

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 October 2016

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for copies of correspondence between the Prime Minister's office and senior figures in the Church of England regarding changes to the process of making ecclesiastical appointments.
2. The Commissioner's decision is that the public authority was entitled to withhold the information held within the scope of the request on the basis of the exemption at section 35(1)(a) FOIA.
3. No steps are required.

Request and response

4. The complainant submitted a request for information to the public authority on 9 January 2016 in the following terms:

"Can you please provide me with digital copies of any correspondence between the Prime Minister's Office and senior figures in the Church of England (e.g., the Archbishops of Canterbury and York or officers of the General Synod) or members of their staff acting on their behalf regarding the proposed changes to ecclesiastical appointments outlined in The Governance of Britain Green Paper (CM 7170)? I am particularly interested in correspondence that discusses the proposal that the Prime Minister should no longer use the royal prerogative to exercise choice when advising the Queen on ecclesiastical appointments, but I am also interested in any discussions involving Crown livings."

5. On 13 January 2016 the complainant clarified the date range of his request in the following terms:

"The Governance of Britain Green Paper was laid before Parliament in July 2007, so could you please search between 27 June and 27 December 2007?"

6. The public authority wrote to the complainant on 11 February 2016 and informed him that it held information relevant to his request which it had withheld on the basis of the exemption at section 35(1)(a) FOIA. Relying on the provision in section 10(3) FOIA, the authority also informed the complainant that it needed more time to reach a decision on whether the balance of the public interest was in favour of disclosing the withheld information.
7. The public authority issued a substantive response to the request on 4 March 2016. It concluded that the public interest in maintaining the exemption at section 35(1)(a) was stronger than the public interest in disclosing the withheld information.
8. The complainant requested an internal review on 7 March 2016.
9. The public authority wrote back to the complainant on 21 March 2016 with details of the outcome of the internal review. The review upheld the original decision.

Scope of the case

10. The complainant contacted the Commissioner on 17 April 2016 in order to complain about the public authority's decision to rely on the exemption at section 35(1)(a) to withhold the information held within the scope of his request. He provided the Commissioner with submissions to support his view that the withheld information was not exempt from disclosure under FOIA and the Commissioner has referred to these submissions at the relevant parts of her analysis below.
11. The Commissioner has therefore considered whether the public authority was entitled to rely on the exemption at section 35(1)(a).

Reasons for decision

Background

12. The public authority provided the following background information to assist the Commissioner with her investigation.

13. According to the public authority, "The Governance of Britain" Green Paper was published in July 2007 during the last Labour Government led by Gordon Brown. The Green Paper made a number of proposals for constitutional reform which were intended to shift power from the executive to Parliament and to the public and make the executive more accountable. The Government's proposals were set out under four headings, the first of which – Limiting the powers of the executive – contained seven proposals, of which the last related to ecclesiastical appointments.
14. The paper argued for the removal of Prime Ministerial choice over the appointment of diocesan bishops of the Church of England. Whereas previously the Church's Crown Appointments Commission (now the Crown Nominations Commission) passed two names in order of preference to the Prime Minister, who then would recommend one to The Queen, the Prime Minister would, under the new proposals, only receive one name.
15. The Green Paper of July 2007 was followed by a series of consultation papers including one published on 15 October 2007 by the Archbishops. This paper identified two particular issues for consideration: (i) the nature and establishment and the continuing relationship between the Church and State and (ii) the balance to be struck between uniformity and diversity and the opportunity that the new arrangements provided for the Church to take a more synoptic overview of the talent available for all of its senior appointments. Following the consultation phase, a white paper titled "Constitutional Renewal" was published by the government in March 2008 which produced the Constitutional Reform and Governance Bill, and finally the Constitutional Reform and Governance Act 2010. Neither the Bill nor the 2010 Act carried forward the Church-related proposals from the Green Paper. These were instead introduced through General Synod, including Measures which are legally binding and were implemented mainly in 2010.

Section 35(1)(a)

16. Section 35(1)(a) states:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy."

17. The Commissioner has inspected the withheld information and is satisfied that it relates to the development of government policy on the process of ecclesiastical appointments, specifically with regards to the exercise of executive power in relation to senior ecclesiastical

appointments. She has therefore concluded that the withheld information engages the exemption at section 35(1)(a).

