

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 August 2024

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

Decision (including any steps ordered)

1. The complainant has requested influencer¹ guidelines which were provided to Government Communication Service users on 16 November 2023.
2. The Cabinet Office applied section 21 (information accessible to the applicant by other means) to the first page of the guidelines only and withheld the remaining requested information under section 35(1)(a)(formulation or development of government policy).
3. The Commissioner's decision is that section 21 is engaged in respect of the first page of the withheld information but section 35(1)(a) is not engaged to the remaining information.
4. The Commissioner requires the Cabinet Office to take the following step to ensure compliance with the legislation.
 - Disclose all but the first page of the withheld information to the complainant.
5. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the

¹ A person with the ability to influence potential buyers of a product or service by promoting or recommending the items on social media.

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

6. On 29 November 2023, the complainant wrote to the Cabinet Office and requested information in the following terms:

'I would like to request a copy of this document please.

Guidelines for influencer marketing, published by the Government Communication Service on 16 Nov 2023.

<https://gcs.civilservice.gov.uk/guidance/marketing/guidelines-for-influencer-marketing/>

7. The Cabinet Office responded to the request on 2 January 2024. They confirmed that they held the information requested but that it was exempt from disclosure under section 35(1)(a)(formulation or development of government policy) of FOIA. The response did not specify which government policy or policies the withheld information related to and the public interest test consideration made no reference to the public interest factors concerning the specific information requested.
8. The Cabinet Office recognised that, 'there is a general public interest in disclosure of information and we recognise that openness in government may increase public trust in and engagement with, the government'. However, they stated that, 'these public interests have to be weighed against 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'.
9. Taking into account all the circumstances of the case, the Cabinet Office concluded that the balance of the public interest favoured withholding the requested information.
10. On 3 January 2024, the complainant requested an internal review of the decision.
11. The Cabinet Office provided the internal review on 6 February 2024. The review upheld the use of section 35(1)(a) and confirmed that the balance of the public interest favoured maintaining the exemption. The Cabinet Office stated:
- 'While there is a general public interest in disclosure of information and we recognise that openness in government may increase public trust in

and engagement with the government, this has to be weighed against 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. This policy remains under development, with Ministerial approval and sign off still pending’.

Scope of the case

12. The complainant contacted the Commissioner on 6 February 2024 to complain about the way his request for information had been handled.
13. In his complaint to the Commissioner, the complainant advised that he challenged the use of section 35(1)(a), contending that, ‘this is inconsistent with the fact that several other pieces of guidance are openly available on the same website’. The complainant stated that he was of the view that the balance of the public interest clearly favoured disclosing the requested information, and he noted that in the original refusal notice, the Cabinet Office had not mentioned that the policy remained under development, and was awaiting Ministerial approval and sign off. The complainant advised that he did not accept any part of the Cabinet Office response.
14. During the course of his investigation, the Cabinet Office applied section 21 to the first page of the guidelines. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office was correct to withhold the requested information under the exemptions.

Reasons for decision

Section 35(1)(a)(formulation or development of government policy)

15. Section 35(1)(a) of FOIA 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’.

16. 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 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.

17. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policy-making process, and to prevent disclosures which would undermine this process and result in less robust, well-considered and effective policies. In particular, it ensures a safe space to consider policy options in private.
18. The Commissioner's guidance advises that often policy formulation will continue until the relevant legislation is passed. Where legislation is not required, a public announcement of the decision is likely to mark the end of the policy formulation process.
19. The exemption is a class-based one which means that, unlike a prejudice based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.
20. The Commissioner's guidance on section 35(1)(a) sets out that information does not need to have been created as part of the formulation or development of government policy. Information may 'relate' to the formulation or development of government policy due to its original purpose when created, or its later use, or its subject matter.
21. Although 'relates to' is given a wide interpretation, as the Court of Appeal noted in *Department of Health v The Information Commissioner and Mr Simon Lewis* [2017] EWCA Civ 374, of the First-Tier Tribunal's findings in that matter, the phrase:

'Should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy, but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context', and that, 'a mere incidental connection between the information and a matter specified in a sub-paragraph of s.35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph'.
22. Therefore, there must be a clear and tangible relationship between the content of information withheld under this exemption and the process that is being protected.
23. The Information Tribunal has made it clear that policy formulation and development is not one which is a 'seamless web', i.e. a policy cycle in which a policy is formulated following which any information on its implementation is fed into the further development of that policy or the formulation of a new policy.

