

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 2016

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

Decision (including any steps ordered)

1. The complainant has requested from the Home Office the full contents of four historic files dating from the 1990s and dealing with aspects of Labour Party policy, open government and access to environmental information. After a long delay, the Home Office disclosed most of the information requested but withheld some relying on several FOIA exemptions. The complainant challenged the application of two of those exemptions.
2. The Commissioner decided that in withholding the disputed information, the Home Office had correctly relied on the FOIA exemptions at section 35(1)(b) (Ministerial communications) and section 42(1) (legal professional privilege).
3. The Commissioner does not require the Home Office to take any steps to comply with the legislation.

Request and response

4. On 13 August 2015 the complainant wrote to the Home Office (HO) to ask for:

"Please now send me copies of the full contents of the following four files listed in Annex B [of the HO response to a preceding FOI matter, HO case reference 33524]:

1. *LABOUR PARTY POLICY ON SECURITY AND RELATED MATTERS*

2. EC DIRECTIVE ON FREEDOM OF ACCESS TO ENVIRONMENTAL INFORMATION

3 & 4. Both files titled OPEN GOVERNMENT".

5. In response HO disclosed a large volume of information but withheld some other information, a decision which the complainant challenged. Following an internal review, HO refused to provide the requested information citing several exemptions including those in FOIA sections 35 (formulation of government policy etc) and 42 (legal professional privilege).

Scope of the case

6. The complainant contacted the Commissioner on 22 June 2016 to complain about the way his request for information had been handled. He said that he disagreed with the decision to withhold information under the section 35(1) and 42(1) FOIA exemptions. Given the age of the material involved, he said that he believed the public interest now favoured disclosure.
7. During the course of the Commissioner's investigation, HO disclosed some further information and made clear that, for section 35 FOIA, reliance was not being placed on the section 35(1)(a) exemption but only on that at section 35(1)(b) (Ministerial communications). HO maintained its reliance on the section 42(1) FOIA exemption. The Commissioner has investigated the reliance of HO on those two exemptions; during her investigation, her staff reviewed the withheld information.

Reasons for decision

Section 35(1)(b) Ministerial communications

8. The Commissioner first considered whether HO was entitled to withhold the disputed information on the basis of the exemption at section 35(1)(b) FOIA. Information held by a government department is exempt from disclosure on the basis of section 35(1)(b) if it relates to Ministerial communications.
9. The Commissioner's staff reviewed the withheld information and she decided that it did constitute Ministerial communications within the meaning of section 35(1)(b) by virtue of the fact that it had been sent by Ministers to one another.

10. The Commissioner therefore found that the exemption was engaged and that HO was entitled to withhold the disputed information on the basis of the exemption at section 35(1)(b) of the Act.

Public Interest Test

11. The exemption at section 35(1)(b) FOIA is subject to a public interest test. The Commissioner must therefore consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the disputed information.

Public interest case for disclosure

12. The Commissioner believes that there is a general public interest in openness and transparency in all aspects of government which generally favours full disclosure whenever it is reasonable to do so.
13. The complainant said that, given the age of the withheld material, he was totally unconvinced that there would be any significant damage to the public interest by its disclosure and that the HO approach to this matter has been to withhold material on entirely spurious and unnecessary grounds. He noted that current legislation was migrating from a 30 year to a 20 year rule for disclosure for these exemptions. He suggested that the relevant information could become eligible for disclosure in 2018 and said that releasing it a couple of years early could not result in any harm. He did not advance any reason for disclosure other than the age of the information.
14. HO explained that the withheld information dates from 1993, and acknowledged that it was reasonable to ask, some 23 years on, whether the information should still be withheld.

Public interest case for maintaining the exemption

15. HO said that the subject matter, which was about the then proposed introduction of laws governing access to official information, had been a significant policy issue which had spanned government. The views of Ministers had been sought, and deliberations took place through Cabinet committees. HO said that disclosing this correspondence prematurely would impact adversely the principle of maintaining collective Cabinet responsibility.
16. HO said that collective responsibility was the longstanding convention whereby all Ministers were bound by the decisions of the Cabinet and carried joint responsibility for all government policy and decisions; this was a central feature of constitutional government in the UK. Whilst permitted to express their own views in a free and frank manner within

Cabinet and in committee, Ministers then maintained a united front once decisions had been reached. This relied upon maintaining the privacy of opinions expressed in Cabinet and in Ministerial committees, including correspondence.

