

Freedom of Information Act 2000

Decision notice

Date: 3 April 2017

Public Authority: Cabinet Office
Address: Room 405
70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information relating to the Independent Commission on Freedom of Information (the Commission). The Cabinet Office denied holding information for one part of the complainant's request. For the other requests, it refused to disclose the relevant information because it was third party personal data under section 40(2) of the Freedom of Information Act 2000 (the Act).
2. During the Commissioner's investigation, the Cabinet Office denied holding information for another part of the request, and for the others cited further exemptions:
 - Section 35(1)(a) – for the information in its entirety
 - Section 35(1)(b) – for the specific correspondence which was communication between ministers
 - Section 36(2)(c) – should the Commissioner find that section 35 did not apply
 - Section 41(1) – for the correspondence concerning Jack Straw MP
3. The Commissioner's decision is that on the balance of probabilities the Cabinet Office does not hold information relating to contact with the Labour and Liberal Democrat parties regarding the setting up of the Commission, or views or correspondence on the suitability of Jack Straw MP and Lord Carlisle.

4. The Commissioner's decision regarding section 35(1)(a) is that the exemption is engaged for the information in its entirety, and that the balance of the public interest test favours maintaining the exemption.
5. The Cabinet Office breached section 17(1) by citing additional exemptions late. As the complainant has been informed of these new exemptions the Commissioner does not require the Cabinet Office to correspond further on this.
6. No steps are required.

Request and response

7. On 20 July 2015, the complainant wrote to the Cabinet Office and requested information in the following terms:

"I would like to make an FOI request for the following information. Please note that I am requesting only recorded information, and not explanations or justifications. If any unrecorded information is included in your response, please make that clear (but to confirm, I do not wish to receive any information that is created in order to answer my request).

1) Any information on payments made to the members of the Cabinet Office's Commission on Freedom of Information.

2) Any contact with the Labour or Liberal Democrat parties about setting up the Commission, including but not limited to any request for nominees for the "cross party" Commission, and any requests for views on the suitability of Jack Straw and Lord Carlisle respectively to be representatives of the two parties.

3) Correspondence with Jack Straw or his representatives about the FOI Commission, including, but not limited to, the initial approach and who it was made by.

4) Any information about who should be selected to be on the Commission, including those who were considered and rejected."

8. The Cabinet Office responded on 18 August 2015. It denied holding any information for item 1) of the request, and for items 2) – 4) it stated that the relevant information was withheld under section 40(2) of the Act as it was third party personal data.
9. Following an internal review the Cabinet Office wrote to the complainant on 18 December 2015. It upheld the initial refusal notice of 18 August 2015.

10. The Cabinet Office also confirmed to the Commissioner that there was no relevant information held for item 2) of the complainant's request.
11. During the course of the Commissioner's investigation the Cabinet Office sought to apply other exemptions to the withheld information:
 - Section 35(1)(a) – for the information in its entirety
 - Section 35(1)(b) – for the specific correspondence which was communication between ministers
 - Section 36(2)(c) – should the Commissioner find that section 35 did not apply
 - Section 41(1) – for the correspondence concerning Jack Straw MP

Scope of the case

12. The complainant made his appeal on the basis of the Cabinet Office's section 40(2) refusal, as the Cabinet Office had not applied the other exemptions before he made his appeal. Following the Cabinet Office's citation of further exemptions and denial of holding information for item 2) of the request, the Commissioner contacted the complainant to inform him of the development. The complainant confirmed that he wished to appeal against the newly cited exemptions, as well as the Cabinet Office's position that it held no information in relation to item 2) of the request.
13. The Commissioner considers the scope of the complaint to be whether on the balance of probabilities the Cabinet Office holds information in relation to item 2) of the request. She will also decide upon whether the Cabinet Office is entitled to refuse items 3) and 4) of the complainant's request under section 35(1)(a). Should she find this does not apply to all or part of the information then she shall consider the other exemptions cited where relevant.

Reasons for decision

Section 1(1) – information held

14. Section 1(1) of the Act states:

“(1) 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."*

15. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – in accordance with a number of First-Tier Tribunal decisions – applies the civil standard of the balance of probabilities.

