

## Freedom of Information Act 2000

### Decision notice

**Date:** 5 October 2016

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall

London

SW1A 2AS

#### Decision (including any steps ordered)

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1. The complainant requested information relating to correspondence between certain UK government officials and a named individual (Person A). The Cabinet Office denied holding some of the information, and refused to disclose what it did hold under section 40(2) of the Freedom of Information Act 2000 (the Act) as it was third party personal data, and its disclosure would breach one of the data protection principles.
2. During the course of the Commissioner's investigation the Cabinet Office changed its position and instead refused the request under section 38(1) of the Act, because disclosure would endanger the safety and wellbeing of Person A, and Person A's family.
3. The Commissioner's decision is that the requested information is exempt under section 38(1) and that the balance of the public interest test favours maintaining the exemption.
4. The Commissioner also finds that the Cabinet Office breached section 17(1) of the Act as it did not issue its refusal notice within the statutory time limit.
5. No steps are required.

## Request and response

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6. On 6 August 2015, the complainant wrote to the Prime Minister's Office and requested information in the following terms:

*"1. Copies of all correspondence between Ameet Gill (advisor to the Prime Minister) and [Person A] that has taken place in 2015;*

*2. All correspondence between David Cameron and [Person A] that has taken place in 2015, 2014, and 2013."*

7. The Prime Minister's Office responded on 15 September 2015. It stated that no information was held for item 2 of the complainant's request, and that a small amount of information was held for item 1 of the request. The Prime Minister's Office refused to disclose this information under section 40(2) of the Act.
8. The Cabinet Office conducted the internal review on behalf of the Prime Minister's Office, as it is the government department with responsibility for the Prime Minister's Office within the provisions of the Act. The internal review was issued on 3 November 2015, and in it the Cabinet Office upheld the decision taken by the Prime Minister's Office to refuse the request under section 40(2) of the Act.

## Scope of the case

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9. The complainant contacted the Commissioner on 4 November 2015 to complain about the way his request for information had been handled. Specifically, that the Cabinet Office withheld information under section 40(2) of the Act, as the complainant considered that there was sufficient legitimate interest to justify breaching the respective individual's privacy rights.
10. The Commissioner investigated the Cabinet Office's refusal of the request under section 40(2) of the Act and had drafted her decision notice along these lines. However, the Cabinet Office provided further submissions to state that it considered the information to be exempt under sections 38(1) and 41(1) of the Act.
11. The Cabinet Office's submissions on section 40(2) had not demonstrated that Person A's personal data should be withheld. Therefore, the Commissioner has made the scope of the case whether the request can be refused under section 38(1) of the Act. Should she find that it cannot, she will go on to consider section 41(1).

## Reasons for decision

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### Section 17(1) – time for response

12. Section 1(1) of the Act provides that any person making a request for information to a public authority is entitled:

*“(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

*(b) if that is the case, to have that information communicated to him.”*
13. Section 10(1) of the Act provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
14. Section 17(1) of the Act states (Commissioner’s emphasis):

*“(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, **within the time for complying with section 1(1)**, give the applicant a notice which—*

*(a) states that fact,*

*(b) specifies the exemption in question, and*

*(c) states (if that would not otherwise be apparent) why the exemption applies. ”*
15. The effect of section 17(1) is that if a public authority wishes to refuse a request – even if it is taking further time to consider the balance of the public interest – then it must inform the requester of this within 20 working days.
16. The Prime Minister’s Office confirmed that it received the request by email on 6 August 2015. The twentieth working day following this date was 4 September 2015. As the Prime Minister’s Office did not issue a response until 15 September 2015 it breached section 17(1) of the Act.

### Section 38 – Health and safety

17. Section 38(1) of the Act states that information is exempt information if its disclosure under the legislation would, or would be likely to:

*“(a) endanger the physical or mental health of any individual, or*

*(b) endanger the safety of any individual.”*

18. For the exemption to be engaged it must be likely that the endangerment identified would occur. Even if the exemption is engaged, the Commissioner must consider the balance of the public interest in maintaining the exemption.
19. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other exemptions from Part II of the Act. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment and the likelihood of it occurring as a result of disclosure of the information in question is "*real, actual and of substance*",<sup>1</sup> rather than trivial or insignificant. As part of this she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
20. This means that three conditions must be satisfied for the exemption to be engaged:
  - First, the harm that is envisaged would occur, or would be likely to, relates to the applicable interests described in the exemption.
  - Secondly, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against.
  - Third, there is a real risk of the endangerment arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice - 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.

#### *The applicable interest*

21. Section 38 of the Act provides that information relating to the endangerment of the health and safety of an individual can be withheld. Therefore, the prejudice involved in the disclosure of the requested information must therefore relate specifically to the health and safety of one or more individuals.

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<sup>1</sup> See paragraph 30 – <http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf#page=8>

22. The Cabinet Office has argued that disclosure would endanger the health and wellbeing of both Person A and their immediate family. Person A has previously been the target of extremists, who have made numerous threats against Person A's life. One of these extremists killed a colleague of Person A, and following this they were placed under police protection. The Cabinet Office argued that the withheld information relates entirely to the subject matter that brought about the threats to Person A's life.
23. The Commissioner has checked the Cabinet Office's statements and agrees that the withheld information relates to the subject matter that resulted in death threats against Person A. The Commissioner accepts that the exemption is applicable in this instance.

*Causal link between harm and disclosure*

24. The Cabinet Office made arguments concerning the causal link between disclosure and the endangerment which are enclosed in a confidential annex. The Commissioner appreciates that this impacts upon the reader's understanding of the decision, but given the nature of the arguments it is necessary in this instance.
25. The Commissioner's view of the Cabinet Office's submissions is that they demonstrate a causal link between the disclosure of the withheld information and the endangerment of Person A's wellbeing. The Commissioner is therefore satisfied that this element of the test has been met.

