

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 January 2024

**Public Authority:** Cabinet Office  
**Address:** 2 Marsham Street  
London  
SW1P 4DF

#### **Decision (including any steps ordered)**

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1. The complainant requested due diligence reports relating to the appointment of Chris Pincher as Deputy Chief Whip. The Cabinet Office refused to confirm or deny whether the information was held, citing the exemptions for prejudice to the effective conduct of public affairs (section 36(3)) and personal information (section 40(5)) of the FOIA.
2. The Commissioner's decision is that the exemption in section 40(5) does not apply and that, whilst the exemption in section 36(3) is engaged, the public interest in favour of confirming or denying whether information is held is greater than the public interest in maintaining the exemption
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
  - Confirm or deny whether the requested information is held.
  - If information is held, it should either be disclosed or the Cabinet Office should issue a fresh refusal notice in compliance with section 17 of the FOIA.
4. The Cabinet Office must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 5 July 2022, the complainant wrote to the Cabinet Office and requested the following information:

“Please provide a copy of any due diligence reports conducted by the Cabinet Office Propriety and Ethics Team into the appointment of Chris Pincher MP as deputy chief whip in 2022.”

6. The Cabinet Office responded on 4 August 2022 and confirmed that it was refusing to confirm or deny whether the information was held, citing the exemption for personal information in section 40(5) of the FOIA.
7. On 8 August 2022 the complainant asked the Cabinet Office to review its handling of the request. On 24 November 2022 the Cabinet Office provided the outcome of its internal review. This confirmed that it was maintaining the position set out in its initial response and also relying on the neither confirm nor deny provision of the exemption for prejudice to the effective conduct of public affairs (section 36(3)).

## **Scope of the case**

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8. The complainant contacted the Commissioner on 21 October 2022 to complain about the way their request for information had been handled.
9. The Commissioner confirmed that his investigation would consider whether the Cabinet Office was entitled to refuse to confirm or deny whether the requested information was held.

## **Reasons for decision**

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### **Section 40(5B)**

10. The Cabinet Office refused to comply with the request on the grounds that confirming or denying whether the information requested was held would be in breach of Article 5(1)(a) of the GDPR and that, therefore, section 40(5) of the FOIA was applicable.
11. Section 40(5B) of FOIA provides that if confirming or denying whether relevant information is held would disclose information in relation to a

third party in breach of the data protection principles, then the duty to confirm or deny is exempted.

12. The decision to use a 'neither confirm nor deny' response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for a 'neither confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.

Would the confirmation or denial involve a disclosure of personal data?

13. Section 3(2) of the DPA (Data Protection Act) 2018 defines personal data as: - "Any information relating to an identified or identifiable living individual." The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus. Confirming that the requested information is or is not held would confirm that that a due diligence exercise was or was not carried out in relation to Chris Pincher's appointment. Providing confirmation or denial would involve a disclosure of information that identifies and relates to a living individual and, therefore, would involve the disclosure of personal data.
15. The Commissioner is satisfied that giving the confirmation or denial would involve a disclosure of personal data within the definition in section 3(2) of the DPA.
16. The fact that the giving of the confirmation or denial would involve disclosure of personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether that disclosure would contravene any of the DP principles.

Would disclosure contravene principle (a)?

17. Article 5(1)(a) of the GDPR states that: "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

18. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
19. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:  
  
"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data...."
20. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:
  - i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
  - ii) Necessity test: Whether disclosure of the confirmation or denial is necessary to meet the legitimate interest in question;
  - iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
21. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

22. In considering any legitimate interest(s) in the disclosure of the confirmation or denial, the Commissioner recognises that a wide range of interests may be legitimate interests. The interests may be public or personal, broad or narrow, compelling or trivial. However, the narrower and less compelling the interest, the less likely it is that such an interest will outweigh the rights of the data subjects.
23. The Commissioner considers that there is a clear legitimate and national interest in knowing what (if any) due diligence tests are carried out in relation to senior appointments and, specifically, given the central role that concerns around the appointment of Chris Pincher played in the resignation of Boris Johnson as Prime Minister, whether one was carried out in this case. The Commissioner accepts that disclosure of the confirmation or denial would promote openness, transparency and accountability.

