

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 September 2011

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

Summary

The complainant requested the minutes of discussions of the Cabinet Committee on devolution, dating from 1997 and 1998. The public authority refused the request, citing the exemptions provided by the following sections of the Act: 28(1) (prejudice to relations within the UK), 35(1)(a) (information relating to the formulation or development of government policy) and 35(1)(b) (information relating to Ministerial communications). In the course of the Commissioner's investigation, the public authority also cited the exemption provided by section 42(1) (legal professional privilege) in relation to excerpts from the information. The Commissioner upholds the exemptions provided by sections 35(1)(a) and 35(1)(b) in relation to a minority of the information, including any content which identifies individual participants in the discussions, and section 42(1) in relation to the entirety of the information in connection with which this exemption was cited. In respect of that information, the public interest favours maintaining the exemptions. However, the Commissioner finds that the remainder of the information is not exempt under section 28(1) and the public interest in disclosure outweighs that in maintaining the exemption under section 35(1). The public authority is required to disclose this information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made the following information request on 7 June 2010:

"...the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions"

3. The response to this request was dated 5 July 2010. The request was refused, with the exemptions provided by sections 35(1)(a) (information relating to the formulation or development of government policy), 35(1)(b) (information relating to Ministerial communications) and 28 (prejudice to relations within the UK) cited.
4. The complainant responded to this on 21 July 2010 and requested an internal review. The response giving the outcome of the internal review was dated 24 November 2010. The refusal was upheld.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner's office in connection with this case on 29 November 2010. The complainant indicated at this stage that he was dissatisfied with the grounds given by the public authority for the refusal of this request.
6. The view of the Commissioner is that an objective reading of the scope of the request is that this is for all minutes of the committee referred to in the request that are held by the public authority. The analysis and conclusion in this Notice relate to all the minutes supplied to the Commissioner's office by the public authority, which dated from 1997 and 1998.
7. This information was the subject of a previous Decision Notice issued by the Commissioner. This Notice was later countermanded by a Ministerial certificate issued under section 53 of the Act. This background is covered in greater detail at paragraphs 12 to 15 below.

Chronology

8. The Commissioner's office contacted the public authority in connection with this case on 14 December 2010. The public authority was asked to respond on the issue of whether the almost 5 years between the request in the case that was the subject of the Ministerial veto and the request in this case altered the balance of the public interest in relation to

sections 35(1)(a) and (b) and to explain the citing of section 28. The public authority was also asked to comment on whether it may be possible to disclose any part of the content of the minutes, even if it maintained that these could not be disclosed in their entirety.

9. The public authority responded to this on 20 January 2011. In relation to the passage of time, the public authority emphasised that the statement in support of the veto had noted that the view of the Minister was that the public interest continued to favour maintenance of the exemption at that time, as it had at the time of the request. The public authority believed that this continued to be the case and also stated that it did not believe that it was possible to disclose any part of the information.
10. On the issue of section 28 the public authority specified subsection 28(1) and explained why it believed that this exemption was engaged. It also at this stage introduced section 42(1) (legal professional privilege) and stated that this was engaged in relation to some of the information. In relation to both sections 28(1) and 42(1) the public authority was specific that it believed that these exemptions were engaged in relation to some of the content of the information, but not the entirety of this.
11. The public authority was later asked to provide a copy of the withheld information to the Commissioner's office. This information was received by the Commissioner's office on 22 February 2011. Following this, the public authority provided further clarification as to where it believed sections 28(1) and 42(1) were engaged.

Background

12. The request in this case was for the information that was the subject of the request in case reference FS50100665. The request in that case was worded as follows:

"I would like to make a request under Freedom of Information to see all the minutes of the Cabinet Sub-Committee on Devolution Scotland, Wales and the Regions (DSWR). The remit of this committee, under the Chairmanship of the then Lord Chancellor, Derry Irvine, was:

'To consider policy and other issues arising from the Government's policies for devolution to Scotland and Wales and the regions of England and to promote and oversee progress of the relevant legislation through Parliament and its subsequent implementation.'"

13. In that case the Commissioner issued a Decision Notice¹ finding that sections 35(1)(a) and (b) were engaged, but that the public interest in the maintenance of those exemptions did not outweigh the public interest in disclosure. The public authority was required to disclose the information.
14. The public authority appealed this decision and a Tribunal hearing was scheduled to take place. Prior to this hearing, the then Secretary of State for Justice issued a certificate under section 53 of the Act to the effect that the public interest in the maintenance of the exemptions did outweigh that in disclosure. This certificate effectively vetoed the Decision Notice and the disclosure of the information.
15. The Commissioner published a response to the veto². In this the Commissioner noted his regret that the Tribunal process that was underway at the time of the veto was not allowed to proceed and stated that:

"...it seems to the Commissioner that a considered review of the 1997 Minutes as part of the appeal process might have resulted in the disclosure of some, or portions of some of the 1997 minutes in redacted form."