16. The Cabinet Office initially stated in its refusal notice of 18 August 2015 that (Commissioner's comments in square brackets):

"The Commissioners and Chair are unpaid but they are entitled to the reimbursement of reasonable expenses [item 1) of the request]. Information relating to the appointment of the Chair and members is personal information and is being withheld under Section 40 (personal information) [items 2), 3) & 4) of the request]."

17. The Cabinet Office stated in its internal review of 18 December 2015 (Commissioner's comments in square brackets):

"I have carefully the handling of your request and I consider that in answer to your first question you were correctly informed that the members of the Independent Commission on Freedom of Information do not receive payments but are entitled to reasonable expenses [item 1) of the request]."

...

"In relation to your other questions, the Cabinet Office correctly applied the exemption in section 40(2) of the Freedom of Information Act on the basis that disclosure would constitute a breach of the Data Protection Act. I have therefore concluded that I should uphold the decision given in our previous letter."

18. Any objective reading of these responses would lead to the conclusion that information was held for item 2) of the request, and that it had been refused under section 40(2) of the Act.

19. When the Cabinet Office provided its first set of submissions it informed the Commissioner that upon "further review" no information was held in relation to item 2). No explanation was offered for how this oversight had occurred.

20. The Commissioner enquired with the Cabinet Office how this had come about. The Cabinet Office stated that the refusal notice had been worded

to address the request as a whole rather than any individual question. In the Commissioner's view, this is incorrect, as there is a sentence stating that no information is held for payments, which is clearly in relation to item 1. The Cabinet Office went on to say that the internal review was inadvertently and erroneously worded in such a way that it implied information was held for item 2.

21. The Commissioner therefore finds that the Cabinet Office were in breach of section 1(1)(a) and section 10(1) for providing a response to the request that led the complainant to understand the information was held under item 2.
22. The Commissioner recommends that the Cabinet Office is clearer in future when responding to a multi-itemed request.
23. Regarding whether information is held, the Cabinet Office confirmed that it provided the Commissioner all of the recorded information it holds on correspondence relating to the establishment of the Commission. The Commissioner has reviewed the correspondence and cannot locate any information which would come within the scope of item 2).
24. The Cabinet Office stated that both Jack Straw MP and Lord Carlisle were approached personally, and there was no involvement with their respective political parties. From the Commissioner's reading of the withheld information this seems entirely credible, and she is satisfied on the balance of probabilities that no information is held relevant to item 2 of the request.

Section 17(1) – time for refusal notice

25. Section 10(1) of the Act provides that 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.

26. Section 17(1) of the Act states (Commissioner's emphasis):

*(1) 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.

27. The effect of section 17(1) is that if a public authority wishes to refuse a request – even if it is taking further time to consider the balance of the public interest – then it must inform the requester of this within 20 working days. This applies to all of the exemptions a public authority wishes to rely on to refuse disclosure of recorded information.
28. The Cabinet Office refused items 2), 3) and 4) of the complainant's request under section 40(2), and did not apply any of the exemptions from sections 35, 36 or 41 until during the Commissioner's investigation. This was long after the 20 working day limit, so the Cabinet Office breached section 17(1) of the Act. As the complainant has been informed of the Cabinet Office's change in position no steps are required to address this breach.
29. The Commissioner recommends that the Cabinet Office ensures its full position is made clear to requesters at the earliest stage possible, in order that they may form an informed view on whether to pursue any form of appeal.

Section 35(1)(a) – government policy

30. Section 35(1)(a) of the Act states:

*“(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –

(a) the formulation or development of government policy,”*

31. In order for information to engage the exemption at section 35(1)(a) it must relate to the formulation or development of government policy. The Commissioner uses a wide interpretation of the phrase “relates to”, and accepts any significant link between the information and the formulation or development of government policy is sufficient to engage the exemption.
32. The Commissioner's guidance confirms that for the purposes of section 35(1)(a) the definition of government policy can be seen as *“a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives.”*¹

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf#page=8>

33. The withheld information relates in its entirety to the formulation of the Commission, which was established to review the Act and consider whether various aspects of the legislation needed to be amended. The set up and composition of the Commission was clearly a matter of government policy. In the Commissioner's view, by relating to the formulation of the Commission the withheld information relates to the formulation of government policy on a specific piece of legislation. Therefore, the exemption at section 35(1)(a) is engaged.
34. Section 35(1)(a) is a qualified exemption, meaning that it is subject to a public interest test. To decide whether the information can be disclosed the Commissioner will need to determine the balance of the public interest.
35. For the Commissioner's own view she will address items 3) and 4) of the request together, as the nature of the information is sufficiently similar that the Commissioner's arguments will cover both. Item 3) of the request is correspondence between Jack Straw MP and David Cameron MP (and their assistants) concerning Mr Straw's appointment to the Commission. Item 4) of the request relates to civil servants from government departments, along with some Cabinet ministers and their assistants, discussing the various individuals who were suitable appointees to the Commission.

