

Freedom of Information Act 2000 (the Act)

Decision notice

Date: 27 July 2022

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

Decision (including any steps ordered)

1. The complainant has requested the agendas and minutes of the Yellowhammer board meetings.
2. The Commissioner's decision is that the Cabinet Office is entitled to withhold the minutes of the meetings under section 35(1)(a) and a small amount of one agenda. However, he considers that the Cabinet Office is not entitled to rely on sections 35(1)(a) or 35(1)(b) to withhold the majority of the information falling within the agendas of these meetings.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the full agendas with the exception of the action point table which is exempt under section 35(1)(a).
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 FOIA and may be dealt with as a contempt of court.

Background

5. The House of Commons library holds a research briefing "Brexit timeline: events leading to the UK's exit from the European Union"¹ which sets out the following timeline.
- In a referendum held on 23 June 2016, the majority of those who voted chose to leave the European Union.
 - On 29 March 2017, in writing to European Council President Donald Tusk, the Prime Minister² formally triggered Article 50 and began the two-year countdown to the UK formally leaving the EU (commonly known as 'Brexit').
 - The UK had long been expected to leave the European Union at 11pm on 29 March 2019. However, following a House of Commons vote on 14 March 2019, the Government sought permission from the EU to extend Article 50 and agree a later Brexit date.
 - On 20 March 2019, the Prime Minister wrote to the European Council President Donald Tusk, asking to extend Article 50 until 30 June 2019.
 - Following a European Council meeting the next day, EU27 leaders agreed to grant an extension.
 - On 2 April 2019, the Prime Minister announced she will seek a further extension to the Article 50 process and offered to meet the Leader of the Opposition to agree a deal that could win the support of MPs.
 - At a meeting of the European Council on 10 April 2019, the UK and EU27 agreed to extend Article 50 until 31 October 2019.
 - On 19 October 2019, the Prime Minister's³ new Brexit deal was lost on amendment in the Commons. In accordance with the European Union (Withdrawal)(No. 2) Act 2019 – commonly known as the

¹ <https://commonslibrary.parliament.uk/research-briefings/cbp-7960/>

² The Rt Hon Theresa May MP

³ The Rt Hon Boris Johnson MP

'Benn Act' – the Prime Minister wrote to European Council president Donald Tusk, to request an extension to the Brexit process.

- On 28 October 2019, EU Ambassadors agreed a further Brexit extension to 31 January 2020.
 - On 23 January 2020, the European Union (Withdrawal Agreement) Act 2020 received Royal Assent. This is the legislation that will implement the withdrawal agreement negotiated by the UK and the EU.
 - At 11pm on 31 January 2020, the UK left the EU and entered a transition period.
 - On 1 February 2020, the transition period began.
 - On 24 December 2020, the Brexit deal (the EU-UK Trade and Cooperation Agreement⁴) was sealed.
 - On 30 December 2020, Parliament was recalled to pass the European Union (Future Relationship) Bill.
 - On 31 December 2020, the transition period ended at 11pm and the UK left the EU single market and customs union.
6. The Institute for Government provided the following explanation of Operation Yellowhammer⁵:

“Operation Yellowhammer is the Government’s contingency planning for its response to the most severe anticipated short-term disruption under a no-deal Brexit – known as its ‘reasonable worst case’ scenario. It covers 12 key areas of risk, including food and water supplies, healthcare services, trade in goods and transport systems. Government departments are setting up 24-hour operational centres to co-ordinate responses to issues as they arise.

Operation Yellowhammer is a key part of the Government’s no-deal preparations.

⁴ https://ec.europa.eu/info/strategy/relations-non-eu-countries/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en

⁵ <https://www.instituteforgovernment.org.uk/explainers/operation-yellowhammer>

As part of this scenario, the Government assumes that there will be no deals in place with the EU or member states to manage the impact, that business will remain very unprepared, and that the Brexit extension from March to October [2019] will mean that businesses are in some cases less prepared – due to 'Brexit fatigue' and the 'seasonable impacts'.

