

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 May 2017

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

Decision (including any steps ordered)

1. The complainant has requested information about a meeting in November 2015 between Tim Cook, CEO of Apple, and the then Home Secretary, Theresa May. The Home Office refused to disclose the information, citing the exemption at section 35(1)(a) (formulation of government policy) of the FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 35(1)(a) to withhold the requested information. The Commissioner requires no steps to be taken.

Request and response

3. On 17 March 2016, the complainant wrote to the Home Office and requested information in the following terms:

"I'm writing to request the minutes and any other documentation produced to record what was discussed in a meeting between the Home Secretary Theresa May and the CEO of Apple Tim Cook which took place during November 2015, regarding "Discussions over IP Bill"."
4. The Home Office responded on 21 April 2016 and confirmed that it held information falling within the scope of the request. It refused to disclose it, citing the non-disclosure exemption at section 35(1)(a) (formulation

of government policy) of the FOIA. It said that the public interest favoured maintaining the exemption over disclosing the information.

5. The complainant requested an internal review of the decision the same day. He challenged the Home Office's assessment that the public interest favoured maintaining the exemption at section 35(1)(a).
6. The Home Office provided the outcome of the internal review on 21 October 2016 in which it maintained its original position

Scope of the case

7. The complainant contacted the Commissioner on 26 October 2016 to complain about the way his request for information had been handled. He disagreed with the Home Office's decision that the public interest favoured maintaining the exemption at section 35(1)(a).
8. The Commissioner considers the scope of this decision notice to be whether the Home Office was entitled to rely on section 35(1)(a) to refuse to disclose the requested information.
9. In reaching her decision, the Commissioner has had sight of the withheld information, which comprises a one and half page summary of the meeting.

Reasons for decision

Section 35 – formulation of government policy

10. The purpose of section 35(1)(a) is to protect the integrity of the government policy-making process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
11. Section 35(1)(a) of the FOIA states:

"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".
12. 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 employs 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.

13. 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
14. The Commissioner's guidance also notes that White Papers, bills and the legislative process are areas where policymaking processes are likely to take place:

"The classic and most formal policy process involves turning a White Paper into legislation. The government produces a White Paper setting out its proposals. After a period of consultation, it presents draft legislation in the form of a bill, which is then debated and amended in Parliament. In such cases, policy formulation can continue all the way up to the point the bill finally receives royal assent and becomes legislation."

15. The withheld information in this case relates in its entirety to the formulation of policy relating to the Investigatory Powers Bill, which sets out proposals for governing the use and oversight of investigatory powers by law enforcement and the security and intelligence agencies. The Bill was announced in the Queen's Speech in May 2015, and at the time of the meeting in question, it had not yet had its first reading in the House of Commons (at which the short title of the Bill is read out and is followed by an order for the Bill to be printed).
16. The proposals contained in the Bill were clearly a matter of government policy, and the meeting summary confirms that the Bill was the sole topic of the meeting. In the Commissioner's view, by relating to the Investigatory Powers Bill, the withheld information relates to the formulation of government policy on a specific piece of legislation. Therefore, the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged.
17. The Commissioner notes for the record that the complainant has not disputed that section 35(1)(a) is engaged. It is the outcome of the public interest balancing test that he disagrees with.

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

The public interest

18. The exemption at section 35(1)(a) is qualified by a public interest test, meaning that if it is engaged, information may still only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the withheld information

19. The complainant disputed the Home Office's conclusion that the public interest favoured maintaining the exemption at section 35(1)(a). In his request for an internal review, he argued that there was a clear public interest in disclosure:

"...especially considering the criticism brought by Tim Cook CEO of Apple, in the company's submission to the Joint Committee on the Investigatory Powers Bill:

<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-investigatory-powers-bill-committee/draft-investigatory-powers-bill/written/26341.html>.

During the course of Apple's submission it made several criticisms which the government did not answer in subsequent exchanges. It is in the public interest that the development of the government's policy here is made public."

20. In his complaint to the Commissioner, the complainant cited the following as factors which, in his view, tipped the balance of the public interest in favour of disclosure:

"That the incumbent postholder at the time of the meeting [Theresa May] has since moved on. That the Investigatory Powers Bill is currently before Parliament and this "crucial" live quality neither makes the information exempt from disclosure—a notion which would relegate the entire FOIA into a tool for historians—nor does it diminish the public interest test in knowing how meetings informed the construction of the Bill's contentious provisions.

Additionally, it is known that the CEO of Apple must have a significant interest in the provisions of the Bill—much of which was set forth in Apple's submission to the Joint Committee on the Investigatory Powers Bill—and therefore it is in the public interest that the results of a lobbying meeting between the CEO of a large company and the minister responsible for significant provisions are disclosed."

21. The Home Office acknowledged that there is a general public interest in the Government being open and transparent, so as to maintain public

trust. It also recognised that there is a legitimate public interest in disclosing information about Ministers' activities, including some information on their meetings. However, it considered this interest was met by publishing on the gov.uk website information about Ministers' meetings with external bodies on a regular basis.