Analysis

Exemptions

Section 35

16. The public authority has cited sections 35(1)(a), which provides an exemption for information relating to the formulation or development of government policy and 35(1)(b), which provides the same for information relating to Ministerial communications. These sections are set out in full in the attached legal annex, as are all other sections of the Act referred to in this Notice. Consideration of these exemptions is a two stage process; first the information must fall within the class described.

1

http://www.ico.gov.uk/~media/documents/decisionnotices/2009/FS_50100665.ashx

2

http://www.ico.gov.uk/about_us/research/~media/documents/library/Freedom_of_Information/Research_and_reports/IC_REPORT_TO_PARLIAMENT_HC218.ashx

Secondly, these exemptions are qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

17. Turning first to whether the information is within the classes described in these exemptions, the information consists of minutes of meetings of the Ministerial Committee on Devolution to Scotland and Wales and the English Regions dating from between 8 May 1997 and 25 June 1998. The Commissioner considers it clear that this information falls within the classes described in both sections 35(1)(a) and 35(1)(b).
18. In relation to section 35(1)(a), devolution was a policy of the then government and the information is clearly a record of the development of that policy. In relation to section 35(1)(b), section 35(5) is specific that Ministerial communications as referred to in that exemption include any committee of the Cabinet; a description to which the Commissioner believes the Devolution Committee accords. The Commissioner finds, therefore, that the exemptions provided by sections 35(1)(a) and 35(1)(b) are engaged.

The public interest

19. Having found that the exemptions are engaged, it is necessary to go on to consider the balance of the public interest. As the Commissioner's view is that similar factors apply in relation to both sections 35(1)(a) and 35(1)(b), this analysis of the balance of the public interest covers both of these exemptions jointly. In reaching a conclusion on the balance of the public interest here, the Commissioner has taken into account the general public interest in transparency and openness in decision-making, as well as factors that apply to this specific information. This includes arguments advanced by the complainant and by the public authority and, in particular, the reasoning given for the veto in response to the previous Decision Notice and the points made by the Commissioner in response to this. The Commissioner would stress at this point that, whilst he respects the decision to use the Ministerial veto in the previous case, in this case it is necessary to consider the factors that applied in relation to, and at the time of, the request in question. It is not the case that the conclusion of this Notice should necessarily follow the veto decision.
20. The conclusion of the previous Decision Notice was that the risk of harm to the convention of collective Cabinet responsibility was not great due to the passage of time. The issues discussed within this information were no longer the subject of live policy formulation or development at the time of that request. The Commissioner also gave some weight to the fact that few of the participants in the Devolution Committee remained

actively involved in politics. The statement of reasons accompanying the veto decision contradicted these arguments:

"...my view is that disclosure of information would have been as harmful to the convention of collective Cabinet responsibility precisely because devolution issues continued to be the subject of debate in 2005.

I do not accept in principle or as a matter of law that the balancing decision about the public interest should be reduced to a matter of arithmetic, and whether those in fact involved in the relevant discussions were still involved at the date of the request.

Ministers will be far less willing to engage in frank and open exchanges in the privacy of the Cabinet and Cabinet committee system if they face, among other things, a future risk of unjustified damage to the reputation of their party, even though they as individuals may have left politics.

...a number of individuals – and indeed current Government Ministers – have comments attributed to them in the minutes."

21. The public authority was specific when corresponding with the Commissioner's office that it believed that the situation was unchanged at the time of the request in this case in that it maintained that the passage of time had not significantly reduced the concern about the effect on collective Cabinet responsibility as a public interest factor against disclosure.
22. The Commissioner acknowledges the arguments concerning the passage of time and collective Cabinet responsibility set out in the statement of reasons and reaffirmed by the public authority and has taken these into account here. In particular, the Commissioner does not rely to any extent on the continued involvement or otherwise of the participants in the Devolution Committee in politics.
23. Whilst the Commissioner acknowledges the argument concerning the maintenance of the convention of collective Cabinet responsibility and regards this as a valid factor in favour of maintenance of the exemption, it is not the case that this is the only relevant factor, or that it carries decisive weight. This point was acknowledged in the veto statement of reasons:

"I agree with the Commissioner's view that collective Cabinet responsibility does not represent the entirety of the public interests that are in play in the present case."