Complainant's position

36. Often in section 35(1)(a) cases there is an argument for 'safe space' which allows government to develop ideas and debate live issues. However, the complainant stated that there was no such need in this situation. His request was made three days after the statement was issued which announced the Commission's creation, so it follows it was not a live issue and the safe space was no longer required.
37. The complainant stated to the Commissioner that the process for selecting members of the Commission was far from being transparent, and that many people were unaware of its creation and the process of selecting candidates was done in secret. He argued that disclosure of this information would not impede the Cabinet Office's ability to create a similar Commission in future; and the only possible precedent that would possibly be set would be disclosure may follow once a controversial decision had been made.

38. Additionally, the complainant argued against the official position that this Commission was strictly a “cross-party”² body. He stated that the Labour and Liberal Democrat Parties had not been involved in the process, so the term was a misnomer.
39. The complainant also argued that the government had selected individuals to the Commission (Jack Straw MP and Lord Howard) whom had made very clear statements that could be interpreted as ‘anti-FOI’. The complainant stated that such selection practices “effectively invited scrutiny of the selection process”.

Cabinet Office's position

40. The Cabinet Office acknowledged that there was an argument for transparency in government decisions, and that there was “significant” public interest in the decisions taken that led to the selection of the Commission’s members.
41. In contrast to the complainant, the Cabinet Office argued that there was a very clear safe space argument to be made for the withheld information. Whilst the request did come after the Commission’s formation, it had only done so by three days. The Cabinet Office argued that whilst the announcement about the Commission had taken place, the Commission was yet to have its first meeting. Full transparency over the selection process would reveal the reasons why certain individuals had or had not been selected, which would undoubtedly lead to unwarranted scrutiny at such a timely stage. This would be likely to impact upon the Commission’s ability to form its reasonable conclusions without significant interference, which the Cabinet Office concluded was not reasonable at such an early stage.
42. To support its argument the Cabinet Office cited two previous requests where a decision had been made under similar circumstances: the Commissioner’s decision [FS50608015](#) and the First-Tier Tribunal (Information Rights) decision [EA/2011/0279](#). The former concerned a request for government’s discussion for terms of reference for the Airport Commission, and the selection of its members. The latter concerned a request for advice provided to ministers to relating to changes to section 37(1)(a) of the Act. In both instances the information related to a decision that had been made, yet the argument for a safe space was still accepted due to adverse effect of disclosure.

² <https://www.gov.uk/government/speeches/freedom-of-information-new-commission> see paragraph 5

43. The Cabinet Office also argued that disclosure of such information would lead to a chilling effect. Creating public debate three days after the announcement of the Commission – before that body had even met for the first time – would lead those involved in the selection to be far more restrained in their comments about which individuals would be suitable and their reasons why. The Cabinet Office also argued that certain junior members of staff would likely refrain from making certain comments at all, less their remarks are subject to a level of public scrutiny that went beyond what they could reasonably expect at that time. The Cabinet Office argued that this would be detrimental to future selection processes, and so there was a strong public interest argument in maintaining the exemption.
44. Additionally, the Cabinet Office argued that disclosure so soon after the announcement had been made would represent an adverse challenge to the constitutional convention of Cabinet collective responsibility. The information went right to the heart of central government policy formulation, and disclosure would expose whether there was disagreement between ministers. The Cabinet Office argued that the timing of the complainant's request meant added weight to this argument.
45. The Cabinet Office sought to argue that the Commission's recommendations showed that – far from the public perception that it was not 'pro-FOI' – it was fully supportive of the Act and believed for the most part it was working well. The Commissioner has dismissed this argument as the balance of the public interest is taken from the time of the request. At that time there was widespread concern over the Commission's members and the outcome cannot not alter the circumstances, e.g. the level of public concern that existed at the time of the request.