Request and response

7. On 13 October 2020, the complainant wrote to the Cabinet Office and requested information in the following terms:

"I wish to see full copies of the agendas, minutes and action logs for the Yellowhammer Board meetings."
8. The Cabinet Office provided its response on 10 November 2020 and confirmed that it held the requested information. The Cabinet Office confirmed that it was withholding the information on the basis of sections 35(1)(a) and 35(1)(b) and that these exemptions protect the formulation of policy and communications between ministers.
9. As an explanation of why section 35 is engaged, the Cabinet Office stated that disclosure would weaken ministers' ability to discuss controversial and sensitive topics free from premature scrutiny.
10. The Cabinet Office provided generic public interest arguments acknowledging only a "general" public interest in openness in public affairs in order to ensure that the public are able to scrutinise the manner in which public authorities reach important decisions. The Cabinet Office explained that weighed against this general public interest is a strong public interest that policy-making and its implementation are of the highest quality and informed by a full consideration of all the options.
11. The Cabinet Office confirmed that the balance of the public interest lay in withholding the information.
12. The complainant requested an internal review on 11 November 2020 and provided no reasons or comment.
13. The Cabinet Office provided the outcome of its internal review on 10 December 2020 and upheld the original response. The internal review

provided no further insight into why the Cabinet Office was withholding the information and showed no evidence of a fair and thorough review as required by section 5.8 of the section 45 Code of Practice⁶.

Scope of the case

14. On 10 February 2021, the complainant wrote to the Commissioner to complain about the Cabinet Office's handling of their request, specifically its refusal to disclose the requested information.
15. During the course of the investigation, the Cabinet Office explained that having considered its position, it was no longer relying on section 35(1)(b) to withhold the requested information. However, the Cabinet Office then re-introduced section 35(1)(b) and also introduced section 31(1)(g) by virtue of section 31(2)(b)⁷ to some of the requested information.
16. The Commissioner therefore considers that the scope of this case is to determine whether, in the first instance, section 35(1)(a) is engaged and the balance of the public interest in relation to the requested information. If the Commissioner determines that the Cabinet Office is not entitled to rely on section 35(1)(a) to withhold the information to which the Cabinet Office has also applied section 35(1)(b) and section 31(1)(g), he will proceed to consider these exemptions and the accompanying public interest tests.

Reasons for decision

Section 35(1)(a): Formulation or development of government policy

17. Section 35 states:
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⁶ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁷ Section 31(1)(g) states that information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2). Section 31(2)(b) sets out the purpose of ascertaining whether any person is responsible for any conduct which is improper.

“(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”

18. Section 35 is a class based exemption. Therefore, if information falls within the description of a particular sub-section of section 35(1) then this information will be exempt; there is no need for a public authority to demonstrate prejudice to these purposes.
19. The Commissioner takes the view that the ‘formulation’ of policy comprises the early stages of the policy process, where options are generated and sorted, risks identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers.
20. ‘Development’ may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
21. It is only necessary for the withheld information to ‘relate to’ the formulation or development of government policy for the exemption to be engaged. In accordance with the Information Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/006, 19 February 2007) the term ‘relates to’ is interpreted broadly. Any significant link between the information and the process by which Government either formulates or develops its policy will be sufficient to engage the exemption.
22. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
23. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - The final decision will be made either by the Cabinet or the relevant Minister;
 - The government intends to achieve a particular outcome or change in the real world; and
 - The consequence of the decision will be wide-ranging.
24. The Cabinet Office explained that the Civil Contingencies Secretariat (CCS) in the Cabinet Office exists to improve the UK’s ability to prepare for, respond to, and recover from emergencies and disruptive

challenges – usually described as ‘resilience’. Some challenges are of a scale or complexity to require central coordination and support.

