

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 6 January 2022

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the Microsoft Office 365 licencing agreement.
2. The Commissioner's decision is that the Cabinet Office correctly applied section 41(2) FOIA to neither confirm nor deny (NCND) that it held information within the scope of the request.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

Request and response

4. On 17 November 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

"Regarding the department's Microsoft Office 365 licencing agreement;
 1. *Is the department currently using the "FromSA" product SKU in its licencing agreement?*
 2. *What is the date of the department's next agreement renewal for this subscription?*
 3. *Did the department "relinquish" the ownership of its prior perpetual licences in order to obtain discounts from Microsoft?"*
5. The Cabinet Office responded on 19 January 2021 and provided information in response to questions 1 and 3. However, it refused to provide the information requested at question 2 citing section 31(1)(a) as its basis for doing so.

6. On 22 December 2020 the complainant made a further request for information as follows:
 1. *Do any of the CCS/Microsoft Agreements refer to the relinquishment of perpetual licences whether or not discounts are involved?*
 2. *Do any of the CCS/Microsoft Agreements refer to the retention of perpetual licences, or clause (iii) of the From SA section of the Microsoft product terms, whether or not discounts are involved?*
 3. *If the answer to either 1 or 2 is "yes", please provide copies of those documents."*
7. The Cabinet Office responded on 19 January 2021 and refused to confirm or deny that the information was held citing section 41(2) FOIA.
8. Following an internal review the Cabinet Office wrote to the complainant on 26 March 2021 and maintained its position.

Scope of the case

9. The complainant contacted the Commissioner on 19 May 2021 to complain about the way their request for information had been handled. On 12 November 2021 the Commissioner wrote to the complainant advising that his investigation would focus on the Cabinet Office's application of section 41(2). On 17 November 2021 the complainant contacted the Commissioner to confirm they concurred.
10. The Commissioner therefore considers the scope of his investigation to be to determine if the Cabinet Office has correctly applied the exemption under section 41(2) from the duty to confirm or deny whether information is held.
11. Due to the nature of this case, the Cabinet Office asked the Commissioner not to reproduce in this notice all of its submissions in support of the application of section 41(2). Therefore, although the Commissioner has considered the public authority's submissions in full, the brevity of his findings below is an unavoidable consequence of complying with the public authority's request, which he considers to be reasonable in the circumstances as to do so, could in itself, confirm or deny that information is held.

Background

12. The UK government's Memorandum of Understanding (MoU) - called the Digital Transformation Arrangement (DTA) - was signed in 2018 and ran until April 2021. It allowed all eligible public sector organisations to benefit from discounted pricing and beneficial terms for eligible public sector organisations to use the Azure cloud. The DTA has featured packages around cloud security and compliance, as well as Office 365, Teams video conferencing and Windows 10.
13. The Azure Pricing Arrangement was agreed in 2020 as an addendum to the existing DTA MoU between Microsoft and the Crown Commercial Service (CSS).
14. The MOU in place at the time of the FOI request expired in April 2021. The UK government signed a new three-year MOU to enable public sector organisations to continue to benefit from cloud computing and business applications.
15. Both the previous and current MOU were negotiated by Microsoft and CCS, an Executive Agency of the Cabinet Office and the UK's largest public procurement body.
16. The MOUs between Microsoft and the UK government have increasingly focused on cloud services since the Government launched its Cloud First policy in 2013. The policy was reassessed in 2019 and remains a flagship technology policy. The current MOU builds on the Government's One Government Cloud Strategy and the principles of the Digital Data and Technology strategy, which focuses on modernising technology, strengthening cyber defence, improving digital skills and embedding a culture of innovation. It also supports more recent issues such as supporting the UK's recovery from the COVID-19 pandemic, sustainability, and the social value agenda.
17. The Cabinet Office considers that confirming or denying that the requested clauses exist would be a breach of confidence that it believes would be actionable in court. Consequently, it considers that a "neither confirm nor deny" response is the most appropriate in these circumstances. The DTA has a bearing on multiple public sector organisations. Breaching confidentiality would affect Crown Commercial Service's (CSS) ongoing ability to negotiate agreements of this kind with suppliers.

Reasons for decision

Section 1 – general right of access

18. Section 1(1)(a) of the FOIA states that an individual who asks for information is entitled to be informed whether that information is held. This is known as “the duty to confirm or deny”. However, some of the exemptions within the FOIA apply to the duty to confirm or deny in certain circumstances.

Section 41 – information provided in confidence

19. Section 41(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

20. In other words, if providing confirmation or denial would, of itself, constitute an actionable breach of confidence, the Cabinet Office is not obliged to do it.