The position of the Cabinet Office

24. In submissions to the Commissioner the Cabinet Office advised that the Government Communications Service (GCS) devised a document entitled 'Guidelines for influencer marketing' (the guidelines') in November 2023. Its purpose was to provide 'guidelines' on how to work with online influencers from a paid for perspective. The guidelines constitute the withheld information in this case.
25. The Cabinet Office maintained that section 35(1)(a) applies to the guidelines on the basis that they relate to the development of government policy. 'Specifically, the area of government policy to which the guidelines relate is that of influencer marketing. We consider that it is self-evident that the guidelines relate to that policy area by virtue of its purpose and content'.
26. The Commissioner noted that the Cabinet Office had previously made the guidelines available to the GCS, the professional body for more than 7,000 public sector communicators, working in government departments, agencies and arms length bodies. The Cabinet Office confirmed that the guidelines were available only to those who were members of GCS Connect, and accessibility was therefore limited to those who were in the Government communications profession.
27. In submissions to the Commissioner, the Cabinet Office stated that disclosure to Government communications professionals does not equate to disclosure to the public. The Cabinet Office noted that a number of Government departments employ more than 10,000 people (and some, the Ministry of Justice and the Department for Work and Pensions included, employ considerably more). They contended that if a document were to be disclosed to all the members of staff of a Government department, either to inform them or to solicit their opinions with a view to developing a policy that affected that department, then they would consider that such a document would reasonably relate to the development of government policy and should attract the exemption in section 35(1)(a) of FOIA.
28. The Cabinet Office advised the Commissioner that:

'Government communications professionals have been actively engaged in the development of the policy. On 21 November 2023, an 'all staff' call was arranged (and advertised on the LinkedIn page) which allowed GCS Connect members (only) to discuss the guidelines. The call was not accessible to the general public. During the call, participants were asked to join working groups, provide feedback and help develop case studies that would contribute to shaping the policy. References were also made to weaknesses in the guidelines. We consider that this

makes apparent that the engagement of GCS Connect members was aimed at improving the guidelines during a process of development that was limited to a particular category of people'.

29. The Cabinet Office stated that they considered that the purpose of section 35(1)(a) was worthy of emphasis, and they referenced the Commissioner's guidance, which notes that, 'the purpose of section 35 is to protect good government. It preserves a safe space to consider policy options in private'.
30. The Cabinet Office advised that the necessity of privacy is in the protection of the policy development process from those on the outside and more particularly, the pressures which can be generated by public exposure. It is not to protect it from those who are also employed by the Government, albeit less central to the process. 'It is relevant, for example, that the Commissioner acknowledges that the key public interest argument for section 35 'will usually relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction'. The Cabinet Office stated that the external interference and distraction that would be occasioned by disclosure of the information is contemplated to come from outside the Government, not within it.
31. In this case, the Cabinet Office emphasised that the approach to influencer marketing is relevant to all those across Government who are communications professionals. In being accessible to those who are members of GCS Connect, the guidelines had been made available to those who are directly concerned with its ultimate implementation, and had not been shared outside it.
32. The Cabinet Office advised the Commissioner that the situation remained as previously advised in the internal review, 'that the policy remained under development and that Ministerial approval (and that of the Permanent Secretary) was still pending'.
33. The Cabinet Office stated that 'the guidelines concern an area of policy development that remains unconcluded. The approval of the Minister and the Permanent Secretary would conclude the development of the policy and initiate its implementation. Until that approval is given we consider that the guidelines remain the subject of policy development'.
34. The Cabinet Office further advised the Commissioner that the guidelines had undergone editing subsequent to the request, to the extent 'that the policy and process for the use of influencer marketing has altered'. The Cabinet Office contended that this served to illustrate that the guidelines are still undergoing policy development and should, therefore, be exempt from disclosure under section 35(1)(a).

