

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 8 July 2020

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

Decision (including any steps ordered)

1. The complainant has requested information prepared for Gordon Brown in the event that he became Prime Minister again following the 2010 general election. The Cabinet Office eventually sought to rely on section 36 (prejudice to the effective conduct of public affairs) as its basis for doing so. It failed to conduct an internal review.
2. The Commissioner's decision is that the Cabinet Office is not entitled to rely on section 36. In failing to provide a response in accordance with its timeliness obligations under FOIA, it contravened section 10 of the FOIA
3. For reasons which are unique to the circumstances of this case, the Commissioner does not require the Cabinet Office to take steps in respect of this request.

Request and response

4. On 27 August 2018, the complainant requested information of the following description:

"Please provide a copy of all documents prepared between 1st January 2010 and 12th May 2010 to be provided to Gordon Brown in the eventuality that he was re-elected Prime Minister at the 2010 general election.

Please send me this information by e-mail to [email address provided], in a machine readable format such as .csv or .xlsx where appropriate.

If you have any queries about this request please contact me on [telephone number provided].

If you are encountering practical difficulties complying with this request, please contact me so that we can discuss the matter and if necessary I can modify the request.”

5. The Cabinet Office wrote to him on 25 September 2018 to explain that it needed further time to consider the balance of public interest in respect of section 35 but undertook to provide him with a response by 23 October 2018. It then provided its response to his request on 27 September 2018 but sought to rely on section 36(2)(b)(i) and (ii) as its basis for refusing to provide the requested information.
6. The complainant requested an internal review on 28 September 2018. The complainant sought the Commissioner’s intervention on this in March 2019. The Commissioner wrote to the Cabinet Office about this on 26 April 2019. However, this did not appear to yield a response.

Scope of the case

7. The complainant contacted the Commissioner on 8 August 2019 having previously written to the Commissioner to advise that the Cabinet Office had not responded to his request for internal review. Despite the Commissioner’s intervention in April 2019 as noted above, the Cabinet Office had not responded to the complainant’s request for internal review.
8. The Commissioner has commented further on the Cabinet Office’s failure to conduct an internal review in the Other Matters section of this Notice. The Cabinet Office also failed to respond to the Commissioner’s enquiries about this request. The Commissioner served an Information Notice under section 51 of the FOIA on 18 December 2019 requiring the Cabinet Office to provide a response. It failed to meet the deadline for response to this Notice but responded shortly after. The Commissioner has also commented on this in the Other Matters section of this Notice.
9. The Commissioner has considered whether or not the Cabinet Office is entitled to rely on section 36 as its basis for withholding the information described in the request.

Reasons for decision

Section 36 – Effective conduct of public affairs

10. Section 36(2) provides that –

'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

11. Section 36 can only be engaged if, in the reasonable opinion of the qualified person, disclosure would result in any of the effects set out in section 36(2) of the Act

12. The Commissioner's guidance explains that the opinion does not have to be one with which the Commissioner would agree, nor the most reasonable opinion that could be held. The opinion must be in accordance with reason and not irrational or absurd.

13. The Commissioner expects public authorities to provide her with evidence that the qualified person has given an opinion preferably with evidence to show what the qualified person looked at before reaching that opinion. The Cabinet Office explained that it was dealing with a similar request at the same time regarding information prepared for David Cameron for the 2010 election. It supplied evidence of what the qualified person considered in respect of that request and evidence of the opinion given on 11 September 2018.

14. The Cabinet Office explained that it sought to rely on section 36 when it finally responded to the complainant's initial request because "we believed [this opinion] was sufficiently similar to cover the request for the same advice to Gordon Brown at the same election".

15. The Commissioner profoundly disagrees with this position.

16. Firstly, while there may be some similarities between information prepared for a Gordon Brown premiership and information prepared for a David Cameron premiership following the 2010 general election, the Commissioner is aware from previous cases that the information in one bundle for one prospective Prime Minister is not exactly the same as the information prepared in the other bundle for another prospective Prime Minister.

17. Secondly, the Commissioner would observe that even if it was the same information (and she is satisfied that it is not) she would have expected the Cabinet Office to have carried out at least a perfunctory exercise where it sought the qualified person's opinion in respect of this specific request made at broadly the same time as the other request. To do otherwise is to misuse the process by which section 36 can be engaged.