Public interest test

18. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore also considered whether in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the withheld information

19. The public authority acknowledged that there was a general public interest in openness in government, and recognised that this would increase trust in and engagement with the government. It also acknowledged that there is a public interest in understanding how government develops policies in relation to Church appointments and the interaction between Church and State.
20. The complainant has argued that there is a public interest in disclosing the withheld information because in his view the change to the executive's role, specifically that of the Prime Minister, in making senior ecclesiastical appointments represented a major change to the relationship between the Church of England and the State.
21. He pointed out the Church was generally in favour of the move as evidenced by the fact that while debating the Green Paper in July 2007, the General Synod voted overwhelmingly in favour of a motion that welcomed the prospect of the Church having the decisive voice in the appointment of bishops. He submitted that the Synod was less enthusiastic about the prospect of Downing Street disengaging from the process in relation to other Church appointments but that even then they were prepared to change the status quo. He argued that this was at odds with the claim made by the public authority to him that the proposals regarding ecclesiastical appointments in the Green Paper were by no means uncontroversial and unanimous. Therefore, if the Church expressed reservations about the proposals, then the public has a right to know what they were and how the government responded to them. On the other hand, if there were only a handful of dissenting voices then it is inaccurate to refer to the proposals as controversial and sensitive.
22. The complainant further argued that the timing of his request and the age of the withheld information meant that there was hardly any public interest in maintaining the exemption.

Public interest arguments in favour of maintaining the exemption

23. The public authority has argued that government policy in relation to ecclesiastical appointments is still developing and provided evidence in support of its position. It has consequently argued therefore that disclosing the withheld information would have a detrimental effect on the ability of the Prime Minister and the Archbishops and their senior officials to have free and frank discussions and exchange of views about the process and procedures of making senior Church appointments.
24. The public authority has further argued that there is a public interest in maintaining a safe space within which the Church is able to discuss its views on the emerging policy freely and frankly with the Prime Minister. Disclosing the withheld information would invite premature public scrutiny which would distract those involved in the ongoing discussions from focussing on the central issues and instead on the presentation of their views to the general public.

Balance of the public interest arguments

25. The Commissioner shares the view that the removal of Prime Ministerial choice over senior appointments in the Church was a significant development in respect of the relationship between the Church of England and the State. She considers that disclosure of the withheld information would increase public understanding of that decision.
26. She has not identified any specific evidence from the public authority's submissions to support the view that the proposal was controversial or that it was met with strong reservations by the Church. However, that is not to say that it was unanimously accepted or indeed uncontroversial. She is simply pointing out that she is unable to find any support for this view in the public authority's submissions.
27. The public authority has however provided evidence in confidence to the Commissioner in support of its view that at the time of the request discussions were ongoing between the government and the Church in relation to ecclesiastical appointments. However, as far as she can see, some of the discussions are quite broad ranging and do not specifically touch on the removal of Prime Ministerial choice over senior appointments in the Church. A change which it must be emphasised had become legally binding in 2010. Furthermore, a small part of the evidence provided by the public authority actually post-dates the request and in any event does not suggest to the Commissioner that officials and representatives of the Church intended to revisit this particular decision.

28. In the Commissioner's view, the enactment of a policy will more often than not signal the end of the policy formulation or development process. She considers that 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. She does not accept that there is inevitably a continuous process or seamless web of policy review and development.
29. While the Commissioner accepts from the evidence provided by the public authority that the ongoing discussions broadly relate to ecclesiastical appointments, she does not consider that they touch specifically on the fundamental change to the process of making senior ecclesiastical appointments, which was the removal of Prime Ministerial choice. This, coupled with the fact that the withheld information was over 8 years old at the time of the request reduces the weight of the public interest in maintaining the exemption in her view. The fact that the request was submitted 5 years after the enactment of the proposal is also significant in the context of assessing the balance of the public interest. Clearly, the weight of the public interest in maintaining the exemption will not be as strong as it was before the policy change was implemented in 2010.
30. The Commissioner however notes that parts of the withheld information also touch on related ecclesiastical policy matters. These matters formed part of discussions which were ongoing (and are still ongoing) between the government and the Church at the time the complainant submitted his request. Having carefully considered the withheld information in context of the ongoing discussions, the Commissioner has therefore concluded that disclosure is likely to affect free and frank exchange of views between the government and the Church. She has also concluded that disclosure is likely to limit the private thinking space necessary for officials and Church representatives to discuss these matters free from external interference and distraction. The decisive factor for the Commissioner is that related ecclesiastical policy matters mentioned in the withheld information remain at the formulation or development stage.
31. The Commissioner has therefore concluded by a narrow margin that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

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

Gerrard Tracey
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