papers or prioritising issues, travel expenses, information about staffing, the minister's diary, and any purely internal documents or discussions which have not been circulated outside the private office.
62. The Cabinet Office have applied section 35(1)(d) to approximately 50 of the entries in Mr Cummings' calendar. In submissions to the Commissioner the Cabinet Office confirmed that the relevant Ministerial private office is that of the Prime Minister (Boris Johnson at the time in question). Having considered the relevant calendar entries, the Commissioner is satisfied that section 35(1)(d) applies to them in their entirety as they clearly relate to the operation of the Prime Minister's private office.
63. The engagement of this exemption requires the Commissioner to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

64. In submissions to the Commissioner the Cabinet Office acknowledged that there is a public interest in greater transparency in Government and in particular around the operation of Ministerial private offices.

Public interest arguments in favour of maintaining the exemption

65. However, the Cabinet Office considered that there was a stronger public interest in favour of maintaining the exemption. The Cabinet Office advised that they consider that a Ministerial office requires space in which its staff can focus on efficiently managing the work of a Minister without undue external interference and distraction. The Cabinet Office stated that a special adviser who maintains an electronic calendar '*will want the assurance that they can maintain that calendar as a working*

tool without needing to give consideration to the impact its disclosure might have on relationships within the Prime Minister's Office or between the Prime Minister's Office and external stakeholders'.

66. The Cabinet Office also advised the Commissioner that they were mindful about the disclosure of the timings of meetings as they may reflect upon the working routine of the Prime Minister. They stated that *'there are potential security implications in the disclosure of such information which would complicate the scheduling of routine meetings that are held at particular times and in specific locations'*. The Cabinet Office considered that Ministerial office staff should be able to conduct work around such meetings without distraction of this kind.
67. The Cabinet Office also contended that were the information to be disclosed, the public *'would learn very little which was useful beyond what it will already understand about how the Prime Minister works'*.

Balance of the public interest arguments

68. The Commissioner considers that there is a legitimate and strong public interest in the public having knowledge of how Ministers, in particular the Prime Minister, use their time, particularly in the context of carrying out their official duties.
69. The Commissioner accepts that significant weight should be given to safe space arguments, in this instance the importance of providing a safe space for a private office to focus on managing a minister's work efficiently without external interference and distraction. The Commissioner considers that such safe space considerations have particular weight when it comes to the Prime Minister's private office. There is also a public interest in the protection of officials, since public accountability for decisions should remain with ministers and not fall on civil servants providing administrative support.
70. However, having had sight of the relevant calendar entries, the Commissioner does not consider that the disclosure of the information would encroach significantly into the safe space of the Prime Minister's private office. The information would not reveal any particularly sensitive or confidential details as to the operation of the Prime Minister's private office and the Commissioner is not persuaded that the disclosure of the information would pose any potential security implications or risks – the information is simply too unspecific and generalised, in terms of locations, to do so.
71. As the Prime Minister's Chief Adviser, Mr Cummings provided more than just administrative support to the Prime Minister and in the Commissioner's view his senior and influential position and role within the Government at the time attaches a greater degree of public

accountability than a more low ranking official providing purely administrative support to the Prime Minister.

72. In submissions to the Commissioner, the Cabinet Office contended that some of the information to which this exemption has been applied, would not come as a surprise to the public, and that the public *'would learn very little which was useful beyond what it will already understand about how the Prime Minister works from the disclosure of this information'*.
73. In respect of the specific calendar entries to which the Cabinet Office refers here, the Commissioner would agree. However, not all the relevant entries are relatively anodyne, and the Commissioner considers that the information contained in some of them would provide some additional transparency and public insight as to how Prime Minister Johnson used his time. The Commissioner considers that this transparency attracts a greater level of importance, given the events that were unfolding at the time, namely the emergence of Covid-19 and the threat of a global pandemic.
74. Therefore, on balance, taking into account the facts and circumstances of this particular case and the specific withheld information, the Commissioner is of the view that the public interest in disclosure of the relevant information outweighs the public interest in maintaining the exemption to the same.

