

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 January 2020

Public Authority: Cabinet Office

Address: Room 405
70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information on Cabinet committee minutes on devolution from 1997 and 1998. The Cabinet Office refused the request in reliance of the exemptions at FOIA section 35(1)(a) & (b) – Formulation of government policy, Ministerial communications.
2. The Commissioner's decision is that the exemptions are engaged in respect of the requested information, however, the public interest favours disclosure of the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 August 2018, the complainant wrote to the Cabinet Office and requested information in the following terms:

"Please send me copies of all the minutes of the Cabinet Sub-Committee on Devolution for Scotland, Wales and the Regions for 1997 and 1998."
6. The Cabinet Office responded on 18 September 2018 with a refusal notice in reliance of sections 35(1)(a) & (b).
7. The complainant requested an internal review on 18 September 2018. Following an internal review the Cabinet Office wrote to the complainant on 10 December 2018 upholding its initial refusal.

Scope of the case

8. The complainant contacted the Commissioner on 4 January 2019 to complain about the way his request for information had been handled. He explained his view as follows:

"1. The public interest has been applied in an unjustifiably blanket fashion to all the requested material en bloc, rather than taking account of the balance of the public interest for individual elements of the material requested.

2. In my view the balance of the public interest favours disclosure of the material I am seeking. The Cabinet Office response fails to reflect and engage with the important arguments put forward and the decision taken by the Information Commissioner in the following highly relevant case¹.

3. Given the additional passage of time since that decision, and the fact that the material involved is now over 20 years old, it is my contention that the weak case against disclosure has been substantially further weakened since then."
9. The Commissioner wrote to the Cabinet Office on 20 May 2019 to request a copy of the withheld information and the Cabinet Office's submission on the application of the exemptions.
10. The Commissioner did not receive a substantive response to her correspondence or any acknowledgement, despite several emails requesting a response.

¹ FS50347714 issued in 2011

11. On 29 August 2019 the Commissioner issued an information notice under section 51 of the FOIA. The Cabinet Office responded to the information notice on 26 September 2019.
12. The Commissioner notes that she has served other decision notices in respect of similar information requested here. The latest notice being earlier this year on 18 February 2019, in respect of the 1997 minutes². Notwithstanding this, the Commissioner has considered this decision on the circumstances of this case.

Reasons for decision

Section 35: Formulation of government policy

13. Section 35 FOIA states:

“(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications

14. The Commissioner’s view is that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.
15. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policymaking 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. Her guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process.
16. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614408/fs50745325.pdf>

order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.

17. The Cabinet Office explained that the requested information relates to the policy of the function of devolution. The Cabinet Office confirmed that the policy was completed at the time of the request but considers that:

“the constitutional importance of devolution and collective Cabinet responsibility means that discussions that took place before the devolution settlements remain sensitive.”

18. The Commissioner is satisfied that the exemption at section 35(1)(a) is engaged in this case. She has considered the Cabinet Office’s assessment of the likelihood of prejudice as part of the public interest analysis set out below.

19. Section 35(1)(b) provides that information held by a government department is exempt information if it relates to Ministerial communications. Section 35(5) defines ‘Ministerial communications’ as any communication between a Minister of the Crown and;

“includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales.”

20. As with section 35(1)(a), section 35(1)(b) provides a class-based exemption. The Cabinet Office relied on this exemption with respect to information about the subjects discussed at the Cabinet Sub-Committee meetings.
21. Having inspected the requested information the Commissioner is satisfied that it falls within the description set out at section 35(1)(b), therefore the exemption is engaged.

Public interest test

22. Sections 35(1)(a) and 35(1)(b) are qualified exemptions and therefore subject to the public interest test. The Cabinet Office provided combined public interest arguments for section 35(1)(a) and section 35(1)(b). The Commissioner has therefore considered whether the public interest in favour of maintaining either or both of the exemptions outweighs the public interest in favour of disclosure of the information.

Public interest in favour of disclosing the withheld information

23. The Cabinet Office recognised the general public interest in openness. It further recognised that the decisions Ministers make may have a significant impact on the lives of citizens across the UK, and there is a public interest in their deliberations being transparent. The Cabinet Office also recognised that openness in government may increase public trust and engagement with government. Furthermore it acknowledged the wider public interest in the public being well-informed about the policy on devolution.
24. As set out in paragraph 8 above, in bringing his case to the Commissioner the complainant focussed on the balance of the public interest favouring disclosure in the light of previous decisions by the Commissioner.