Public interest arguments in favour of maintaining the exemption

22. The Home Office argued that good government requires a safe space in which to allow Ministers to generate policy through open and honest debate, where they can consider a variety of different options, without being subject to public scrutiny, commentary or other outside interference. The removal of this safe space, which allows Ministers to consider policy issues without inhibition, would mean the policy development process would be markedly more difficult, and there may be a concomitant decrease in the quality of policy created. This would clearly be contrary to the public interest.
23. The Home Office also recognised that section 35(1)(a) is concerned with protecting the processes that may be inhibited if information is disclosed about policy-making. In other words, it is not only about the specific information itself, but also the broader issue of whether disclosure would inhibit the processes of providing advice in general, leading to poorer decision- (or policy-) making. This is known as the 'chilling effect'.
24. The chilling effect argument is that disclosure of discussions in response to a request now, would inhibit free and frank discussions, on any issue, in the future, with parties more reluctant to express a view if they believe this could subsequently be disclosed. As with the safe space arguments, the accompanying loss of frankness and candour would damage the quality of advice provided to decision-makers and potentially lead to poorer decision/policy-making.

Balance of the public interest arguments

25. The Commissioner has accorded weight to general public interest arguments in favour of disclosure. She recognises the importance of transparency in policy-making, the particular public interest in understanding the development of a policy which contains contentious elements and the role of third parties in policy development.
26. For its part, the Home Office submitted a combination of safe space and chilling effect arguments in favour of maintaining the exemption.
27. With regard to the safe space arguments, the Commissioner accepts the general importance of safe space for policy formulation and development. Policy-makers need a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This is because rather than having robust discussions about

the options under consideration, officials and Ministers could instead be forced to expend time and resources justifying why an option was or was not being considered and/or whether sufficient weight was being given to an option under consideration. This would be detrimental to policy development.

28. This argument carries significant weight when the issue under consideration is still live and ongoing, as was clearly the case here. The Home Office explained that at the time the request was received the Bill was still subject to debate and amendment. It had received its second reading in the House of Commons, but had not yet gone into Committee, and still had to complete most of its stages through both Houses. It did not receive Royal Assent until November 2016 (eight months after the request was received), and some of its provisions have not yet been implemented and are still subject to ongoing policy development and formulation.
29. In view of this, the Commissioner is of the opinion that the Home Office's safe space arguments attract considerable weight in this case.
30. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants (particularly senior ones) are expected to be impartial and robust when giving advice, and that, in general, they should not easily be deterred from expressing their views by the possibility of future disclosure.
31. However, where the formulation or development of the policy to which the withheld information relates is still live and ongoing, the Commissioner does accept that disclosure would be likely to have a chilling effect on those specific, ongoing policy discussions.
32. As discussed above, the Commissioner is satisfied that the policy making in question here was live and ongoing at the time of the request. The Commissioner therefore accepts that disclosure of the withheld information would have a significant chilling effect on the government's ongoing policy discussions regarding this specific policy. She considers that this argument carries significant weight.
33. Lastly with regard to chilling effect arguments, the Commissioner notes that the meeting in question involved a representative from the private sector.
34. The Commissioner considers that private sector stake holders make an important contribution to the policy making process by virtue of their expertise and practical understanding of matters in respect of which policy or legislation is being developed. They are able to provide up to date, practical information and perspectives which can be crucial to public sector policy makers having a rounded, comprehensive view of a particular issue. She considers that disclosure of the meeting note in this

case could have a slight chilling effect on the willingness of private sector representatives to engage candidly in such circumstances, although it is limited to some extent as stakeholders will often see a benefit in being able to present their views to Ministers, even if they are subsequently disclosed.

35. The complainant had expressed particular concern about the CEO of a major corporation having access to government ministers regarding a policy in which it could be considered to have an interest. The Commissioner acknowledges that there is a public interest in transparency surrounding the meetings that government has with representatives of the private sector, regarding matters of public policy. It is an important means of ensuring public confidence that public policy is not being shaped or driven by the interests of anything other than the public interest.
36. However, the Commissioner notes that less than a month after the meeting with the Home Secretary, Apple made a formal submission to the Joint Committee on the Investigatory Powers Bill setting out its position and the changes it would like to see made to the Bill. This submission is in the public domain² and the Commissioner considers that it goes a considerable way to satisfying the public interest in transparency in this case.
37. Taking all the above into account, the Commissioner considers that while the complainant's arguments advocating for disclosure do carry some weight, they are not sufficiently strong to outweigh the considerable public interest she finds in maintaining the exemption in this case.
38. Therefore, the Commissioner's decision is that the Home Office was entitled to rely on section 35(1)(a) to withhold the requested information in this case.

Other matters

Section 45 code - Internal review

39. There is no obligation under the FOIA for a public authority to provide an internal review process. However, it is good practice to do so, and where
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²<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidence/document/draft-investigatory-powers-bill-committee/draft-investigatory-powers-bill/written/26341.html>

an authority chooses to offer one the section 45 code of practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.

40. The complainant asked for an internal review of his request on 21 April 2016 and the Home Office provided the outcome of the internal review on 21 October 2016, 128 working days later.
41. The Commissioner considers that in failing to conduct an internal review within the timescales set out above, the Home Office has not acted in accordance with the section 45 code.

Right of appeal

42. 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

43. 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.
44. 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

Samantha Bracegirdle
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