Section 36(2)(b)(i), (ii) and (c)

75. In submissions to the Commissioner, the Cabinet Office confirmed that they maintained, in the alternative to section 35, that section 36(2)(b)(i)(ii) and (c) of the FOIA applied to the information contained in the calendar on the grounds that its disclosure, in the opinion of the qualified person, would, or would be likely to inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
76. Section 36(2) 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 –*
- (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'.*

77. In deciding whether section 36(2) is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one.
78. 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.
79. 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 4 November 2020, as well as the submissions for the qualified person's consideration which were provided to Ms Smith on 2 November 2020.
80. The Minister's reasonable opinion was that the exemptions at section 36(2)(b) and (c) were engaged because Ministers, and those acting on their behalf, including special advisers, must be able to provide full and frank advice to support the Prime Minister's decision making. This is a critical part of the effective conduct of public affairs, and it should not be constrained by undue concern as to how it will be perceived or interpreted if subject to scrutiny by external parties.
81. Sections 35 and 36 are mutually exclusive and so information which is exempt under section 35 cannot also be exempt under section 36. Having considered those entries in the withheld information which are not exempt under sections 35(1)(b) and (d), and taking into account the qualified person's reasonable opinion, the Commissioner is satisfied that sections 36(2)(b)(i)(ii) are engaged to the withheld information. However, in order for section 36(2)(c) to apply, the prejudice claimed must be different to that claimed under section 36(2)(b)(i.e. must 'otherwise prejudice').
82. In the submissions prepared for the Minister, the Cabinet Office advised that disclosure of the calendar '*may reveal information that could inhibit the free and frank provision of advice and views*' by special advisers to the Prime Minister'. The Cabinet Office also advised that the removal of the safe space where advisers are free to seek input into government

policy development *'could lead to a chilling effect where officials and third parties are less willing to engage in exploration of new policy ideas'*.

83. In her reasonable opinion, the Minister stated that disclosure of the requested information *'would, or would be likely to cause prejudice, for the purposes of the provisions of section 36, 'because it is strongly in the public interest that there is a protected space to enable those charged with providing direct advice (such as senior advisers to the Prime Minister) to be able to engage with both the Prime Minister and colleagues across Whitehall and beyond'*.
84. The Commissioner considers that the prejudice identified here, what is commonly termed the *'chilling effect'* is one which is already caught by the provisions of sections 36(2)(b)(i) and (ii).
85. In subsequent submissions to the Commissioner, the Cabinet Office stated that they considered that Ministers and advisers should be able to freely determine when to schedule meetings (and how) for the purposes of developing policy and carrying out the routine business of government. The Cabinet Office submitted that the disclosure of the calendar could give rise to the expectation that such calendars would be disclosed in the future and on a routine basis. The Cabinet Office contended that this *'could have a significant impact on how a special adviser in future handles his or her appointments, particularly in handling crises as arose with the increase in COVID-19 cases in March 2020'*.
86. The Cabinet Office contended that disclosure of the withheld information *'could encourage advisers (in future) to focus unduly on the perception of his or her actions rather than the effective management of his or her own time and work'*. The Cabinet Office stated that this would clearly inhibit the free and frank provision of advice and the exchange of views for the purposes of deliberation. The Cabinet Office also considered that it would have a prejudicial effect on the conduct of public affairs (for the purposes of section 36(2)(c)) in that *'the routine disclosure of meeting dates and lengths would impact upon how Ministers conduct themselves'*.
87. Finally, the Cabinet Office noted that the disclosure of the requested information would give an insight into the demands on the time of the Prime Minister and senior officials. The Cabinet Office contended that *'the disclosure of such information would undermine relationship management with stakeholders and encourage officials to be unduly concerned with stakeholder relationships rather than the proper conduct of government'*. The Cabinet Office considered that such an outcome would be likely to prejudice the effective conduct of public affairs for the purpose of section 36(2)(c).

88. As noted above, in their submissions to the Commissioner, the Cabinet Office provided expanded detail and explanation as to how disclosure of the withheld information would be likely to 'otherwise' prejudice the effective conduct of public affairs.
89. However, in order for section 36(2)(c) to be engaged, it is the qualified person's opinion which must identify this 'otherwise' prejudice. In this case the Minister's opinion (nor the submissions upon which she based that opinion) did not identify this 'otherwise' prejudice (i.e. a prejudice not already covered by the provisions of sections 36(2)(b)(i) and (ii)). Consequently, the Commissioner does not consider that section 36(2)(c) is engaged in this matter.
90. Section 36 is a qualified exemption and in accordance with the requirements of section 2 of the 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.