25. The Cabinet Office explained that in June 2018, the CCS began work on contingency plans to address the short-term impacts of a no deal exit from the EU. It codenamed this work as Operation Yellowhammer. This work represented the activity to mitigate and respond to any significant disruption that might arise from a no deal exit. Operation Yellowhammer formed part of the Government’s no deal preparations. It operated alongside the Government’s broader preparations for no deal, and for a deal, which were coordinated by the Department for Exiting the EU (DExEU). DExEU focused on putting in place planned solutions to address the policy, legislative and practical consequences as the UK prepared to leave the EU.
26. The Cabinet Office explained that the Yellowhammer Board was a regular officials’ meeting of representatives from lead departments to identify and resolve issues. It sat just below, and fed into, the relevant ministerial meeting. It was chaired by CCS and board membership was composed of senior officials and decision makers from lead departments. The Yellowhammer board discussions were typically strategic and high-level rather than focussing on operational detail. This is reflected in the short and concise Yellowhammer Board agendas, minutes and actions. The Cabinet Office explained that the governance structure is provided on page 11 of the National Audit Office briefing⁸ into contingency planning in March 2019.
27. The Commissioner asked the Cabinet Office to confirm exactly which government policy it considered the requested information related to.
28. The Cabinet Office explained that following the EU Exit referendum of 2016 where the outcome was that the UK would end its membership of the European Union, one of the most critically important HM Government policies was the effective understanding of and planning for the risks, impacts, changes and possible outcomes of our exit. The Cabinet Office explained that this reflected the highly complex and interdependent policy areas that underpinned civil contingencies planning and preparedness for the end of the Transition Period.
29. The Cabinet Office explained that the EU exit transition period was agreed in the UK-EU Withdrawal Agreement in which the UK was no

⁸ <https://www.nao.org.uk/wp-content/uploads/2019/03/Contingency-preparations-for-exiting-the-EU-with-no-deal.pdf>

longer a member of the EU but remained a member of the single market and customs union, and continued to be subject to EU rules. The transition period started immediately after the UK left the EU on 31 January 2020 and lasted until 31 December 2020. The Cabinet Office confirmed that at the time of the request in October 2020, the UK was in the transition period.

30. The Commissioner asked the Cabinet Office to explain when the formulation or development of this policy was completed.
31. The Cabinet Office explained that the UK was in prolonged, continuous and complex negotiations with the EU right through to the end of the transition period. As such the formulation and development of policies relating to contingency planning and readiness for the UK's new relationship with the EU from 1 January 2021 were still in progress when the complainant made their request.
32. The Cabinet Office explained that government policy towards the UK's departure from the EU was therefore still evolving as the UK moved towards the end of the transition period. The withheld information (ie the discussions around planning assumptions) continued to evolve throughout the months following the request and is still evolving as the Government continues to negotiate and build the post-exit relationship with the EU. The Cabinet Office confirmed that it considers that the withheld information relates to government policy that was ongoing at the time of the request and remains so.
33. Having had sight of the withheld information, the Commissioner is satisfied that it relates to the formulation and development of the Government's policy on the UK's exit from the EU, in particular, its response to a 'no deal' scenario.
34. The Commissioner is therefore satisfied that section 35(1)(a) is engaged in relation to the requested information.
35. Section 35(1)(a) is a qualified exemption and the Commissioner will therefore go on to consider the public interest test.

Public interest in disclosing the withheld information

36. The Cabinet Office recognised the general public interest in openness and that the decisions ministers make may have a significant impact on the lives of citizens. There is a public interest in knowing how the Government communicates its developing policy, in this case, around the planning for transition out of the EU. There is a wider public interest in the public being well-informed about (at the time of the request) preparations for the end of the transition period.

Public interest in maintaining the exemption

37. The Cabinet Office explained that while the public interest in maintaining the exemption may diminish over time, as the UK has now left the EU, at the time of the request the UK was still in the transition period and the requested information was of recent provenance. The Cabinet Office considered that disclosure would have interfered with the space needed for making properly considered policy decisions both then and now. The content of the Yellowhammer discussions is still extremely relevant to current policy decisions, and releasing the content would be likely to prejudice current arrangements where the subject matter is similar, or identical in many areas.
38. The Cabinet Office considers that there is a strong public interest in maintaining the "sovereignty" of the process of policy formulation.
39. The Cabinet Office explained that participating stakeholders need freedom to test plans and identify areas for improvement through engagement with realistic scenarios. This has to take place without fear of the potential for public discussion of decisions made in this type of planning environment.
40. The Cabinet Office considers that disclosure would be likely to invite judgements about whether the plans were comprehensive and proportionate. The Cabinet Office considered that a department's arrangements for managing communications on a particular policy area are in the safe space protected by section 35, and the integrity of the policy-making process contributes to effective decision-making. The Cabinet Office considered that there would be greater focus on public perception than on the planning itself. The effect of this would be to undermine the efficacy of the policy development process and limit effective engagement of stakeholders in national level planning.
41. The Cabinet Office explained that it was of the view that there is no strong public interest in disclosure. The Cabinet Office acknowledged that the Government's planning for the end of the transition period had a significant impact on the lives of citizens and that there is a consequent public interest in transparency, including preparedness activity. However, it considers that there is a strong public interest that policy development is of the highest quality.
42. The Cabinet Office considered that premature disclosure of information relating to the development of that policy would be likely to damage future policy making and thus prevent good government.

