

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Direct Dial: 020 7650 [REDACTED]
Email: tgregory@leighday.co.uk/
cott@leighday.co.uk
Your Ref: IC-83706-P2P2
Our Ref: TGY/CXO/00242584/2
Date: 8 April 2021

Sent by email only: icocasework@ico.org.uk
CC: foi-team@cabinetoffice.gov.uk

Dear Mr Cawthorne,

Submissions to the ICO regarding case ref. IC-91642-W3P0

1. We write on behalf of Dr Moosa Qureshi with respect to his complaint regarding the Cabinet Office's refusal of his request under the Freedom of Information Act 2000 (**FOIA**). By this letter, Dr Qureshi wishes to make preliminary submissions to the ICO regarding the proper resolution of his complaint under section 50 FOIA, which we understand you have responsibility for investigating. He reserves the right to make further submissions upon the receipt of further information or documentation relating to this request.

Key background: Exercise Cygnus, COBR and LRFs

2. To understand the nature of Dr Qureshi's requests, some background is needed.
3. Exercise Cygnus was a 3-day command post exercise which took place on October 2016. It followed a table-top exercise in August 2016 named Exercise Cygnet. Both exercises were designed to evaluate the preparedness of the UK for a viral influenza pandemic in a close to worst case scenario. It was aimed at responders across government, Local Resilience Forums and health and social care services.
4. Local Resilience Forums are required under the Civil Contingencies Act 2004. They are multi-agency partnerships made up of representatives from local public services

Leigh Day postbox@leighday.co.uk - www.leighday.co.uk

Priory House, 25 St John's Lane, London EC1M 4LB
T 0207 650 1200 - F 0207 253 4433
DX 53326 Clerkenwell

Central Park, Northampton Road, Manchester M40 5BP
T 0161 393 3600 - F 0207 253 4433

and include Category 1 responders such as emergency services, local authorities, NHS and Environment Agency¹.

5. Following Exercise Cygnus, a number of key lessons and recommendations were identified. These were outlined in a report (the **Cygnus Report**) which the Government belatedly published last year. Dr Qureshi has provided you with a copy of the Cygnus Report for the purposes of his parallel complaint against the Department of Health and Social Care (case ref. IC-83706-P2P2) and we assume you do not need a further copy.
6. The Cygnus Report details how the Civil Contingencies Secretariat ran four COBR meetings across the 3-day exercise. COBR (or COBRA) is shorthand for the Civil Contingencies Committee, which is convened to handle matters of national emergency or major disruption and provide high-level coordination and decision-making. As set out in the Cygnus Report (p.5):

“COBR meeting times were set by the exercise national planning team but all other meetings were set-up by the participants as part of exercise play. The exercise activity was based around four simulated COBR meetings which took place over three days. The meetings were attended by Ministers and Officials from the Devolved Administrations and participating UK government departments. On the 18 October 2016 all of the organisations took part in the exercise and prepared for a COBR(O) meeting. On the morning of the 19 October 2016 the Secretary of State for Health chaired a meeting of the COBR(M). The results of that meeting were communicated back to participants through the chain-of-command. On the 20 October 2016 a further two meetings took place: a COBR(O) in the morning and a COBR(M), chaired by the Minister for the Cabinet Office, in the afternoon.”

See further Appendix C.

7. The Cygnus Report goes on at p.13 to give some indication of what was discussed in the simulated COBR meetings, which included the use of population-based triage in the event of a surge in demand on resources:

“Population Based Triage is a provision that should be used only when the resources and staffing required to support normal working practices are no longer available. This is defined as when: decision criteria about the allocation of

¹ <https://www.gov.uk/guidance/local-resilience-forums-contact-details>

treatment require that those selected to benefit from the limited resources must have a likelihood of medical success, yet the selection must not impede the conservation of scarce resources for those equally in need.

On the first day of the exercise a decision was made to consider introducing an alternative model of care (population-based triage) to manage capacity and respond to the excessive demand for hospital care as set out by the exercise scenario. Draft proposals developed by NHS England prior to the exercise - and shared with the Devolved Administrations - were considered during Exercise Cygnus.”