Public interest arguments in favour of disclosing the withheld information

91. As noted, in their substantive request response of 8 October 2020, the Cabinet Office stated that *'in all aspects of this request, that there is a general public interest in disclosure of information'* and that *'openness may increase public trust in and engagement with the Government'*. The Cabinet Office also recognised *'that there is a specific public interest in Mr Dominic Cummings' engagements, in his role as chief advisor to the Prime Minister'*.
92. The Commissioner considers (as the Cabinet Office have recognised and accepted), that there is a specific public interest in Mr Cummings' engagements during his role as Chief Adviser to the Prime Minister. Mr Cummings had a particularly influential and powerful position as Chief Adviser to the Prime Minister. That influence and importance in the formulation and implementation of government policy, became of particular and pressing public interest during the months covered by the complainant's request, as the Government deliberated upon and decided how to deal with the then unfolding Covid-19 pandemic.

Public interest arguments in favour of maintaining the exemption

93. In the internal review of 13 November 2020, the Cabinet Office stated that the public interest factors in favour of disclosure which were relevant to section 35 were *'equally relevant'* to section 36. However, the Cabinet Office stated that the public interest factors in favour of withholding the requested information under section 36 *'are stronger'*.
94. The Cabinet Office contended that it is strongly in the public interest that senior officials are able to engage with those who assist the Prime

Minister, 'to understand the Prime Minister's requirements in the *shaping of government policy*' and to ensure that the Prime Minister was appropriately equipped in his decision making.

95. The Cabinet Office advised that the disclosure of the requested information '*may reveal information that could inhibit the free and frank provision of advice and views by special advisers to the Prime Minister as it would indicate those topics on which the Prime Minister was being advised*'.
96. The review contended that there is a strong public interest in the ability of Government officials to explore ideas with colleagues or third parties in order to gauge the attitude and reaction to a proposed policy idea. If advisers could not freely contribute to Government policy development it could lead to a chilling effect in which officials and third parties were less willing to engage in the exploration of new policy ideas. The quality of debate which underlay collective decision making would decline as a result.
97. The Cabinet Office contended that '*if Ministers felt that they could not express themselves properly because they knew that the timing of a meeting was publicly known, it would be likely to have a prejudicial impact*'. The Cabinet Office also contended that '*if Ministers were to schedule meetings for purposes chiefly associated with public perception, then it would similarly be likely to have a prejudicial impact*'. The Cabinet Office advised the Commissioner that they considered that the public interest was in favour of Ministers being able to conduct themselves without such concerns.

Balance of the public interest arguments

98. As the Upper Tribunal recently confirmed in *Montague v The Information Commissioner and The Department of Trade (UA – 2020- 000324 & UA-2020-000325) [13 April 2022]*³, the time for judging the competing public interests in a request is the time when the public authority should have given a response in accordance with the timeframe required by the FOIA. Therefore the appropriate time in this case is 22 July 2020 (i.e. 20 working days after the complainant's request of 23 June 2020).
99. At the time of the complainant's request there had been considerable criticism and concern expressed about the Government's handling of the

³ [IN THE UPPER TRIBUNAL \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/104222/20220413-Upper-Tribunal-Decision-2020-000324-2020-000325.pdf)

early stages of the pandemic, most notably the timing of the first full lockdown on 23 March 2020. The Commissioner considers that the withheld information carries a strong and specific public interest in disclosure, since it would give an indication as to how alert the Government was to the threat posed by the pandemic, what actions and steps were being taken to address it, and when.