43. The Cabinet Office explained that the National Audit Office published its briefing⁹ on contingency preparations for exiting the EU with no deal in March 2019. The briefing was intended to assist Parliament in its scrutiny of the contingency preparations being put in place by government departments.
44. The Cabinet Office also confirmed that, on 23 September 2020, the Government published its “Reasonable Worst Case Scenario planning assumptions” relating to potential disruption to freight travelling between the UK and the EU at the end of the transition period, along with detailed rationale for these assumptions¹⁰.
45. The Cabinet Office explained that the Government had published these assumptions in order to support key stakeholders to put in place proportionate plans and for businesses to get ready for the changes at the end of the Transition Period in order to minimise the risk of delays at the border. The Cabinet Office considers that these publications represent some transparency on contingency planning and serves the public interest in understanding this.
46. The Cabinet Office confirmed that it considered the balance of the public interest favours maintaining the exemption at section 35(1)(a). The Cabinet Office considers that given the sensitive and highly political nature of the UK’s exit from the EU, it sees no clear, compelling and specific justification that outweighs the obvious interest in protecting the safe space within which policy development is managed.
47. The Cabinet Office acknowledged that section 35 is not an absolute exemption but did not consider that there is justification for disclosure in this case. Its view is that the risk of prejudicing the policy development process outweighs the public interest in disclosure.

The balance of the public interest

48. In light of the generic public interest arguments set out in the Cabinet Office’s response to the complainant, the Commissioner advised the Cabinet Office that it should ensure that it demonstrates that its

⁹ <https://www.nao.org.uk/wp-content/uploads/2019/03/Contingency-preparations-for-exiting-the-EU-with-no-deal.pdf>

¹⁰

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/920675/RWCS_for_our_borders_FINAL.pdf

public interest arguments fully considered the public interest in disclosure and demonstrate why it considers that the public interest in maintaining the exemption outweighs this.

49. As part of addressing this, the Commissioner set out his preliminary considerations of the public interest in disclosure to aid the Cabinet Office's full consideration of the public interest. These are set out below in the Commissioner's consideration of the balance of the public interest.
50. The Commissioner is disappointed that the Cabinet Office has failed to take the opportunity to fully and appropriately consider the balance of the public interest. The Cabinet Office instead stated:

"We believe that these observations could be taken to suggest that some conclusions have already been drawn in regards to the balance of public interest in disclosure vs non-disclosure. We appreciate that the ICO will have its views on the Government's response to EU Exit and to the pandemic. However, we respectfully suggest that comments on any "strong and national" public interest in the disclosure of the withheld information would be most appropriately and objectively considered once the ICO has had the opportunity to see the withheld information, together with the Cabinet Office's relevant explanations regarding its response under the Act".
51. The intention of the Commissioner was not for his letter to be interpreted in this way. He agrees with the Cabinet Office as to how he can most appropriately and objectively consider the public interest. Rather, the purpose of the Commissioner's letter was to set out what he considered to be relevant public interest factors in disclosure relating to the overall subject matter at that stage of the investigation. This was in order to garner a more considered and specific response from the Cabinet Office as to its assessment of the strength of those factors and why it considers the public interest in maintaining the exemption outweighs this.
52. Indeed the Commissioner's experience of cases of this nature is that he can often receive generic responses on the public interest test. Although such responses are not "wrong", they can be insufficient. Therefore, the indication of provisional observations can help to ensure more considered responses and quicker case outcomes, avoiding the need for further rounds of correspondence. These more detailed responses can also avoid additional representations relevant to the decision being deployed at a later stage, most notably at the Information Tribunal.