### **Is disclosure necessary?**

24. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the confirmation or denial unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
25. Given that the Commissioner has concluded that there is a legitimate interest in knowing whether a due diligence test was carried out, this legitimate interest cannot be met by less intrusive means. He has therefore concluded that the necessity test is met and has gone on to carry out a balancing exercise.

### **Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

26. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the confirmation or denial would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
27. In the Commissioner's view, a key issue is whether the individual concerned would have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
28. The Cabinet Office has argued that Chris Pincher could have a reasonable expectation that confirmation or denial of the existence of due diligence would not be released under the FOIA. However, the Commissioner does not accept that someone being appointed to a government role could reasonably expect confidentiality about whether a due diligence exercise was even carried out.

### **The Commissioner's conclusions**

29. In the circumstances of this particular case, the Commissioner considers that the legitimate interests outweigh the rights of the data subject.

30. Having considered the arguments provided by the Cabinet Office, the Commissioner is not convinced that confirming or denying the existence of the information would reveal any significant personal data but rather that it would only reveal whether a due diligence exercise was carried out in this specific case without confirming the contents of that exercise.
31. Confirming that such an exercise was or was not carried out does not, in the Commissioner's view, reveal any significant biographical details about the individual. It is not unreasonable to believe that those being appointed to government roles might be subject to such a vetting exercise and the Commissioner considers that confirming or denying whether it happened in this specific instance would simply reveal that a procedure was or was not followed.
32. The Commissioner considers that the strength of the legitimate interest in disclosure in this case, which relates to accountability for decisions and judgements made which had a direct impact on the then Government, outweighs the data subject's fundamental rights and freedoms. He also does not consider that confirmation or denial in this case would result in any significant harm or distress to the individual. There is therefore an Article 6 basis for processing this personal data and it would thus be lawful.
33. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under principle (a).
34. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
35. The requirement for transparency is met because as a public authority, the Cabinet Office is subject to the FOIA. The Commissioner has, therefore, decided that the Cabinet Office wrongly refused to confirm or deny whether the information was held under section 40(5B) as that exclusion does not apply.

### **Section 36 – prejudice to the effective conduct of public affairs**

36. The Cabinet Office refused to confirm or deny whether the requested information was held under section 36(3) by virtue of the effects of confirming or denying in respect of the prejudice described in sections 36(2)(b) and 36(2)(c).
37. Section 36(2)(b) and 36(2)(c) state:

"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."

38. Section 36(3) states:

"The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2)."

39. Section 36(3) envisages circumstances in which it is not appropriate for an authority to confirm or deny whether requested information is held, which is normally the duty under s1(1)(a) of FOIA. In such cases the qualified person must still give their reasonable opinion that to confirm or deny that the information is held would itself have the effects listed in s36(2).

### **The Qualified Person**

40. In determining whether section 36(3) applies the Commissioner must determine whether the qualified person's opinion was a reasonable one.

41. In deciding 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 subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

42. In addressing this the Commissioner has considered the following factors:
- Whether the qualified person has concluded that the relevant prejudices or prohibitions would or would not occur through the confirmation or denial of the existence of information.
  - If the qualified person concludes that confirmation or denial of the existence of information would give rise to prejudice, they then need to form the reasonable opinion as to the severity of that prejudice: either the higher threshold that prejudice “would” occur, or the lower threshold “would be likely to” occur.
  - If the reasonable opinion is that section 36 is engaged, then the second stage is consideration of the public interest for and against confirming or denying if information is held.
43. With regard to the process of seeking this opinion, the Cabinet Office sought the opinion of the Minister for State on 17 November 2022 and provided a rationale for the application of section 36(3). The qualified person provided their opinion that section 36(3) was engaged on 21 November 2022.
44. Qualified persons are described in section 36(5) of FOIA with section 36(5)(a) stating that ‘qualified person’ means ‘in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown’. The Commissioner is therefore satisfied that the Minister of State was an appropriate qualified person.
45. With regard to the substance of the opinion, in relation to section 36(2)(b)(i) and (ii), the qualified person confirmed that they considered that confirming or denying whether information was held would be likely to result in the prejudice described by the exemption. ‘Would be likely’ refers to a lower level of probability than ‘would’, but one which is still significant.
46. The qualified person argued that the work that is undertaken to support the Prime Minister’s selection of Ministers for appointment is highly sensitive involving the gathering, assessing and communicating of personal information. It explained that the work relies on officials being able to handle, record and communicate and exchange views on information that can be highly sensitive, without the threat of media speculation about the quantity, extent or content of that information, or the processes by which it is gathered and communicated.
47. The qualified person has argued that that confirming the existence of information in scope of this request and/or releasing information about