8. Reports in *The Telegraph* further indicate that in the COBR meeting on the first day of the exercise, the then Health Secretary Jeremy Hunt “*refused to play*” when asked to decide whether to turn off ventilators, which was said to lead to “*important rethinking about how we avoid getting into such a situation*”. See the reporting [here](#).
9. The Cygnus Report also explains that alongside the simulated COBR meetings, the 8 participating Local Resilience Forums held simulated meetings of their Strategic Coordinating Groups. They provided information feeds through Government Liaison Officers to the Department for Communities and Local Government (“DCLG”). DCLG then communicated that information through to the Civil Contingencies Secretariat for use in the simulated COBR meeting. See section A.3 (p.21 of the Report) stating that “*each of the participating SCGs was allocated a Government Liaison Officer (GLO) in line with best practice. These GLOs assisted the SCGs in producing a SitRep for DCLG who in turn collated the information for COBR*”; Annex C of the Report, at §4.9(b) (p.40 of the Report); and Appendix 1 to Annex C noting that the objective for DCLG was to “*test situation reporting arrangements between central government and localities through LRFs*” (p.43 of the Report).
10. The published Cygnus Report goes on to detail four key learning outcomes and 22 detailed lessons. The Report’s overall conclusion is summarised at p.6:

“The analysis of the evaluation reports from the organisations participating in the exercise indicate that the UK’s command & control and emergency response structures provide a sound basis for the response to pandemic influenza. However, the UK’s preparedness and response, in terms of its plans, policies and capability,

is currently not sufficient to cope with the extreme demands of a severe pandemic that will have a nation-wide impact across all sectors.”

11. Also in the public domain is a document disclosed by NHS England which identifies the steps taken to implement the key lessons learned from Exercise Cygnus. You have been provided with a copy of that document for the purposes of Dr Qureshi’s parallel complaint.
12. As we noted in the context of that complaint, this document notes that some of the key lessons from Exercise Cygnus included the need for further work to be done to *“inform consideration of the issues related to the possible use of population-based triage during a reasonable worst case scenario”* and the need for further work *“to consider surge arrangements for a Reasonable Worst Case Scenario pandemic”* (which work was to be led by NHS England with oversight from *“DH”*, presumably a reference to the Department of Health). Both key lessons are marked as *“Complete”*.
13. Further, the accompanying notes and comments to these key lessons refer to the former and current Chief Medical Officers and the Chief Nursing Officer having given *“approval”* to an NHS England *“policy paper”* covering *“how systems will be flexed to cope with the expected surge in demand during a pandemic and the possible application of “population triage”*”. Likewise, the notes accompanying key lesson 18 states that a *“policy paper on social care surge has been completed and reviewed by the previous CMO”*. The notes then state that *“following approval”* of the Reports, further steps were being taken – in particular *“finalising the strategy to be published and developing the service facing guidance”*.

The FOIA Request

14. On 22 December 2020, Dr Qureshi requested copies of reports from the Cabinet Office under FOIA. The requested reports fell into three categories:
 - 14.1. *“overall summary reports on the four simulated COBR meetings run by the Civil Contingencies Secretariat (CCS) during the Command Post Exercise*

(CPX) for the second phase of Exercise Cygnus from 18 to 20 October 2016” (“Request 1”);

14.2. *“overall summary reports received by the CCS, based on data gathered from the eight Local Resilience Forums (LRFs) which simulated Strategic Coordinating Groups (SCGs) during the CPX for Exercise Cygnus” (“Request 2”); and*

14.3. *“overall reports sent by the CCS for the information of the LRFs after Exercise Cygnus summarising the findings of Exercise Cygnus and how the LRFs can prepare for any subsequent public health pandemic” (“Request 3”).*

15. For the avoidance of doubt, Dr Qureshi intended for the term *“overall summary reports”* to encompass all of the outputs of the simulated meetings underlying Requests 1 and 2. That would include, for example, the minutes of particular meetings.

16. As set out below, the Cabinet Office has confirmed it has understood this term to encompass all *“products produced as part of exercise play”*. Dr Qureshi invites the ICO to seek clarification on whether this means the Cabinet Office has excluded documents which were technically produced after *“exercise play”* had concluded. His request is not so restricted, as he made clear in his request for an internal review. He is concerned to ensure (for example) that the Cabinet Office would not exclude a summary report of what happened at one of the COBR or Strategic Co-ordinating Group meetings simply because that report was created after the exercise ended.

Cabinet Office Refusal Decision

17. On 2 February 2021, the Cabinet Office responded to Dr Qureshi’s FOIA request. In essence, it confirmed it held at least some of the information requested but refused any disclosure, invoking the qualified exemptions under section 35(1)(a) and 35(1)(b) of FOIA (the **Refusal Decision**).