17. HO said that disclosing the withheld material would undermine the fundamental importance of the general constitutional principle of Ministerial collective responsibility. Despite the passage of time, premature disclosure without an over-riding reason would act to undermine government unity, and could have a negative impact on the effectiveness of government.
18. HO added that this information was likely to be transferred to the National Archives at some point in the next few years, but until that time there was still a need to withhold the information; disclosure now would prejudice Cabinet collective responsibility.

Balance of the public interest

19. The Commissioner saw that there are openness and transparency reasons favouring disclosure now and she acknowledged the age of the withheld information as favouring disclosure. However, she recognised the importance to constitutional government of maintaining the integrity of collective Cabinet responsibility. She noted that Parliament had established time limits for the withholding of information and considered that it would not be right for her to override those time limits arbitrarily without good cause. In this matter she has seen no over-riding public interest reason to depart from the decision of Parliament and require early disclosure.
20. The Commissioner accepted that Ministers needed a safe space to discuss issues secure in the knowledge that their deliberations would not be made public, and made the subject of public debate prematurely. Accordingly she decided that in all the circumstances of the case, the public interest in maintaining the section 35(1)(b) FOIA exemption outweighed the public interest in disclosing the withheld information.

Section 42 Legal professional privilege

21. The Commissioner has viewed the withheld information which is within the scope of the request. HO considered that the privilege attached to the advice had not been lost.
22. Section 42 FOIA provides that information in respect of which a claim to legal professional privilege communications could be maintained in legal proceedings is exempt information. The principle of legal professional privilege is based on the need to protect a client's confidence that full

and frank communication with his or her legal advisor will be treated in confidence.

23. There are two types of legal professional privilege: advice privilege (where no litigation is contemplated or underway) and litigation privilege (where litigation is underway or anticipated). HO said, and the Commissioner agreed, that the withheld information attracted advice privilege. She therefore decided that Section 42(1) FOIA is engaged.
24. Section 42(1) FOIA is a qualified exemption. Therefore the Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest factors favouring disclosure

25. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding how public authorities make their decisions. This in turn fosters public trust in the authorities and facilitates public participation in the decision making process.
26. The complainant considered that in view of the age of the withheld information, there would not be any significant damage to the public interest from its disclosure.
27. HO accepted that the information was no longer 'live', being now some 23 years old, and that the relevant legislation had been enacted.

Public interest factors for maintaining the exemption

28. The Commissioner considers that there will always be strong arguments in favour of maintaining legal professional privilege. It is a longstanding, well established and important common law principle. The Information Tribunal affirmed this in the *Bellamy* case (*Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023)) when it stated:

"...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).

29. HO said that it required comprehensive legal advice to conduct its business effectively. That advice needed to be given freely and frankly to include possible arguments both for and against a particular view.

Such advice might set out perceived weaknesses in a department's position. Disclosure of such information might then prejudice its ability to defend its position effectively in any legal proceedings. The preservation of legal professional privilege therefore helped to ensure the fairness of legal proceedings, which is in the public interest.

30. HO added that it was the concept of legal professional privilege, and the rationale behind it of ensuring frankness between lawyer and client, which served the wider administration of justice and which HO considered gave weight to the application of the exemption in this particular instance. In the longer term disclosure of this information without an overriding public interest reason could have a prejudicial effect in future.
31. While recognising the considerations in favour of disclosure, HO said that it did not consider that they were of equal strength to those in favour of maintaining the exemption. They did not, in the view of HO, override the inbuilt public interest in maintaining legal professional privilege.
32. The Commissioner has noted that Parliament had established time limits for the withholding of information that attracts legal professional privilege which apply here. She considered that it would not be right for her to alter those time limits arbitrarily in this matter without strong reason and she has seen no over-riding public interest reason to depart from the decision of Parliament and require disclosure earlier than Parliament intended.

Public interest balance

33. The Commissioner is satisfied for the reasons discussed above that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Other matters

34. The Commissioner has made a separate record of the delays that arose in HO's handling of this matter which were in part due to the volume of information requested. The issue of delay by HO may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

35. 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

36. 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.
37. 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

Jon Manners
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