Section 36 – Conclusion

18. The Commissioner has therefore concluded that the qualified person's opinion in this case is not reasonable because it was not sought nor was it ever provided in respect of this request. In reaching this view she has also had regard for her own guidance on section 36.¹ Because the Commissioner is satisfied that section 36 is not engaged, she has not gone on therefore to consider the balance of public interest in maintaining this exemption.
19. The Commissioner would stress that she has reached the conclusion that section 36 is not engaged because the Cabinet Office failed to demonstrate that it had obtained the qualified person's reasonable opinion in respect of this request. It erroneously believed that a reasonable opinion given in respect of one request could be used for another. She will not speculate what her conclusion would have been as to the reasonableness of the qualified person's opinion with regard to this request because she did not ever receive it.
20. The logical next step from this conclusion is that the Commissioner would order the disclosure of the information. However, she has concluded that in the unique circumstances of this case she cannot.
21. The Cabinet Office sought to argue in mitigation regarding the delays that arose in this matter – there was no internal review and the Cabinet Office did not respond to the Commissioner's Information Notice in time – that the original handler of the request had left that department and it, the Cabinet Office, was unable to find the hard copy of information that the original handler of the request had used when preparing their response. Seeking to resolve this had given rise to the delay, it explained.

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

22. The Cabinet Office then set out a litany of technical problems it would have in retrieving archived electronic versions of the documents in question including the prohibitive costs involved in doing so due to these problems. The Commissioner has not set out on the face of this notice what those problems are because they related to technical specifics. The Commissioner is prepared to accept that they apply in this case.
23. However, the Commissioner is extremely disappointed to learn of such records management problems in respect of this information. She referred the matter to her criminal investigations team to see if this constituted a criminal breach of the legislation under section 77 of the FOIA – deliberate destruction of requested information or deliberate blocking of a request. Although the problems described above are highly regrettable, the fact that the information still exists, albeit in electronic form, does not show evidence of deliberate destruction or loss of information.
24. While she has considered whether she could substitute the application of section 12 for section 36, she notes that the Cabinet Office did not explicitly choose to do so although it gave some information about the cost of compliance in this case since it had lost hard copies of the information in question. Had it done so, she would, with considerable regret given the circumstances and the Cabinet Office's own failures, have accepted an argument that the cost of complying with the request exceeds the appropriate limit for doing so set in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004².

Section 10 – Time for compliance

25. Section 10 of the FOIA states that responses to requests made under the FOIA must be provided "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
26. By virtue of section 17(2) a public authority can have further time to consider the balance of public interest on the application of an exemption it seeks to rely on but it must tell the complainant about this including provision of an estimated date by which it will do so.
27. In this case, the Cabinet Office did write to the complainant to explain that it needed to consider the balance of public interest in accordance with section 17(2) (see above). However, it did not cite the exemption it

² <http://www.legislation.gov.uk/uksi/2004/3244/contents/made>

sought to rely on in its refusal letter of 27 September 2019. It explained to the Commissioner that this happened due to “an administrative error within the FOI team, arising from the confusion between section 35 and section 36.” The Commissioner is uncertain what sort of administrative error arose and is surprised that a public authority that is very experienced in dealing with section 35 and section 36 would experience such an error. It is also experienced in dealing with requests for so-called Day One information of this type because the Commissioner has previously dealt with cases about this sort of information.

28. The Commissioner calculates that the Cabinet Office did not provide its response until 23 working days after the day following receipt of the request. It was not entitled to extend the time for compliance with the request in order to consider the balance of public interest because it can only do so where it informs the requester within 20 working days what exemption it is seeking to rely on.

Section 10 - conclusion

29. In failing to issue a response to the request within 20 working days, the Cabinet Office has breached section 10 of the FOIA.

Other matters

30. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint. In other words, it should have an internal review process although it is not under a legal obligation to provide one.
31. As the Commissioner has made clear on a number of occasions, she considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

32. In this case, the request for an internal review was made on 28 September 2018 but no internal review was undertaken. The Cabinet Office sought to explain in mitigation that delay arose because it was trying to locate the requested information. The Commissioner finds that this delay is unacceptable particularly given that it failed to engage with the Commissioner in a timely manner.

33. Given protracted delays in obtaining a response from the Cabinet Office, the Commissioner served an Information Notice on 18 December 2019. She is disappointed to note that it was necessary to do so and that the Cabinet Office did not respond to the Commissioner's informal attempts at engaging with it. She is also disappointed that the Cabinet Office did not meet the deadline for response to the Information Notice although it responded shortly after.

Right of appeal

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

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

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

35. 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.
36. 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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