100. As Chief Adviser to the Prime Minister in the months before and during the Covid-19 emergency, Mr Cummings was at the very centre of Government and events. Consequently, the Commissioner considers that his calendar of scheduled activities between January and March 2020, would provide important and valuable transparency and accountability as to what actions and steps the Government was taking during this period to address and respond to the then unfolding global pandemic.
101. The Commissioner of course recognises that the calendar entries of one individual cannot provide *complete* transparency and information as to the Government's response to the serious threat posed by the spread of Covid-19. However, such was Mr Cummings' key position and role at the time, the Commissioner is of the view that his calendar entries would provide a significant and substantial degree of transparency and accountability as to the Government's response.
102. The Commissioner acknowledges and appreciates that the information requested was of recent provenance at the time of the request (the calendar entries for March being only three months old in late June 2020). Ordinarily, such a short time gap between the information requested and the date of the request would be a factor favouring maintaining the exemption to withhold the information. However, the Commissioner considers that the information requested, and the public interest which it carries, must be seen within the context of the Covid-19 pandemic which was unfolding at the time of the request.
103. In the three-month period between the end of March 2020 and late June 2020, the situation as regards the spread of Covid-19 and the action taken by the Government to contain and manage the virus was a fast changing and dynamic one, with daily briefings being given to the public by the Prime Minister or Cabinet Ministers, accompanied by scientific and medical advisers. Government actions and decisions were informed and adapted by the rapid accumulation of knowledge as to the virus properties, its transmissibility and effect upon those infected. By late June 2020, the restrictions on social mixing and gathering which had been imposed by the Prime Minister in his announcement of the first

national lockdown on 23 March 2020 had begun to be eased, with most lockdown restrictions lifted on 4 July 2020⁴.

104. Consequently, the policy challenges and demands which faced the Government in late March 2020, in terms of its pandemic response, were not the same as those which prevailed in late June 2020. The Commissioner considers that this extraordinary crisis and the Government's rolling response to it, means that the three-month period separating the request from the period covered by its scope, provides a greater degree of distance than would usually be the case.
105. As regards those calendar entries which relate to areas of Government policy unrelated to Covid-19, the Commissioner is sceptical (for the reasons given below) as to the strength of the public interest arguments advanced by the Cabinet Office in this case.
106. In both their internal review of 13 November 2020 and later submissions to the Commissioner, the Cabinet Office contended that the disclosure of the requested information '*may reveal information that could inhibit the free and frank provision of advice and views by special advisers to the Prime Minister as it would indicate those topics on which the Prime Minister was being advised*'. The Commissioner would agree and accept that disclosure of the withheld information would certainly give a good indication as to those topics on which the Prime Minister was being advised. However, many of those topics would come as no surprise to members of the public.
107. For example, were the Prime Minister's Chief Adviser to attend a meeting concerning a foreign country with a particularly controversial or high public profile, and an entry to state nothing more than the country's name, that would not in itself reveal any sensitive information, much less inhibit the free and frank provision of advice and views by special advisers. Were such an entry to record the details of that meeting and what was discussed (or scheduled to be discussed) then that would be a different matter and the Commissioner would agree that the disclosure of such information could be considered to be potentially sensitive and could act to inhibit the free and frank provision of advice and views by special advisers in future.
108. If the withheld information was of this nature then there would be strong public interest grounds for maintaining the exemption to the same. However, the withheld information does not contain or reveal

⁴ A second national lockdown would later be imposed on 5 November 2020, and a third between January and March 2021.

such detail. As one would expect from a calendar, the entries simply list Mr Cummings' scheduled meetings with Ministers or third-party individuals or stakeholders external to government. They do not divulge or indicate the intended purpose or approach to be taken at the relevant meeting by Mr Cummings, from a government policy perspective.

109. Nor is the Commissioner persuaded by the Cabinet Office arguments as to a chilling effect. Civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. But in addition to this, as noted above, the withheld information does not contain the views or advice of Mr Cummings (or any other named individual) and so its disclosure is unlikely to have the chilling effect contended by the Cabinet Office.
110. The contention that disclosure of the requested information could give rise to the expectation that such calendars would be disclosed in the future '*and on a routine basis*', is not one which finds support with the Commissioner. As the Cabinet Office is aware, the Commissioner approaches and decides each case on its own individual facts and circumstances and the Commissioner's view that one calendar should be disclosed in a particular case because of case specific public interest factors, does not mean that a similar type of information would necessarily be found to be appropriate for disclosure in another case.
111. The Commissioner recognises that there is a risk that the disclosure of the requested information in this case could encourage future special advisers to focus on the perceptions of their actions rather than the effective management of their work, and that such an outcome would not be in the public interest. However, the above expectation that special advisers would not be so easily deterred from undertaking their duty, combined with the fact that the withheld information does not contain details of their actions, means that the Commissioner considers this risk to be a relatively remote and not significant one.
112. The Commissioner considers that the information contained in the calendar entries carries a legitimate and important public interest in disclosure. They would indicate, but without revealing sensitive information, which policy topics or issues were of particular interest to Mr Cummings, and by extension the Prime Minister and the Government, during the three-month period before the Government's agenda became dominated by dealing with the pandemic. Whilst the Commissioner acknowledges that some of these policy topics or issues would be of little surprise to the public, given what was being reported in the news and media at the time, the disclosure of the information would nevertheless serve a useful public interest in terms of transparency and accountability as it would provide an indication as to

the level of priority and importance given to some topics or issues by the Prime Minister.