Commissioner's position

46. The Commissioner has considered the strength of the arguments made in favour of maintaining exemption in relation to this information, and is of the view that it relates directly to the establishment of a Government appointed Commission. This relates directly to the formulation of government policy, and the as such the effects of disclosure could be significant.
47. The Commissioner accepts the general importance of safe space for policy formulation and development. It will depend on the circumstances of a case how much weight this argument is given. The

weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.³ The Commissioner's guidance on section 35 also states:

*"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."*⁴

48. In this instance, the Commissioner acknowledges the complainant's point that the announcement of the Commission's members had been made by the time of the request, but the Commissioner is swayed by the Cabinet Office's argument that the Commission was still at a very early stage of its work. It is evident that disclosure would have had a sizeable impact upon the Commission. Revealing the government's deliberations about the Commission and who should be appointed would have immediately exposed the Commission to facts about its creation before it had even had its first collective discussion. Members of the Commission would not necessarily be aware of the reasons why they were picked, or who might have been preferred to them. This would bring about wider scrutiny from the press and elsewhere, and would destabilise the Commission before it had even begun its work. In the Commissioner's view, this would be an unwarranted intrusion at such an early stage, and there is a strong public interest in protecting this from occurring.
49. The Commissioner also agrees that disclosure would have an impact upon future discussions.. It would be likely to have an impact upon the future process if it was known that information of this nature must be disclosed immediately after a decision had been reached on one stage of an ongoing policy. The Commissioner agrees with the Cabinet Office that the views of ministers and officials would be directly affected, and that there is a strong public interest argument in maintaining the exemption as a result.

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http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i181/DBERRvIC_FOefinaldecision_web0408.pdf#page=27 see paragraph 114

⁴ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf> paragraph 200

50. Similarly, the Commissioner agrees with the Cabinet Office's arguments on free and frank discussion, as well as the arguments for protecting Cabinet collective responsibility. The content of the withheld information contains frank opinions. It is evident that were this information disclosed so soon after the decision to appoint the Commission members had been announced it would both deter future free and frank discussions, as well as undermine Cabinet Office collective responsibility. It follows that there is a strong public interest in avoiding both consequences, which strengthens the argument to maintain the exemption.
51. There is a strong argument for transparency in government decisions, especially with regards to those taken at the highest level. As the FOI Directory webpage makes clear, there were a number of prominent concerns from major media organisations, campaign groups, and within the general public about the decisions that had been made. Transparency over the government's intentions about the Commission and the reasoning why certain individuals were selected would add much to the public debate about the Commission.
52. The Commissioner accepts that there was considerable public debate and doubt about the "cross-party" description of the Commission. She therefore accepts that some weight should be given the argument that openness about the process, to enable the public to assess the validity of this claim, would be in the public interest.
53. The Commissioner also notes that the stated views of certain members of the Commission were not exactly supportive of the current FOIA legislation, with Jack Straw MP stating in his autobiography that the Act was "showing signs of its wholly inadequate conception and implementation". The Commissioner accepts that this created a strong public interest in favour of disclosing the information to enable further scrutiny.

Balance of the public interest

54. It is clear that there is a strong case for transparency over this information given its high profile nature, and the widespread concern that was expressed following the announcement of the Commission. The withheld information would certainly inform public debate, and does provide insight into the rationale behind the Commission and the selection of its members.
55. However, the Commissioner's decision is that the balance of the public interest lies with maintaining the exemption. The timing of the request is crucial in this instance, and whilst the Commissioner notes that the announcement of the Commission and its members had been made, it is evident that the Commission was still at a very early stage. To expose it to widespread scrutiny would undermine a number of factors that

contribute towards effective government, and this would be unwarranted at that time.

56. The Commissioner's decision is that items 3) and 4) of the request are exempt under section 35(1)(a) of the Act and that the balance of the public interest favours maintaining the exemption. No steps are required.

Other matters

57. Delay to the Cabinet Office's internal review: the Cabinet Office took 82 working days to issue its internal review to the complainant. The Commissioner's guidance expects a review to take no longer than 20 working days in most cases, or 40 in exceptional circumstances. The Commissioner reminds the Cabinet Office of the importance of following this guidance.

Right of appeal

58. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

59. 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.
60. 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

Steve Wood
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