24. The Commissioner's view is that the passage of time between the date of the information and the date of the request significantly reduces the weight of the concern about collective Cabinet responsibility as a public interest factor in favour of maintenance of the exemption. The information is a record of discussions approximately 12 to 13 years prior to the request. The Commissioner would generally expect that in any case where this factor is relevant the weight attaching to it will be reduced through the passage of time. Close to five years elapsed between the date of the request in this case and that to which the previous Decision Notice related. Therefore the weight attaching to this factor has eroded further in relation to this case.
25. Turning to those factors that favour disclosure of this information, in his previous Decision Notice the Commissioner noted that wider political debate on devolution continued – this was also the case at the time of the more recent request – and found that this meant that there was a strong public interest in disclosure in order to inform current and future debate. The veto statement of reasons also acknowledged this argument in favour of disclosure:

"I recognise that there is a public interest in disclosure of information which would improve the public's understanding of the Committee's work, promote further debate on devolution issues, and enable the public both to scrutinise historic, and contribute to ongoing, policy discussions in this area. These considerations are particularly important where, as here, the matters under discussion by the Committee were of constitutional significance."

The Commissioner's view is that this is a valid factor in this case that carries significant weight in favour of disclosure.

26. In his response to the veto, the Commissioner noted that a 'blanket' approach appeared to have been taken when refusing to disclose any of the information in question, and suggested that a considered review of this information as part of the Information Tribunal process may have resulted in the disclosure of some of the content. The Commissioner has undertaken such a review in this case. His conclusion is that the public interest favours maintaining the section 35 exemption in respect of some of the withheld information only.
27. The Commissioner has recognised the validity and weight of the argument against disclosure on the grounds of preserving the convention of collective Cabinet responsibility. His conclusion is that this factor tips the balance in favour of maintenance of the exemptions in relation to some of the information, specifically content that identifies individual Ministers and other content that in the Commissioner's view

covers what could be fairly characterised as the more sensitive areas of policy discussed by the Devolution Committee. In relation to the content identifying individual Ministers and the content recording discussions on sensitive issues, the view of the Commissioner is that the factor relating to collective Cabinet responsibility continues to carry significant weight. The Commissioner would stress that his decision in relation to information identifying Ministers means that *only* the content specifically identifying any Minister should be redacted. The information which the Commissioner considers should be withheld because the public interest favours maintaining the exemption is specified in a separate annex supplied to the public authority with this Notice.

28. In relation to the remainder of the content, the Commissioner considers that its disclosure would not be likely to result in harm to the convention of collective Cabinet responsibility, particularly given the passage of time. The Commissioner considers there to be a specific public interest in disclosure in order to inform current and future debate about devolution and a general public interest in the transparency and openness in decision-making. In relation to the information as detailed in the confidential annex, the Commissioner's conclusion is that the public interest in the maintenance of the exemptions provided by sections 35(1)(a) and (b) does not outweigh the public interest in disclosure.

Section 28

29. The public authority has cited the exemption provided by section 28(1) in respect of some of the withheld information. This provides an exemption for information the disclosure of which would, or would be likely to, prejudice relations between any UK administrations. Consideration of this exemption is a two stage process; first the exemption must be engaged as a result of relevant prejudice being at least likely to result. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
30. The public authority's argument in this case is that disclosure would be likely to prejudice the relationship between the UK Government and the Scottish and Welsh devolved administrations. The test that the Commissioner applies when considering whether prejudice would be likely is that the likelihood of this must be real and significant and more than hypothetical or remote. This is in line with the approach taken by the Information Tribunal in the case *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005).

31. The public authority believes that disclosure of the information in question, which records the considerations of the then Government at the time that policy on devolution was being formulated and developed, would be likely to result in prejudice as this would '*shed light*' on difficult decisions that were taken at that time. The public authority believes that this could exacerbate current disagreements between the administrations and could also create new disagreements.
32. The public authority has also referred to the Liberal Democrat Party being a participant in the Scottish Constitutional Convention. The public authority explained how the outcomes of this convention fed into the policy formulation on devolution that is recorded within the information in question and suggested that disclosure of this information could be harmful to future developments in devolution whilst the current coalition Government, in which the Liberal Democrat Party is a participant, is in power.
33. The Commissioner's view on both of these arguments is that they are significantly weakened by the passage of time. The request was made approximately 12 to 13 years after the events recorded in this information. Since then, devolution legislation has been enacted and implemented. The devolved administrations in Scotland and Wales have been in place for a number of years. The outcome of the discussions recorded within the information in question is, therefore, in effect, already known. Where the Devolution Committee chose not to follow a particular option, this will have been reflected in the devolution settlement.
34. The public authority argues that policy on devolution remains live and is the subject of formulation and development and possible future legislation. This could be a relevant factor in that any prospective prejudice might manifest itself lack of cooperation in the process of ongoing or future policy development in the area of devolution, or resistance to it. However, the fact that devolution might remain a live issue does not in itself suggest that prejudice to relations between UK administrations would be likely.
35. The Commissioner's view is that this argument would carry significant weight in favour of the exemption being engaged were it made in relation to information that recorded a current policy making process, or a process that had been ongoing recently prior to the date of the request. However, this is not the case here. The age of the information at the time of the request is such that the argument that disclosure could have had a knock-on effect on current policy making does not carry sufficient weight for the Commissioner to conclude that the alleged prejudice would be likely.