21. Section 41(2) should be read in conjunction with section 41(1) which applies where disclosure of requested information would constitute an actionable breach of confidence. It explains more about the circumstances in which a disclosure can be actionable.

22. Section 41(1) provides that:

“Information is exempt information if

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

23. Section 41(2) is an absolute exemption so the Commissioner does not have to consider the balance of the public interest to determine whether the information can be disclosed. However, the common law duty of confidence contains an inherent public interest test. The Commissioner has therefore also considered this in order to decide if the Cabinet Office can rely on section 41(2).

24. To reach a decision on whether section 41(2) applies, the Commissioner will first determine whether the requested information, if held, would

have been obtained by the Cabinet Office from a third party as described in section 41(1)(a).

25. In order to determine whether section 41(2) applies, it is not necessary for the Commissioner to know whether the requested information is held or not, but he does need to determine whether the information, if held, would have been obtained from a third party by the Cabinet Office.
26. The exemption does not cover information that has been generated by the authority itself. The information must have been given to the public authority by another person. As the Commissioner's guidance on section 41 stated, "In this context the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity."¹
27. The Commissioner has considered the conditions under section 41(1) in order to decide if the Cabinet Office is entitled, under section 41(2), to neither confirm nor deny that it holds the requested information.

Was the information, if held, obtained from a third party?

28. In its submission to the Commissioner the Cabinet Office has confirmed that, if held, the information would have been obtained from a third party.

Would disclosure constitute an actionable breach of confidence by another person?

29. In considering whether disclosure of information, if held, would constitute an actionable breach of confidence, the Commissioner considers the following:
 - Whether the information, if held, has the necessary quality of confidence.
 - Whether the information, if held, was imparted in circumstances importing an obligation of confidence; and
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-inconfidence-section-41.pdf>

30. With regards to the first limb of this test, the Commissioner considers that for information to have the necessary quality of confidence it must not be trivial or be otherwise available to the public.
31. The Commissioner is satisfied that, if held, information provided to the Cabinet Office would have the necessary quality of confidence because it is not otherwise accessible and it is more than trivial.
32. With regards to the second limb of the test, the Commissioner considers that an obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself and/or the relationship between the parties.
33. The Cabinet Office stated, if held, there would be an explicit duty of confidence and has provided the Commissioner with further arguments in support of its position.
34. Turning to the third limb of the test, the Cabinet Office has argued that confirming that the requested information is or is not held would cause a specific detriment to either the party which provided it or any other party. The Cabinet Office considers this criterion to be met as, confirming or denying whether the information is held would be more likely than not to adversely impact interests of those parties.
35. As the Commissioner is satisfied that the conditions under section 41(1)(a) and 41(1)(b) are met, he is also satisfied that the Cabinet Office is correct not to confirm or deny whether it holds the requested information under section 41(2) because, if held, it is information that would have been provided in confidence.
36. Section 41 of the FOIA is an absolute exemption and not subject to the public interest test. However the common law duty of confidence contains an inherent public interest test. This test assumes that a public authority should not confirm or deny it holds the information unless the public interest in confirming or denying outweighs the public interest in maintaining the duty of confidence.
37. In other words, the test is the reverse of that normally considered under the FOIA and the emphasis is on maintaining the duty of confidence unless it can be proved there is a stronger public interest in confirming or denying the information is held.

Public interest in maintaining the duty of confidence

38. The Cabinet Office has considered whether there is a public interest defence to an action for breach of confidence. It is satisfied that confirming or denying if the requested information is held would constitute an actionable breach of confidence e. The courts have

maintained that there is a very strong general public interest in protecting confidences and this could only be superseded by an overriding public interest in disclosure. The Cabinet Office argued that it would not be able to mount a successful defence by relying on the public interest should it confirm or deny the information is held.

39. An overriding public interest in disclosure of the information (if held) would be present if, for example, the information revealed iniquity or fraud, or disclosure was necessary to protect the public from harm. These are among the conventional public interests that the Courts have accepted as outweighing the public interest in maintaining a confidence.
40. None of these factors are present and the Cabinet Office therefore considers that the general public interest in having information made available is not a sufficiently compelling public interest capable of overriding the very strong public interest in maintaining the confidentiality of this information.
41. The Commissioner is satisfied for the reasons provided by the Cabinet Office that in the circumstances, it would be highly unlikely for it to be able to successfully defend confirmation or denial that the information is held on public interest grounds.
42. The Commissioner therefore finds that the Cabinet Office was entitled to rely on the exemption at section 41(2).

Right of appeal

43. 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

44. 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.
45. 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

Susan Duffy
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