

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 November 2014

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

Decision (including any steps ordered)

1. The complainant has requested information about Sir Jeremy Heywood's investigation into the appointment of Emma Harrison as an advisor to the government. The Cabinet Office refused to provide this citing section 35(1)(a) (formulation/development of government policy) as its basis for doing so.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 35(1)(a) as a basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 1 January 2014, the complainant requested information of the following description:

"I would like to be provided with:

- 1) On February 29th 2012, the Prime Minister stated during Prime Minister's Questions that he had asked Sir Jeremy Heywood to look into the appointment of Emma Harrison as an advisor to the government and to 'review the guidelines across Government and this particular case' (source: <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120229/debtext/120229-0001.htm#12022956000997>).

Please may I be provided with copies of any reports and documents produced by the Cabinet Office or Sir Jeremy's office as a result of this request by the Prime Minister.

If this information is held by an outside contractor then it is your responsibility under the FOIA to obtain that information. If it is held by another public body then please can you inform me of this and, if possible, transfer the request to that public body.

I would be interested in any information held by your organisation regarding my request. I understand that I do not have to specify particular files or documents and that it is the department's responsibility to provide the information I require. If you need further clarification, please contact me via the telephone number listed.

If my request is denied in whole or in part, I ask that you justify all deletions by reference to specific exemptions of the Act. I will also expect you to release all non-exempt material. I reserve the right to appeal your decision to withhold any information or to charge excessive fees".

5. On 30 January 2014, the Cabinet Office responded.
6. It refused to provide the requested information. It cited the FOIA exemption at section 35(1)(a) (Formulation/Development of Government policy) as its basis for doing so.
7. The complainant requested an internal review on 30 January 2014. The Cabinet Office sent him the outcome of its internal review on 28 February 2014. It upheld its use of section 35(1)(a) and also said that it upheld its use of section 31(1)(a) (Law enforcement exemption) and section 40(2) (Unfair disclosure of personal data). This appeared to be the first time these two exemptions had been mentioned in correspondence with the complainant.

Scope of the case

8. The complainant contacted the Commissioner on 11 March 2014 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the Cabinet Office explained that it had introduced reliance on sections 31 and 40 in error and said that it wished to rely solely on section 35(1)(a).

10. The Commissioner has therefore considered whether the Cabinet Office is entitled to rely on section 35(1)(a) as its basis for withholding the requested information.

Reasons for decision

Background

11. Emma Harrison was appointed in December 2010 as an advisor to the government on the matter of families experiencing long-term unemployment.¹ She was chairman of a company called A4e that provides services in this area.² In February 2012, she stepped down from this role following allegations that there had been incidences of fraud within the company, although the allegations were not made against Emma Harrison herself.³ Concerns were expressed about the processes by which this appointment was made and the Prime Minister, David Cameron, announced a review as described in the complainant's request.

Section 35(1)(a) – formulation and development of government policy

12. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation and development of government policy.
13. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
14. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in

¹ http://news.bbc.co.uk/today/hi/today/newsid_9275000/9275026.stm

² <http://mya4e.com/about-us/who-we-are-what-we-do/>

³ <http://www.bbc.co.uk/news/uk-17145225>

improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

15. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
16. Furthermore, the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was confirmed by the Information Tribunal in *DfES v Information Commissioner & the Evening Standard (EA/2006/0006, 19 February 2007)* at paragraph 75(v), and *DWP v Information Commissioner (EA/2006/0040, 5 March 2007)* at paragraph 56.
17. In describing these general principles, the Commissioner fully recognises that policymaking can take place in a variety of ways: there is no uniform process. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
18. Nevertheless, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
19. The Cabinet Office did not explain to the complainant why the information fell within this exemption other than to assert that it did. In correspondence with the Commissioner, however, it explained that the information related to the formulation of policy on the handling of allegations of impropriety. After some delay, it provided the

Commissioner with access to the information. The Commissioner does not propose to set out detail of the withheld information on the face of this notice because to do so would reveal the content of that information.

20. Having considered the withheld information and the Cabinet Office's arguments, the Commissioner is satisfied that the information does fall within the class of information described in section 35(1)(a). He accepts that the information related to the formulation of policy on the handling of allegations of impropriety. In reaching this view he has had regard for his own guidance, particularly at paragraph 60.⁴
21. By virtue of section 2(2), section 35(1)(a) is qualified by a public interest test. This means that even if the information described in the request falls within section 35(1)(a), the Cabinet Office can only rely on it if the public interest in doing so outweighs the public interest in disclosure.