this area of work is likely to have a chilling effect on those working in this area. Furthermore, knowledge that information would be routinely going into the public domain would likely result in less information (or deliberation about that information) being recorded and less effective record keeping. This would mean that knowledge retention and the free and frank provision of advice and exchange of views would be inhibited, adversely affecting decision-making. The qualified person clarified that it was not suggesting that changes in record keeping would be inappropriate, but simply that it would dilute information to a point that would make it less useful and informative for policy and operational decisions.

48. In relation to section 36(2)(c) the qualified person argued that confirmation or denial would be likely to result in the prejudice described. They explained that making public information that a particular due diligence report does or does not exist would encourage media speculation and comment about the ministerial appointments process and erode the ability of future Prime Ministers to perform their constitutional role in ministerial appointments.
49. The qualified person explained that, as the Sovereign's principal adviser, the Prime Minister has sole responsibility for the organisation of the executive, including recommendations on the appointment, retention and dismissal of Ministers. In line with the constitutional role, it is for a Prime Minister to receive information and advice in the manner they determine, and to act on that information and advice according to their judgement.
50. The qualified person considers that the conduct of this aspect of Government relies on provision of information and advice in a range of ways - formal and informal - as suits the incumbent Prime Minister and the ability of the Prime Minister to make deliberations in confidence. It has further argued that it considers there would not be a reasonable expectation that the Cabinet Office confirm or deny whether information relating to this request is held. Ministerial appointments, it explained, are made public, along with details of any relevant private interests they may hold. The qualified person considers that applying the Neither Confirm Nor Deny (NCND) exemption is also crucial here, to ensure consistency with any future requests, and to prevent NCND being taken as an indication of whether information is held.

### **The Commissioner's conclusions**

51. In relation to section 36(2)(b) and the "chilling effect" that the Cabinet Office has argued that confirmation or denial would be likely to cause, the Commissioner is sceptical about the extent to which this would

occur. However, he accepts that the opinion is reasonable and that the prejudice described would be likely to follow from disclosure.

52. In relation to section 36(2)(c) the Commissioner acknowledges that the request relates to a contentious issue and that confirmation or denial would result in additional media enquiries and the tying up of further resources. He accepts that this would have an impact on the safe space needed for effective decision making and that it would harm the processes and deliberations which facilitate this.
53. Having viewed the opinion given, which is clearly expressed in respect of the limbs of section 36 that is being relied on, the Commissioner accepts that it was reasonable for the qualified person to consider that confirming or denying that information is held would be likely to result in prejudice to the processes relevant to the exemption. He is also satisfied that the qualified person's opinion - that inhibition relevant to those subsections would be likely to occur through confirming or denying that information is held - is reasonable. He is, therefore, satisfied that the exemption was engaged correctly.
54. The Commissioner has concluded that the opinion of the qualified person was a reasonable one and that, by virtue of the prejudice which confirmation or denial under section 36(2)(b) and section 36(2)(c) would be likely to cause, section 36(3) applies. He has gone on to consider whether the public interest in maintaining section 36(3) outweighs the public interest in confirming or denying whether the information is held.

### **The public interest test**

55. In considering a complaint regarding section 36, if the ICO finds that the opinion was reasonable, the weight of that opinion in the public interest test will then be considered. This means we accept that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely, to occur but we will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming our own assessment of whether the public interest test favours disclosure.

### **Public interest in disclosure**

56. The complainant has argued that they are a news reporter trying to obtain information about the circumstances in which Mr Pincher was appointed as a government whip given that that allegations of sexual harassment had already been made. The complainant has suggested that this interest is all the stronger given that, despite a complaint being made and upheld against Mr Pincher in a previous ministerial role, that he was appointed to the position of Deputy Chief Whip.