Public interest in favour of maintaining the withheld information

25. The Cabinet Office stated its view that:

“..there is a strong public interest in maintaining the process of policy formulation, and protecting very sensitive information related to government policy decisions. Government ministers are rightly answerable for the decisions they take, not for the options they consider or the other influences on the policy formulation process. The disclosure of information about how the government took decisions on devolution would invite judgements about whether these decisions were taken correctly and the success or otherwise of the policy.”

26. Following from this the Cabinet Office maintained that the public interest in protecting a ‘safe space’ for Ministers and their advisers to consider policy options overrides the general public interest in transparency.
27. The Cabinet Office advised the Commissioner that those participating in Cabinet Sub-Committee meetings expected that their detailed consideration of policy options, including the level at which discussions took place, would remain private unless there is a “very strong countervailing public interest in disclosure”. The Cabinet Office considers that no such public interest is present in this case.
28. The Cabinet Office does not believe that Ministers or their advisers would shrink from their duty to take decisions based on the relevant information and in full consideration of all the options presented to them. Notwithstanding this it added:

“However, if ministers and their advisers are required to constantly ‘look over their shoulders’ to consider how the public would react to the level at which a decision was taken, there would be pressure for decisions to be taken at a higher level than required, placing an unnecessary burden on the most senior levels of decision making.”

29. The Cabinet Office also argued that the content of any discussions would also be influenced such that there would be an unwarranted concern with the presentation rather than the content of the policy. It advised the Commissioner:

“Over the long term, this would have a tendency to restrict consideration to issues that could be presented as reasonable by the standards of time and exclude from consideration other options that might prove unacceptable to vocal interest groups.”

30. The Cabinet Office also identified a strong public interest in protecting the confidentiality of all aspects of communications between Ministers. It acknowledged the public interest in creating a safe space, away from public glare, in which ministers can debate, discuss and refine proposals and options.

31. The Cabinet Office drew the Commissioner’s attention to the specific public interest in preserving the confidentiality of Cabinet discussions in order to protect the convention of Cabinet collective responsibility. It reminded the Commissioner that this principle underpins the accountability of governments to Parliament and is the foundation of Parliamentary sovereignty. The Ministerial Code makes reference to this convention; it provides that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions are reached. It went on to explain:

“This requires that the privacy of opinions expressed in Cabinet should be maintained. If Ministers cannot be confident that their discussions will be protected they may be inhibited in their deliberations. They may seek to have key discussions taken outside the confines of meetings, or encourage minimal recording of discussions. This would be contrary to good government; which requires Ministers and their officials to engage in full, frank and uninhibited consideration of policy options.”

32. The Cabinet Office further maintained that the Tribunal and the Courts had consistently recognised the importance of Cabinet collective responsibility. The Cabinet Office argued that the Tribunal had generally required evidence of an active public debate, rather than historical or cultural interest, to justify setting aside the constitutional convention and the confidentiality which maintains it. The Cabinet Office found no evidence of urgent or wide public concern about devolution to add to the public interest in favour of disclosure. It claimed there was insufficient public interest, aside from the general public interest in openness, to weigh against the preservation of the convention of collective responsibility.

33. The Cabinet Office also reminded the Commissioner that the decisions of Cabinet Committees carry the full weight of Cabinet as a whole. Consequently, the protection principles applied to Cabinet minutes apply equally to the same records of Cabinet Committees.
34. The Cabinet Office noted that the requested information is still within the period before which it would normally be made public, even under the transition from the 30 to 20 year rule. Given that the transitional period remains in operation, the requested information would not be expected to be released until December 2020 for 1997 minutes and December 2021 for 1998 minutes.