18. As to Request 1, the Cabinet Office interpreted that to be a request for “*products produced as part of the [COBR] meetings as part of exercise play*”. It confirmed it holds “*some*” of the information requested. However, it refused disclosure in reliance upon the section 35(1)(a) and 35(1)(b) exemptions. As to public interest balancing, the Cabinet Office’s reasoning is that during emergency preparedness exercises “*participating agencies need freedom to test plans and identify areas for improvement through engagement with realistic scenarios without fear of the potential for public discussion of decisions made in an exercise environment*”. Further, “[*t*]here is a risk of exercise results being impacted or hampered by the release of this information”. And “*Ministers and officials*” need “*space to objectively explore lessons identified with complete candour, and then develop policies and/or responses plans to address these points*”. It therefore made an argument based upon the chilling effect that disclosure would have upon the conduct of participants in future emergency preparedness exercises.
19. As to Request 2, the Cabinet Office interpreted that to be a request for “*either outputs of the meetings or SCG activity, such as minutes or actions or SCG situation reports produced as part of exercise play*”. However, it refused disclosure by invoking the section 35(1)(a) exemption. It repeated the public interest balancing arguments set out above and argued, further, that it is important that “*local level participants in national exercises have a safe space, so that there can be robust challenge and stress testing*”.
20. As to Request 3, the Cabinet Office said that the Exercise Cygnus report was sent to participating Local Resilience Forums and that report was available online.

Internal review

21. On 5 March 2021, the Cabinet Office wrote again to Dr Qureshi with the outcome of its internal review of its Refusal Decision. The internal review upheld the Refusal Decision. This letter contains no further information or reasoning, save that it clarifies how the Cabinet Office had interpreted both Requests 1 and 2 as seeking “*products produced as part of the meetings as part of exercise play*”. Dr Qureshi understood this to be a

concession that minutes of relevant meetings would fall within both Requests 1 and 2, but the ICO is invited to clarify this point.

22. As to Request 3, it also confirmed that the Civil Contingencies Secretariat “*did not provide any additional reports for DCLG² containing guidance intended for Local Resilience Forums*”. This was a response to Dr Qureshi’s point that his Request 3 was intended to capture reports containing guidance or information to be communicated to the Local Resilience Forums, even if those reports were not sent directly to them.

Legal principles governing the application of the section 35 FOIA exemptions

23. Section 35(1)(a) provides for a qualified exemption from disclosure in respect of information held by a government department which “*relates to*” the “*formulation or development of government policy*”.

24. Section 35(1)(b) provides for a qualified exemption in respect of information which “*relates to... Ministerial communications*”. Section 35(5) provides that ministerial communications means any communications between Ministers of the Crown, between Northern Ireland Ministers, between members of the Welsh Assembly Government, and includes Cabinet meetings or Cabinet committee meetings. It does not cover communications from a minister to a non-minister.

25. There is no inherent or automatic public interest in withholding information falling within these exemptions (see the ICO’s Guidance on the section 35 exemption at §§76 and 111, and the decisions cited therein).

Submissions as to Dr Qureshi’s Requests

26. Dr Qureshi accepts that reports of the simulated ministerial COBR meetings will relate to ministerial communications. However, it is very difficult for Dr Qureshi to test the validity of the Cabinet Office’s position that the exemption in section 35(1)(a) is

² This is understood to be a reference to the Department for Communities and Local Government, which is now known as the Ministry of Housing, Communities and Local Government.

engaged by both Requests 1 and 2. That is because the response letters do not seek to explain what policy or policies the respective documents relate to. The ICO is invited to clarify this point with the Cabinet Office.

27. In any event, Dr Qureshi submits that the public interest very strongly weighs in favour of disclosing the documents sought.
28. Firstly, there is widespread public and political interest in Exercise Cygnus, what it revealed and what has been done since to implement the lessons learned. This was the UK's last simulation and planning exercise for a viral pandemic prior to the ongoing COVID-19 pandemic. Disclosure of the report of the key simulated meetings will assist the public in scrutinising and understanding what went on.
29. Secondly, it is difficult to understand the Cabinet Office's concern that disclosure of the materials being sought by Dr Qureshi will have a "chilling effect" upon participants in future pandemic simulation exercises. The entire purpose of these exercises is surely to practice the application and implementation of existing policies and to identify where they need improvement, so that further work can be carried out. Frank identification of what is working and what is not working is thus to be expected. Further, the participants of the COBR meetings are officials of the highest order. It is precisely at those highest levels of civil service and government that the public should expect to find the highest standards of official behaviour, including robustness in their assessments and deliberations (cf. *Christopher Lamb v (1) Information Commissioner (2) Cabinet Office* EA/2015/0136 at §§27-28).
30. Thirdly, any "chilling effect" argument must (if valid) carry very little weight in the context of Exercise Cygnus given the sheer amount of information which is already in the public domain and the time that has elapsed since its completion. Future participants in similar emergency preparedness exercises may already be aware that any information they produce as part of such an exercise is potentially liable to disclosure given the publication of the Cygnus Report and related documents. Evidently, any concerns about blanket "chilling effects" on future participants were not such as to outweigh the perceived public interest in disclosing the Cygnus Report which refers to matters