The Commissioner's position

35. FOIA does not define 'government policy'. Section 35(5) states that it will include the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Government, but does not provide any further guidance.
36. The Commissioner's guidance on section 35 states:

'The modernising Government White Paper (March 1999) provided a useful description of policymaking as, 'the process by which government translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world'. In general terms, government policy can therefore 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'.

There is no standard form of government policy; policy may be made in various ways and take various forms.

The Cabinets of the UK and Welsh Governments and the Northern Ireland Executive Committee are the ultimate arbiters of their respective governmental policy. Within each administration, significant policy issues or those that affect more than one department are jointly agreed by Ministers. For example, within the UK government such issues are decided in Cabinet or Cabinet committee (although detailed policy proposals may then be developed within one department). See Chapter 4 of The Cabinet Manual (1st edition October 2011).

However, not all government policy needs to be discussed in Cabinet or Executive Committee and jointly agreed by Ministers. Some policy is formulated and developed within a single government department, and approved by the Minister responsible for that area of government.

It is not only Ministers who are involved in making government policy. Civil servants – and, increasingly, external experts and stakeholders – are also involved at various stages of the policy process. The important point is that government policy is ultimately signed off by the Cabinet or Executive Committee or the relevant Minister. This is because only Ministers have the mandate to make policy. If the final decision is taken by someone other than a Minister, that decision does not in itself constitute government policy.

However, this does not mean that every decision made by a Minister is automatically a policy decision. Ministers may also be involved in some

purely political, administrative, presentational or **operational** (Commissioner's highlight) decisions'.

37. The Cabinet Office have advised that the area of government policy to which the guidelines (withheld information) relate is that of 'influencer marketing'. They consider that this is self-evident by virtue of the purpose and content of the guidelines.
38. Having had sight of the withheld information, the Commissioner is not persuaded that it relates to government policy.
39. Influencer marketing is one way, and a relatively new one, in which government can reach and engage with audiences, to further messages, communications or government advertising campaigns. However, the Commissioner considers that influencer marketing in the context of this case is not itself a government policy under the terms of section 35(1)(a), but rather it is an **operational policy** intended to further government policy/policies.
40. In submissions to the Commissioner, the Cabinet Office advised that 'the guidelines are devised as an internal-facing document to be used by Government communications professionals'. The Commissioner accepts that the guidelines were intended for access to GCS Connect members only, and further accepts that the guidelines are still undergoing development (or were at the time of the request). However, the Commissioner is of the view that the policy development to which they relate is operational in nature rather than being a government policy or policies as per the scope of section 35(1)(a).
41. It appears that the withheld information relates to the development of an operational policy and approach which ensures that the Government's messaging and communications reaches as wide and as effective an audience as possible.
42. As the Commissioner has concluded that the the requested guidelines relate to an **operational** policy of the Government, primarily one being developed and to be implemented by GCS Connect members, rather than a Government policy or policies in itself, it follows that he finds that the guidelines do not engage section 35(1)(a).
43. The Commissioner would note that the safe space arguments advanced by the Cabinet Office in this case are not without relevance or substance, given the internal and developing nature of the guidelines. However, in this instance, such arguments cannot carry any weight within the context of section 35(1)(a), as the exemption has been misapplied to the actual withheld information.
44. Having found that section 35(1)(a) is not engaged to the guidelines, the Commissioner is not required to go on to consider the balance of the

public interest test. In the absence of any other exemption having been applied to this information, the Commissioner requires the Cabinet Office to disclose the guidelines (ie as they existed at the time of the request) to the complainant, with the exception of the first page of the same (see below).

Section 21 – Information accessible to the applicant by other means

45. In submissions to the Commissioner, the Cabinet Office advised that they considered that the first page of the guidelines was exempt from disclosure under this exemption as it is already reasonably accessible to the complainant by viewing the GCS's LinkedIn page. The Commissioner accepts that the first page of the guidelines is exempt under section 21². This exemption is not subject to the public interest test.

² https://www.linkedin.com/posts/government-communication-service_governmentcommunicationservice-governmentcommunications-activity-7135228336259125248-bLoy?utm_source=li_share&utm_content=feedcontent&utm_medium=g_dt_web&utm_campaign=copy

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: 0203 936 8963

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.

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