53. The Commissioner considers that the Cabinet Office has failed to adequately consider the strength of the public interest in disclosure. Having reviewed the Cabinet Office's submissions and the withheld information, the Commissioner considers that there is clearly a strong public interest in disclosure of information that provides insight and scrutiny of the Government's preparations for the UK to leave the EU.
54. As the Cabinet Office set out in its submissions, the public interest in maintaining section 35(1)(a) is likely to wane once the policy has been implemented. However, the Commissioner must consider whether the Cabinet Office's handling of the request was correct and he must therefore consider the balance of the public interest as it was at the time of the request.
55. At the time of the request, the UK was in the transition period with the EU which kept the UK in the EU's single market and customs union. The transition period was due to end on 31 December 2020.
56. At this time, it was not known whether the end of the transition period would end in an agreed deal between the UK and EU or whether no deal would be agreed resulting in basic World Trade Organisation arrangements.
57. In either event, the UK and its citizens faced a huge change, and even with a deal in place there was likely to be major disruptions as new arrangements came into force. With the possibility of a no deal Brexit only months away, and against the background of a global pandemic, any information as to the Government's worse case scenario planning to support civil contingencies for the end of the transition period would clearly carry a strong and national public interest.
58. However, the timing of the request also leads to a strong public interest in maintaining the exemption. The UK was still in the transition period, and at that point in time it was engaged in complex and sensitive negotiations with the EU. Furthermore, the discussions and findings of Operation Yellowhammer would clearly form part of the UK Government's policy in its approach to these negotiations.
59. There is a strong and well-established public interest in providing Government with the necessary and required safe space in which to formulate and develop policy. As the Information Tribunal held in *DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072)*, "this public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public". In this case, the Commissioner considers the

safe space arguments to attract particular weight due to the context of the policy making and the content of the withheld information itself.

60. At the time of the request, the relevant policy remained at the formulation and development stage, and could not be considered to have been implemented. That being the position, the case for preserving the safe space in order to allow the Government to conclude the formulation and development of the policy was a particularly strong and compelling one.
61. The Commissioner accepts that the premature disclosure of information revealing the UK's position regarding its contingency planning would have prejudiced this safe space and adversely impacted upon the sensitive and complex negotiations being undertaken by the UK and the EU at that time.
62. The Commissioner accepts that there is a strong public interest in allowing the Government the space and time to formulate its position in these negotiations without having to divert resources to answer questions or respond to lobbying, particularly about a policy position that had not yet been finalised.
63. For these reasons, the Commissioner considers that the public interest in maintaining the exemption outweighs that in disclosure with regard to the minutes of the Yellowhammer board meetings.
64. However, the Commissioner considers that the public interest favours disclosure of the agendas as this will allow the public insight and scrutiny of the areas covered by the Yellowhammer Board without revealing the Government's position and specific consideration regarding these areas.
65. One of the agendas contains an action log detailing the actions agreed at the previous meeting. The Commissioner considers that the public interest lies in maintaining the exemption in relation to this action log for the same reasons as for the minutes of these meetings.
66. The Cabinet Office has confirmed that it considers some of the information held within the agendas is exempt under section 35(1)(b). The Commissioner will therefore consider this exemption and the accompanying public interest.
67. The Commissioner will not go on to consider the redactions under section 31 as these are all contained within the minutes and he has found that this material can be withheld under section 35(1)(a).

Section 35(1)(b): Ministerial communications

68. 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 Cabinet or any committee of the Cabinet of the Welsh Assembly Government".
69. The concept of a communication is broad. It includes written communications such as letters, memos, emails and any other documents written to convey information between ministers, and it also includes meetings and telephone conversations between ministers. Section 35(5) specifically includes meetings of the Cabinet or Cabinet committees.
70. The exemption covers information which 'relates to' ministerial communications. This is interpreted broadly. This means that information does not have to **be** a ministerial communication itself; it will also be covered if it recounts or refers to a ministerial communication. For example, letters between civil servants which refer to a previous letter between ministers will relate to that previous ministerial communication, and will be covered.
71. Minutes of meetings and notes of conversations will relate to those oral communications, and so will be covered. This includes both formal minutes and more informal handwritten notes or personal aide-memoires. In particular, Cabinet minutes (or minutes of Cabinet committees) are covered as they relate to the communications taking place between ministers as the Cabinet (or committee) meeting.
72. However, this does not mean that all information containing the views of ministers will automatically engage the exemption. For example, if a civil servant writes an email which sets out the Minister's view, but is not writing on behalf of that minister to another minister and has not referred to a ministerial communication, this document will neither 'be' nor 'relate to' a ministerial communication.
73. The Cabinet Office provided submissions regarding why the withheld information falls within the class of ministerial communications. The Commissioner cannot replicate these submissions as to do so would partially negate the purpose of withholding the information.
74. Having reviewed the withheld information, the Commissioner is satisfied that the redacted information engages section 35(1)(b). Section 35(1)(b) is a class-based exemption and information only has