113. However, the Commissioner considers that the withheld information also carries a further and more compelling public interest in disclosure, in that it would provide the public with an important and valuable insight into the extent to which the Government was aware of the emerging threat from Covid-19 in the early months of 2020 and the actions taken to address this, in the weeks and months prior to the implementation of social restrictions. Ultimately, it is this strong and specific public interest in transparency and accountability which the Commissioner considers makes a compelling case for disclosure and which outweighs those public interest factors which favour maintaining the exemption to the information (some factors which, in any event, do not have clear application or relevance to the actual information in question).
114. However, the Commissioner considers that in the case of a small number of (non-Covid-19 related) entries in the calendar, the public interest balance favours maintaining the exemption to the specific information concerned. The Commissioner details the reasons for this in a Confidential Annex attached to this notice.
115. The Commissioner would note that if these entries had not already been exempt from disclosure under section 36, he would nevertheless have found them to be exempt under other exemptions applied by the Cabinet Office in this case, for example, section 40(2).
116. Similarly, in respect of those calendar entries which concern meetings with individuals with a high public profile, and who could not be said to have a reasonable expectation of privacy as regards their *contact* with government (as opposed to the details of that contact), the Commissioner, had he gone on to consider section 40(2), would have found (as he has in respect of section 36) that disclosure was necessary to meet the legitimate interests of transparency and accountability.
117. In conclusion the Commissioner is satisfied that whilst section 36 applies to those entries in the calendar not otherwise exempt under the aforementioned provisions of section 35, the public interest balance in this particular case favours disclosure of the information, with the exception of those calendar entries specifically referenced in the Confidential Annex.
118. For the same reasons as set out above in respect of section 36, the Commissioner also finds that the public interest balance in respect of the calendar entries withheld under section 35(1)(b) favours disclosure of that information, with the exception of those entries specifically referenced in the Confidential Annex.

Sections 24(2) and 27(4)

119. In their response of 8 October 2020 to the complainant's request the Cabinet Office stated that they could NCND whether they held any information in relation to the request which, if it were held, would engage sections 24 (national security) and 27 (international relations) of the FOIA. They maintained this response in their internal review of 13 November 2020 and subsequently in submissions to the Commissioner.
120. However, if a request is for specific information and the public authority has confirmed that they hold that information, then there is no scope for relying on NCND provisions because there is no *additional* information within scope of the request. In this case the complainant's request was for specific information (copies of Mr Cummings' diary appointments from January to March 2020). The Cabinet Office confirmed that they held this information. It would therefore be illogical for the Cabinet Office to NCND whether they hold that same information under other exemptions. Consequently, the Commissioner is satisfied that neither exemption applies in this case.

Other matters

121. The Commissioner is disappointed and concerned by the blanket approach taken by the Cabinet Office towards the exemptions in this case. The use of section 35 or section 36 in respect of a request for a ministerial or senior official's diary, is not unusual or inappropriate, given the sensitive nature of some of the information usually recorded in the same. However, it is well established and expected that public authorities take a proportionate approach to requests for such information, exempting from disclosure (usually via suitable redactions) only that information which is sensitive or confidential.
122. In this case the Commissioner considers that some of the information contained in the calendar entries could, and should, have been disclosed to the complainant immediately rather than being withheld under sections 35 and (in the alternative) 36. For example, at the time of the Cabinet Office's substantive response to the request on 8 October 2020, some of the information contained in the calendar had been proactively published by the Government, and in a greater level of specification. The Commissioner details some examples in the Confidential Annex.
123. The Commissioner would impress upon the Cabinet Office the need to adopt an appropriately careful and proportionate approach to requests for such 'diary' information, rather than withholding such information in blanket fashion under section 35 (or section 36).

Right of appeal

124. 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

125. 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.

126. 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
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