The complainant's arguments

22. The complainant, in his request for internal review, asked the Cabinet Office to explain which policy the information referred to. As noted above, the Cabinet Office did not explain this to the complainant in any of its correspondence with him. He also made the following points to the Cabinet Office:

"I believe that your public interest test has failed to take into account the very great public interest in understanding how and why Emma Harrison was appointed to an [sic] governmental advisory role. Emma Harrison and her company A4E were essential to the implementation of the Work Programme, a centrepiece of the government's welfare reforms. The public interest in understanding the process behind her appointment as a government advisor is strengthened by her company's role in

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx

(Paragraph 60: "... some such decisions may be so novel, high-profile or politically sensitive that they inevitably trigger a decision by the minister on whether the existing policy is appropriate. The more wide-ranging the consequences of the decision and the more unusual or politically sensitive it is, the more likely that it involves an element of policy review or development.")

this manner [sic]. (Once again, I would note that the company's involvement with the Work Programme refers to a policy that has already been implemented, not a future policy-making decision.)

That A4E was subsequently investigated over allegations of fraud makes the public interest in understanding the process behind Ms Harrison's appointment as an advisor even stronger than it otherwise would be. There is a clear and strong public interest in understanding the precise procedure behind Ms Harrison's appointment in the light of these developments (indeed, this would appear to be why the Prime Minister requested a review in the first place). I do not believe that your public interest test placed sufficient weight upon this argument. (Once again, I would note that the company's involvement with the Work Programme refers to a policy that has already been implemented, not a future policy-making decision.)"

The Cabinet Office's arguments

23. The Cabinet Office recognised the public interest in openness in public affairs and also in understanding how policies are developed including the contribution that is made by senior officials. However, it gave greater weight to the public interest in protecting safe space in which policy is developed. It explained that, where there is a presumption of confidentiality, discussions are more focussed and succinct. This, it explained, allowed participants to focus on the matter in hand and not on how to present the discussion of such matters.
24. It also drew attention to the fact that information was created relatively recently. As such, it argued, the public interest in withholding the information was greater. Disclosure of information so recently created would undermine the safe space in which it was created.
25. It recognised that the public interest factors it had identified in favour of disclosure carried some weight but it gave greater weight to the public interest in maintaining the exemption at section 35(1)(a). It made specific reference to the detail of the withheld information as part of its arguments. The Commissioner has taken those representations into account but cannot set them out on the face of this notice without disclosing the withheld information itself.

Balance of public interest - the Commissioner's view

26. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments made in a key Tribunal Decision involving the application of the section 35(1)(a) exemption. In that case, the Tribunal confirmed that there were two key

principles that had to be taken into account when considering the balance of the public interest: firstly the timing of the request and secondly the content of the requested information itself.⁵

27. The Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision. The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.
28. The Commissioner recognises that disclosure would provide information about how the Government responded to the controversy that arose when allegations surfaced about A4e and, in particular, when concerns were raised about how advisers to government are appointed – what checks are in place to assess suitability. The withheld information shows how policy is developed in this area. However, he agrees with the Cabinet Office that greater weight should be given to the public interest in protecting the safe space in which allegations of impropriety have been considered at the heart of government.
29. In reaching this view he has given particular weight to the age of the information. The information was created relatively recently in the safe space that government and its officials expect to use for the frank consideration of pressing issues. He has concluded that the disclosure of recently created information is more likely to undermine the safe space in which issues are discussed. There is a public interest in protecting this safe space that, in the circumstances of this case, outweighs the public interest in disclosure. The information relates to the development of operational policy which has an impact across all areas of government. While this adds weight to the public interest in disclosure, the greater weight afforded to the relative age of the information tips the balance in favour of maintaining the exemption.

⁵ *DFES v Information Commissioner and Evening Standard (EA/2006/0006)*

30. It is extremely unfortunate that the Cabinet Office did not offer the complainant any explanation as to the policy to which this information relates, even in general terms. As a consequence, the complainant was unable to submit arguments which tested the merits of the Cabinet Office's position.

Section 35(1)(a) - Conclusion

31. The Commissioner has concluded that in the circumstances of this case, the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosure.

Right of appeal

32. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

33. 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.
34. 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

Graham Smith
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