discussed in the simulated COBR meetings, excerpts from the feedback of participating Local Resilience Forums and outlines the key lessons learned. Likewise, the public have also been provided with a document stating the various actions taken in response to the lessons learned. It is also notable that as regards the specific discussions held in the simulated COBR meetings, it appears that the office for Jeremy Hunt MP confirmed the reporting in *The Telegraph* noted at §8 above (that report noting that a “spokesman” for Mr Hunt “said he was proud of his actions and that they had ultimately helped in the pandemic planning process”).

31. Further, nearly 5 years have elapsed since Exercise Cygnus, raising the question of whether any relevant process of policy formulation remains live. In this regard, Dr Qureshi notes the ICO’s Guidance on section 35 at §206:

“Chilling effect arguments operate at various levels. If the policy in question is still live, arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.”

32. Fourthly, it is incumbent upon the Cabinet Office to justify why the section 35 exemptions justify a wholesale refusal to disclose any part of the information contained in the reports sought. The proposition that the public interest is best served by the wholesale withholding of all reports falling within the scope of Dr Qureshi’s requests, as opposed to the proper and proportionate use of redactions (if properly necessary), requires justification. This would no doubt be particularly pertinent to Request 2 which seeks reports provided by Local Resilience Forums, where redactions of the names of particular individuals could serve to ensure no one individual is identifiable whilst allowing the public to understand what challenges those participants experienced.

33. The reports sought will presumably differ in their nature and contain a wide range of information, each part of which falls to be considered against the exemptions. See, for example, the approach in *HMRC v Information Commissioner* (EA/2008/0067) concerning a request for a copy of a report prepared following an investigation into

allegations about a proposed amnesty for United Kingdom tobacco producers. The Commissioner considered that different types of information within the report fell to be considered differently (see §17). Information relating to the involvement of third parties need not be disclosed. However, information relating to an HMRC employee could be disclosed, as the same concern about non-cooperation with future investigations did not bear the same force for employees. Whilst the First-tier Tribunal ultimately disagreed with the Commissioner's conclusions as to the public interest test, it did not depart from the approach of differentiating distinct kinds of information.

Need for close scrutiny by ICO

34. The Refusal Decision here challenged is the latest in what has been a persistent pattern on the part of the government of closing ranks and refusing to disclose documentation relevant to the public's understanding of the nation's preparation for and action in response to the ongoing COVID-19 pandemic.
35. You are aware that Dr Qureshi was one of the leading forces behind the calls on Government to publish the reports containing the findings and recommendations of Exercise Cygnus. In April 2020, he requested publication of the Cygnus Report under FOIA. He was not alone in doing so. In response to Dr Qureshi's request, the Department for Health and Social Care engaged in a strategy of evasion and delay. Rather than refuse Dr Qureshi's FOIA request, as it had done so with those requests which came before him, it repeatedly requested extensions of time so as to complete the public interest balancing exercise. We have provided a copy of Dr Qureshi's earlier complaint regarding this conduct for the purposes of a parallel complaint which you are investigating.
36. Dr Qureshi commenced a judicial review, seeking publication of all of the reports prepared as part of and following Exercise Cygnus, including those reports provided to or filed by participants. Faced with the growing pressure for transparency, the Government finally published the Cygnus Report containing a summary of the key lessons learned.

37. In these circumstances, it is incumbent upon the Information Commissioner to submit the Cabinet Office's purported justifications for non-disclosure in this case to the strictest scrutiny. At the very least, we invite the Commissioner to request sight of:

37.1. Copies of any submission made to the person who made a decision on the public interest balancing test;

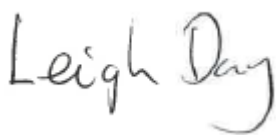
37.2. Copies of any other documents detailing the reasons for their opinion, the factors taken into account and the weight attached to them;

37.3. Any other documents which were considered or produced as part of the Cabinet Office's Internal Review;

37.4. Reasons why the continued withholding of the summary reports sought can be justified, in circumstances in which the Cygnus Report and the document detailing the steps undertaken to implement the key lessons outlined in the Cygnus Report have been disclosed and are in the public domain.

We await your decision. Please do not hesitate to contact Tessa Gregory or Carolin Ott using the details provided above, if we can be of further assistance.

Yours faithfully,

A handwritten signature in black ink that reads "Leigh Day". The signature is written in a cursive, slightly slanted style.

Leigh Day