36. The Commissioner's conclusion is that the likelihood of prejudice relevant to section 28(1) is not real and significant and so this exemption is not engaged. Having reached this conclusion at this stage, it has not been necessary to go on to consider the balance of the public interest.

Section 42

37. The public authority cited the exemption provided by section 42(1) in relation to excerpts from the information in question, which together form only a small minority of all the withheld information. The exemption is for information that is subject to legal professional privilege (LPP). It is qualified by the public interest, so the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
38. Turning to whether the information in question is subject to LPP, there are two types of LPP; advice privilege and litigation privilege. The Commissioner has considered in this case whether the information is subject to advice privilege. For advice privilege to apply, the information must record communications that were confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
39. Some of the information in relation to which this exemption has been cited is a direct record of advice provided to the Devolution Committee by a legal adviser to the Government. The remainder of this information refers to advice provided to the Government on other occasions, but which was relevant to the issue discussed by the Devolution Committee.
40. The approach of both Commissioner and Tribunal has been that information that relates to legal advice provided on other occasions can be subject to legal professional privilege. This is in line with the approach taken in the case *USP Strategies v London General Holdings Ltd* ([2004] EWHC 373):

"The proper analysis, consistent with Three Rivers, is to continue to afford privilege to material which evidences or reveals the substance of legal advice."

41. The Commissioner therefore accepts that LPP applies to all of the information in question, both that which directly records legal advice, and that which records legal advice provided on other occasions. The exemption provided by section 42(1) is, therefore, engaged in relation to this information.

The public interest

42. Having found that this exemption is engaged, it is necessary to go on to consider the balance of the public interest. In considering the balance of the public interest in connection with section 42(1), the Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of the public interest. This includes what harm may result, and what benefit to the public interest would result, through disclosure of the information in question. The inbuilt public interest in legal professional privilege was noted by the Information Tribunal in the case *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023):

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..." (paragraph 35)

43. However, in *DBERR v Dermot O'Brien* (EWHC 164 (QB)) the High Court noted that the inbuilt public interest in legal professional privilege should not mean that section 42(1) is, in effect, elevated to an absolute exemption.
44. Turning to those factors in favour of disclosure in this case, these are broadly the same as those recognised when considering the balance of the public interest in connection with sections 35(1)(a) and 35(1)(b) above; there is a strong public interest in disclosure in order to inform current and future debate on the subject of devolution.
45. However, in line with the relevant case law, the Commissioner accords significant weight to the maintenance of LPP in relation to important policy issues. Having reviewed the withheld information and taking all the circumstances into account, he considers that the public interest in maintaining LPP outweighs the public interest he has recognised in favour of disclosure of this information.

Procedural Requirements

Sections 1 and 10

46. In failing to disclose within 20 working days of receipt of the request the information that the Commissioner has now concluded was not exempt,

the public authority did not comply with the requirements of sections 1(1)(b) or 10(1).

The Decision

47. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act to the extent that it cited the exemptions provided by sections 35(1)(a) and (b) and 42(1) correctly. In relation to some, but not all, of the information exempt under section 35, the public interest favoured maintaining the exemption. In relation to all the information exempt under section 42, the public interest favoured maintaining the exemption. In relation to the information for which section 28(1) was cited, that exemption did not apply. The public authority breached sections 1(1)(b) and 10(1) in failing to disclose this information within twenty working days of receipt of the request.

Steps Required

48. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- Disclose to the complainant all information within the scope of the request with the exception of content that names individuals, the content specified in the schedule provided to the public authority with this Notice which the Commissioner has accepted is exempt by virtue of sections 35(1)(a) and (b) and in relation to which the public interest favours maintaining the exemption and the information in relation to which section 42(1) was cited.

49. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

50. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

51. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to respond with the outcome of the review within twenty working days. Neither did the public authority respond with the outcome of the review within forty working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

52. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 13th day of September 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) 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."

Section 10(1) provides that –

"Subject to subsections (2) and (3), 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."

Section 17(1) provides that -

"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."

Section 28(1) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration."

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,

- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office."

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."