57. The complainant has argued that these factors raise grave concerns about the processes of the Cabinet Office Propriety and Ethics Team, either whether they were made fully aware of complaints, or what specific advice they gave on the appointment.
58. The complainant has alleged that, as Mr Pincher went on to be the subject of further allegations, this failure to adequately advise the Prime Minister, or if the Prime Minister was minded to make the appointment anyway, has likely placed young men at an increased risk of sexual harassment. Transparency around how this came to be, the complainant has argued, is very clearly a legitimate interest in disclosure. The complainant has further argued that disclosure is clearly necessary to meet these interests, as there is no other way to obtain this information, and the disclosure is necessary to ensure the Cabinet Office is held accountable for its approach to the appointment of Mr Pincher.
59. The Commissioner is mindful that the appointment of Chris Pincher and the resulting revelations led to the resignation of Boris Johnson as Prime Minister and the fall of the government. There would, therefore, appear to be a very weighty public interest in knowing what steps were taken to avert this at the appointment stage.
60. The Cabinet Office has acknowledged that there is a public interest in the transparency in how ministerial appointments are made.

### **Public interest in maintaining the exemption**

61. The Cabinet Office has argued that it is important to the appointments process that ministers, including the Prime Minister, and their officials are able to freely consider options in relation to appointments within a safe space. To support this, it is important that effective advice can be commissioned or provided without undue public scrutiny. Confirming or denying the existence of information in scope of the request about this area of work would have a detrimental, chilling effect on the decisions to commission or provide advice, and subsequently the quality of any advice that may be provided. Consequently, the effectiveness of deliberations and decision making would be harmed generally.
62. The Cabinet Office has further suggested that confirming or denying the existence of information in scope of the request would have a prejudicial effect on the appointments process in the future and the ability of the Prime Minister to perform their constitutional role as the Sovereign's principal adviser with responsibility for the organisation of the Executive.
63. The Commissioner accepts that the prejudice identified by the Cabinet Office in engaging the exemption carries some weight in relation to the public interest in maintaining the refusal to confirm or deny. He

acknowledges that the purpose of the exemption is to protect authorities from interference in the processes of decision making and deliberation. He recognises that it is in the public interest that public authorities are able to carry out their functions effectively and that anything which might diminish this effectiveness would not serve the public interest.

### **Balance of the public interest**

64. In considering where the balance of the public interest lies the Commissioner has given due weighting to the qualified person's opinion. He recognises that confirming or denying whether relevant information is held would be likely to result in some harm to the safe space needed for effective decision making and would be likely to result in some harm to the processes around the provision of candid advice and frank discussions. He accepts that confirming or denying whether information held would be counter to the public interest in these factors.
65. However, the Commissioner considers that any harm which would result from confirmation or denial would be very limited as it would simply confirm whether a process had or had not been undertaken. It would reveal nothing of the broader context such as, for example, whether it was a required process, or other factors which would have an impact on the substance of decision making or the process of deliberation.
66. Similarly, whilst the Commissioner has accepted that there is a likelihood that confirmation or denial would result in some form of chilling effect, with officers possibly being deterred from providing free and frank views, he does not consider that confirmation or denial would, in itself, cause a significant chilling effect. In the Commissioner's view confirming or denying whether information is held would not result in severe damage to the process of decision-making since it would reveal nothing of content of any deliberations or, in respect of denial, it would say nothing of broader considerations.
67. In relation to the public interest in confirming or denying whether information is held, the Commissioner is mindful that there are a number of strong factors, notably:
  - The information relates to processes for the appointment of senior officials and to judgements made at the most senior level of public life;
  - There is a direct link between the decision to appoint Chris Pincher as Deputy Chief Whip and the resignation of Boris Johnson as Prime Minister and the collapse of his government;
68. The Commissioner considers that these are very strong public interest arguments in favour of accountability and transparency since they

directly relate to the heart of the exercise of executive power in public life. Whilst he has accepted the attendant harms associated with confirmation or denial he considers that these are more than offset by the public interest in transparency around these matters and the need for public confidence in national institutions.

69. In conclusion, and particularly because of the limited weight that the Commissioner has concluded should be attributed to the public interest arguments in favour of maintaining the exemption, the Commissioner considers that the public interest in knowing whether or not the requested information is held is greater than that in maintaining the exemption from the duty to confirm or deny. It follows that the Commissioner's decision is that the Cabinet Office was not entitled to issue a NCND response under section 36(3) of the FOIA, and it must now take the steps specified in paragraph 3.

## Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

71. 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.
72. 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 .....**

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