to fall within the class of information described. The Cabinet Office does not have to demonstrate any prejudice due to disclosure.

75. Section 35(1)(b) is, however, a qualified exemption subject to the balance of the public interest. The Commissioner will therefore go on to consider the balance of the public interest.

The Cabinet Office's public interest arguments

76. The Cabinet Office provided only arguments in favour of maintaining the exemption.
77. The Cabinet Office set out that section 35(5) of the Act states that ministerial communications include, in particular, "proceedings of the Cabinet or of any committee of the Cabinet".
78. The Cabinet Office explained that members of Cabinet and Cabinet committees expect the content of their discussions to remain private unless there is a very strong countervailing public interest in disclosure. The Cabinet Office confirmed that while it does not believe that disclosure in this instance would prevent ministers' or their advisers' willingness or ability to fulfil their duties and responsibilities in the proper manner, ministers and their advisers could be put in a position where they would be required to have an undue focus on presentational concerns.
79. The Cabinet Office considers that ministers and their advisers may have to put undue weight to the consideration of how the public would or would be likely to react to the timing or content or forum of discussions leading up to a decision, placing an unnecessary burden on the most senior levels of decision-making. The Cabinet Office explained that it is essential to sound policy development for ministers to be able to discuss and debate issues freely and frankly, and organise themselves in a way to best facilitate such discussion, in order to maintain and deliver high quality outcomes for the public.
80. The Cabinet Office considers that it is strongly in the public interest that ministers and their advisers are able to consider policy in confidence, allowing for a free and frank exchange of views, essential to decision making, particularly regarding policy around the EU exit. The Cabinet Office explained that there is a very strong public interest for ministers and their advisers to be able to consider and develop – in confidence – policy options in fast-moving situations, allowing for a free and frank exchange of views in a safe space, to ensure effective UK preparedness. The Cabinet Office considers that disclosure of the requested information would severely limit the ability of the Government to effectively manage future planning and resilience.

81. The Cabinet Office maintained that there is a strong public interest in protecting the safe space at Cabinet Office committees for ministers to debate policy and that this was a position that it had successfully defended at a recent First-Tier Tribunal appeal. The Cabinet Office did not, however, confirm which tribunal case or decision notice it was referring to. The Cabinet Office considers that while the circumstances of that case are different, the overall principle was upheld.
82. The Cabinet Office considers that there is also a very strong public interest in protecting the sovereignty of the deliberative process itself at this level. It explained that there is a specific public interest in preserving the confidentiality of Cabinet and Cabinet committee and sub-committee discussions in order to protect the convention of Cabinet collective responsibility which is a cornerstone of our constitution. The Cabinet Office considers that this principle underpins the accountability of Government to Parliament and is the foundation of Parliamentary sovereignty. The Cabinet Office confirmed that the Ministerial Code¹¹ refers to the application of this convention, which reinforces its importance in particular at part 2, section 2.1.
83. The Cabinet Office considers 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. The Cabinet Office explained that this requires that the privacy of opinions expressed in Cabinet and committees should be maintained. The Cabinet Office considers that disclosure would be contrary to good government; which requires ministers and their officials to engage in full, frank and uninhibited consideration of policy options.
84. The Cabinet Office acknowledged that it may be argued that these concerns are too remote to be particularly pertinent in respect of this case, ie they are not sufficiently linked to this case. However, it argued that the fact that these public interest considerations may apply across a number of different cases does not make them any less applicable in this case.
85. The Cabinet Office explained that Parliament recognised that the principle of Cabinet collective responsibility (and other ministerial communications) was sufficiently important to warrant specific protection in the form of an express exemption in the Act. The Cabinet Office explained that the then Lord Chancellor emphasised the importance the Government attached to this during the debate in the

¹¹ <https://www.gov.uk/government/publications/ministerial-code>

House of Lords on this section of the Freedom of Information Bill. The Cabinet Office set out that he explained the Government believed that "the disclosure of certain types of information, such as ministerial communications, Cabinet papers and minutes would always be likely to prejudice the effective conduct of public affairs and that this is why the Bill provides a class exemption for the interests set out in Clause 33(1) [now Section 35(1)]", (Hansard, House of Lords Debates, Volume 618 Column 283).