Balance of the public interest

35. The Commissioner is satisfied that the exemptions at sections 35(1)(a) and section 35(1)(b) are engaged, however, as she has previously advised, she does not consider that there is an inherent or automatic public interest in maintaining them. The exemptions are not absolute but are subject to the public interest test. This means that Parliament was of the opinion that in some cases the public interest would lie in the disclosure of information into the public domain, despite the exemptions being engaged.
36. The weight to be attached to the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case.
37. In respect of the exemption at section 35(1)(a) the Commissioner notes that the policy in question was not under formulation or development at the time of the request. Clearly the relevant legislation was enacted many years ago and devolution in Scotland and Wales has long since been implemented. Therefore the Commissioner is not persuaded by the Cabinet Office's argument that disclosure of the requested information would influence the content of future discussions. The Commissioner accepts that disclosure would allow scrutiny of the decision making relating to devolution that took place in 1997 and 1998. However she does not consider that it would hold any individual accountable for the detail of the discussions rather than for the decisions taken. The Commissioner's view is that such scrutiny would assist the public's understanding as to how government considers issues of significance such as devolution.
38. The Commissioner is concerned at the Cabinet Office's suggestion that disclosure may result in Ministers seeking to have key discussions taken outside the confines of meetings, or encourage minimal recording of discussions. Currently the Commissioner has seen no evidence to support this generic statement and she would hope that Ministers would

conduct their discussions appropriately irrespective of any future disclosures. Moreover she believes that the public has a right to expect that government ministers will fulfil their responsibilities in the proper manner and maintain appropriate records.

39. The Commissioner has not attached significant weight to the Cabinet Office's argument that attendees would expect that their detailed consideration of policy options would remain private. The Commissioner notes that the withheld information does not attribute any specific opinions to any individual Minister. She does, however, consider that Ministers, as senior politicians and members of the Government, should acknowledge the strong and legitimate public interest accountability. In the Commissioner's opinion it is unreasonable for any Minister to expect that policy development and decision making should be exempt from any scrutiny.
40. The Commissioner is mindful of the age of the requested information. The requested information was at least 20 years old at the time of the request, and if it were not for the transitional arrangements in place the information would have already been considered for transfer to The National Archive and potentially made open records.
41. The Commissioner has also carefully considered the Cabinet Office's public interest arguments relating to the convention of Cabinet collective responsibility. She has had regard to the Tribunal's comments in *Scotland Office vs. Information Commissioner*:

"Where Ministerial communication does engage the convention of collective responsibility, it is necessary in particular, to assess whether and to what extent the collective responsibility of Ministers would be undermined by disclosure. Factors such as the content of the information, whether it deals with issues that are still "live", the extent of the public interest and debate in those issues, the specific view of different Ministers it reveals, the extent to which Ministers are identified, whether those Ministers are still in office or in politics as well as the wider political context, are all matters that are likely to have a bearing on the assessment of the public interest balance."

42. As set out above, the Commissioner considers that the issues are no longer live, in that the specific policy under development was implemented some time ago. The information in question does not reveal the specific views of different Ministers, and although a very small number of the individuals involved are still in politics, none of them remain in office.
43. As in previous cases, the Commissioner does not accept the Cabinet Office's argument that there would need to be evidence of urgent or

wide public concern about devolution in order to overturn the exemptions claimed. The Commissioner is satisfied that there is a strong public interest in the public being fully informed as to how the government of the day considered devolution. A large number of people across the UK (not just in Wales and Scotland) were affected by this consideration and involved large sums of public money in terms of establishing institutions and devolving budgetary management.

44. Having inspected the withheld information the Commissioner is satisfied that the policies and discussions relate to historic decisions. The different options discussed were either rejected or implemented at the time, and the devolved administrations in Scotland and Wales have been in operation since 1999. Returning to the Scotland Office case cited above, the Commissioner considers that the political context at the time of the request differed significantly from that at the time the information was created. The impact of the UK leaving the European Union has created a significant public interest in both implemented and developing policy and government communications.
45. The Commissioner recognises that there are public interest arguments both in favour of maintaining the exemption and in favour of disclosure. She acknowledges the significance of the convention of collective responsibility and the emphasis placed on it by the Cabinet Office. Notwithstanding this she is mindful that it is not an overriding factor in the circumstances of this case. The Commissioner is satisfied that there is a considerable weight attached to public interest in the content of the withheld information. In the circumstances of this case she considers that the public interest in maintaining the exemptions at section 35(1)(a) and section 35(1)(b) does not outweigh the public interest in disclosure of the information.

Right of appeal

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

47. 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.
48. 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

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