*The likelihood of prejudice*

26. The arguments from both the complainant and the Cabinet Office regarding the likelihood of disclosure endangering Person A's wellbeing have also been placed inside the confidential annex.
27. The result of the arguments is that the Commissioner does not agree with the Cabinet Office that the prejudice "would" occur, which means that the likelihood of prejudice is more likely than not should the information be disclosed. However, she is of the view that the prejudice would be likely to occur, as the likelihood is seen as having a reasonable chance of occurring. This is sufficient to meet this aspect of the test in engaging section 38.
28. The Commissioner considers that all three aspects of the prejudice test have been met in this instance, and that the exemption at section 38 is engaged. The Commissioner will now go on to consider the balance of the public interest test for the withheld information.

*Public interest arguments in favour of disclosure*

29. The Commissioner has placed the complainant's arguments in favour of disclosure in a confidential annex, as it is not been possible to state them fully without revealing the identity of Person A. In addition to the complainant's arguments the Commissioner has also placed one of her own in there.
30. In addition to the arguments contained in the confidential annex, the Commissioner also considers that there is an argument for transparency in this case. The information held relates to correspondence between Person A and Mr Ameet Gill – who at the time of the request was a senior government advisor to the then Prime Minister David Cameron MP. The correspondence relates to professional matters, and it follows that there is a reasonable argument to make that the public should know whom Mr Gill is corresponding with on such matters.

*Public interest arguments in favour of maintaining the exemption*

31. There is a public interest argument that the government should be allowed to contact whomever it considers best to help solve matters of national importance. If this means contacting individuals whose life is at risk, then it is reasonable that due care is afforded to the protection of those individual's identity, lest it deter other such individuals from coming forward. This is demonstrated in this case, as the Cabinet Office has confirmed in this case that Person A held an expectation that their name would not be disclosed, and only became involved in correspondence because they considered it was in confidence.
32. The complainant has asserted to the Commissioner that he does not consider that disclosure of the withheld information would increase the threat to Person A. However, the Commissioner is mindful of the First-Tier Tribunal's decision in *Keane v IC (EA/2015/0013)*<sup>2</sup>, which concerned the disclosure of the identities of informants working in Irish secret societies. Despite the informants all being long dead, the Tribunal was wary of the consequences that might befall the ancestors of those informants. The appellant in that case argued that no harm would come to those descendants, but the Tribunal found that the appellant could not "be sure of the good nature of every disaffected group in response to the revelation of informant identities".

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<sup>2</sup> [http://www.informationtribunal.gov.uk/DBFiles/Decision/i1625/EA-2015-0013\\_13-08-2015.pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1625/EA-2015-0013_13-08-2015.pdf)

33. The Commissioner considers that this is comparable in this instance. Whilst she does not dispute the complainant's experience in the extremist groups being referred to, it is still reasonable to assume that he is not aware of every group operating who might have an intention to cause Person A harm; and it is also reasonable to go further and state that the complainant does not have access to the rationale for all these groups, so he cannot guarantee their reactions to the disclosure of the withheld information. In the Commissioner's view, Person A already lives in a dangerous situation and it is entirely possible that this would likely be worsened through the disclosure of the withheld information. There is a strong public interest argument in ensuring that individual's aren't placed at risk through disclosure under the Act.
34. Lastly, the Commissioner also considers that the public interest argument for protection of Person A is heightened by the degree of harm that is being considered. The threats Person A has previously received were death threats, including them and their family. It is self-evident that such circumstances impart a strong public interest in maintaining the exemption.

*Balance of the public interest test*

35. The Commissioner considers that the complainant made coherent arguments which reflect his experience concerning the extremist groups which pose a threat to Person A. As these are all contained in a confidential annex the Commissioner cannot comment further, but needless to say there are valid arguments in favour of disclosure. In addition to this, there is a good argument for transparency over the dealings of Mr Gill given his then prominent role in government.
36. However, the Commissioner considers that these are far outweighed by the strong public interest arguments in favour of maintaining the exemption. The threat against Person A is severe, and the groups who pose a risk to her are known to be both committed and capable of acts of violence. Under these circumstances it is evident that the information should be withheld.
37. The Commissioner considers that the balance of the public interest test favours maintaining the exemption, and so the request can be refused under section 38 of the Act. No further action is required.

**Other matters**

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38. Whilst the Commissioner considers that the Cabinet Office was able to provide arguments as to why the request could be refused within the provisions of the Act, she wishes to raise a point about the protracted process that led to this decision. The complainant submitted his request

to the Cabinet Office on 6 August 2015, but it wasn't until 20 May 2016 that the Cabinet Office sought to refuse the request under section 38 of the Act.

39. During this period, the Cabinet Office had numerous opportunities to consider and justify its refusal of the request, both to the complainant and to the Commissioner. It is noted that the Cabinet Office original stance for section 40(2) was that the information was "ephemeral", and that this became changed to disclosure of the information would endanger Person A's personal safety. Whilst one argument is valid, the distance between the two is notable, and the Commissioner asks that the Cabinet Office take greater care when considering the implications for requests of this nature.
40. He also wishes to make it known that it required three sets of submissions from the Cabinet Office before it was possible to make a valid argument for withholding the information. This led to a severe delay to the Commissioner's decision, and for an authority with the Cabinet Office's experience in handling requests this should not be necessary.



## Right of appeal

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41. 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 123 4504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

42. 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.
43. 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 .....**

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