86. The Cabinet Office set out that the Tribunal and the Courts have recognised the importance of this principle.
87. The Cabinet Office reiterated that safe space and Cabinet collective responsibility includes the protection of the content of Cabinet and Cabinet Committee information. The Cabinet Office considered that for these reasons, it considers that the balance of the public interest favours maintaining the exemption at section 35(1)(b).

The balance of the public interest

88. The Commissioner considers that the public interest in disclosure is the same as that set out above for the consideration of section 35(1)(a).
89. The Commissioner does not disagree with the Cabinet Office's explanation of the importance of safe space and collective responsibility. However, he is not persuaded that the level of harm that the Cabinet Office sets out would occur following disclosure of the specific information being withheld under section 35(1)(b). The Commissioner cannot go into specific detail regarding the contents of the withheld information as to do so would essentially negate the purpose of the Cabinet Office redacting this information. However, he does note that the redacted information under consideration is found in the requested agendas rather than the minutes of the meetings. It is usual that agendas provide high level, sometimes generic, items for discussion rather than the outcomes, or the nature/content, of discussions themselves.
90. The Commissioner is not convinced that disclosure of the redacted information would inhibit a minister in the proper conduct of their role and notes the Cabinet Office's acknowledgement (paragraph 78) that ministers would not be prevented from fulfilling their duties and responsibilities as would be expected of a minister. The agenda items do not reveal individual ministers' positions or the contents of the communications.

91. The Commissioner notes the Cabinet Office's concerns regarding undue focus on "presentational concerns" and how the public may react to the disclosure. He does not consider this to be a valid reason to withhold information. The general public should be able to reach their own conclusions and opinions following the provision of any information. He would remind the Cabinet Office that it could provide explanatory supplementary notes to guide public understanding when disclosing information.
92. The Commissioner considers that, whilst there is a public interest in maintaining the exemption, this is not sufficient to outweigh the public interest in disclosure set out above.
93. The Commissioner notes the Cabinet Office's arguments that Parliament recognised the importance of section 35 by making it a class-based exemption rather than prejudice based. However, the Commissioner considers that by qualifying the exemption with the public interest test, Parliament also recognised that not all information falling within this class should necessarily be withheld. The public interest test requires consideration of the specific information being withheld and the circumstances at the time of the request; it is not limited to the class of information.
94. The Cabinet Office has not persuaded the Commissioner that the public interest in maintaining the exemption outweighs the public interest in disclosure set out in the section 35(1)(a) considerations above.
95. The Commissioner requires the Cabinet Office to disclose the full agendas with the exception of the action points set out in paragraph 65.

Other matters

96. In addition to the Cabinet Office's failure to appropriately consider the public interest in disclosure, the Commissioner is disappointed at the length of time the Cabinet Office took to provide him with the withheld information.
97. The Commissioner requested the withheld information alongside requesting the Cabinet Office's submissions. The Cabinet Office originally only provided a representative sample of the withheld information, stating that the volume of the information meant that it could not provide it in its entirety.
98. Once the Commissioner had confirmed that he required the information in its entirety, the Cabinet Office took nearly two months

to provide this information, at which point it confirmed that it was intending to rely on section 31 and was in the process of providing further submissions. This was received after a further three weeks.

99. The Commissioner makes clear in his letters to public authorities that where information is being withheld, this information will need to be provided. In circumstances where this may not be possible, he expects public authorities to engage with him about this promptly and discuss any difficulties with his officers.

100. In this case, it is not apparent why the Cabinet Office required such an extended period of time to provide the information as this was eventually sent to the Commissioner via a single zip file.

Right of appeal

101. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

102. 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.

103. 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

Victoria Parkinson
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF