

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 July 2021

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1 2AS

Decision (including any steps ordered)

1. The complainant has requested documents produced during Exercise Cygnus. The Cabinet Office relied upon section 35 (development of government policy) and section 24 (national security) to withhold the information.
2. The Commissioner's decision is that sections 35(1)(a) and 35(1)(b) of the FOIA are engaged in respect of this information and that the balance of the public interest favours maintaining the exemption. As the Cabinet Office failed to issue a refusal notice, setting out all the exemptions on which it wished to rely, within 20 working days, it also breached section 17 of the FOIA.
3. The Commissioner does not require further steps to be taken.

Background

4. Exercise Cygnus was a simulation run in 2016 to test the UK's response to a flu-like pandemic. Several Local Resilience Forums (LRFs) and their members took part in the Exercise under the command of the Civil Contingencies Secretariat of the Cabinet Office.
5. The exercise was based around several meetings of the Cabinet Office Briefing Room (COBR) sub-committee, but the other organisations involved were encouraged to arrange their own meetings in the manner that they would have looked to do had they been responding to a real outbreak.

Request and response

6. On 22 December 2020, the complainant requested information of the following description:

"I request the following information under the Freedom of Information Act:

"[1] Copies of overall summary reports on the four simulated COBR meetings run by the Civil Contingences Secretariat (CCS) during the Command Post Exercise (CPX) for the second phase of Exercise Cygnus from 18 to 20 October 2016.

"[2] Copies of overall summary reports received by the CCS, based on data gathered from the eight Local Resilience Forums (LRFs) which simulated Strategic Coordinating Groups (SCGs) during the CPX for Exercise Cygnus.

"[3] Copies of overall reports sent by the CCS for the information of the LRFs after Exercise Cygnus summarising the findings of Exercise Cygnus and how the LRFs can prepare for any subsequent public health pandemic.

"The time period for the information I am seeking is between 18 October 2016 and 17 October 2017."

7. On 2 February 2021, the Cabinet Office responded. It refused to provide the requested information. It relied upon section 35 of the FOIA to withhold the information.
8. The complainant requested an internal review on 4 February 2021. The Cabinet Office sent the outcome of its internal review on 5 March 2021. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 3 March 2021 to complain about the way his request for information had been handled.
10. In view of the strong public interest in assessing the Government's response to the Covid-19 pandemic, the Commissioner agreed to prioritise this particular complaint. She therefore wrote to the Cabinet Office on 23 March 2020 to ask it to set out justification for withholding the information.

11. The Cabinet Office requested two extensions, both of which were granted. However, when it failed (without explanation) to meet its third extended deadline, the Commissioner decided to issue an Information Notice, compelling the Cabinet Office to respond. The Cabinet Office also failed to meet the deadline for complying with the Information Notice – but did comply (and apologised for the delay) the following week.
12. In its submission, the Cabinet Office now informed the Commissioner that it considered section 24 of the FOIA would apply to the withheld information. It reaffirmed its view that section 35 of the FOIA applied but argued that, in the event that the Commissioner determined that the information was not covered by section 35, it would wish to rely on section 36(2)(c) of the FOIA (disclosure would otherwise prejudice the effective conduct of public affairs) to withhold the information. It provided a submission and an opinion from its Qualified Person to support the exemption.
13. Sections 35 and 36 are mutually exclusive – section 36 cannot apply to information which would be covered by section 35. Section 35 is also a class-based exemption, meaning that information will automatically be covered merely because it is contained within a document of a particular type – there is no need to demonstrate that disclosure would result in any detrimental effects (as would be the case with section 24). The Commissioner has decided that she will look at the Cabinet Office's section 35 arguments first. If she finds that section 35 is not engaged (or if the balance of the public interest favours disclosure), she will then go on to consider whether either section 24 or 36 is engaged.

Reasons for decision

Section 35 – Formulation or development of government policy

14. Section 35(1) of FOIA states that:

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,*
- (b) Ministerial communications,*
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or*
- (d) the operation of any Ministerial private office*

15. As noted above, the exemption is a class-based exemption meaning that any information of a particular type will automatically be covered. Section 35 is also a qualified exemption, meaning that, even where it is engaged, the information can still only be withheld if the balance of the public interest favours maintaining the exemption.
16. The Commissioner's guidance states that information will relate to the *formulation* of government policy if it relates to the generation and evaluation of new ideas. Information will relate to the *development* of government policy if it relates to reviews of the effectiveness of existing policy or considers whether the existing policy is fit for purpose.
17. However, the guidance also states that section 35 will not cover information relating to the *implementation* of existing policy. Not every decision will necessarily be a policy decision. Whilst the term "policy" is not defined in the legislation, the Commissioner interprets the term as referring to a framework or set of rules designed to effect a change likely to affect substantial numbers of people.
18. The withheld information in this case comprises the reports each LRF that took part in the Exercise submitted to the Cabinet Office as part of the simulated "play." It also includes the minutes of the simulated COBR meetings.
19. At the internal review stage, a question arose about the extent of information within scope. The complainant argued that he was not just seeking the minutes of the simulated COBR meetings, but any summary reports that had been produced.
20. The Cabinet Office explained that any summaries of the simulated COBR meetings would have been incorporated into the main Cygnus report (which had been published at the point the request was responded to). The only other information it held was the minutes of the simulated meetings and the reports from the Local Resilience Forums that were considered at those meetings. The Commissioner is satisfied that the Cabinet Office has identified all relevant information.
21. The Cabinet Office, in its submission, argued that the withheld information formed part of the process of developing its policy towards pandemic response in general and Covid-19 in particular. It explained that:

"The process of exercising the Government's plans for a range of emergencies is a key element of our preparedness activity...Exercise Cygnus tested extreme responses to a significant influenza pandemic, a number of these measures are identified for further policy work in the exercise report."

22. The Commissioner does not accept that the information in question relates to the specific response to Covid-19. Exercise Cygnus took place some three years before the SARS-Cov-2 virus was first identified.
23. However, the Commissioner does accept that pandemics are (thankfully) rare events. There are thus few opportunities to acquire the real-world data necessary to determine whether the strategies that have been designed to cope with a pandemic are (or are not) fit for purpose.
24. Exercises such as Cygnus allow all those involved in preparing for a pandemic to test how well their approach works – within the context of a simulated (and therefore safe) environment. Crucially, it allows the government to identify areas of weakness and to determine whether these areas require small administrative change or more fundamental, systemic change.
25. The Exercise Cygnus report, refers to the potential need for new primary legislation aimed at removing some of the “statutory restrictions” that were identified, during the exercise, as limiting the effectiveness of the response.¹ The report also identifies the need for further work to be done on “population-based triage” in order to manage care in the event that the NHS reaches (or comes close to reaching) the point at which it cannot meet demand.
26. The Commissioner therefore accepts that the information produced during the exercise forms part of the process of “reviewing, improving or adjusting” existing policy and therefore relates to the development of government policy. As such, section 35(1)(a) of the FOIA is engaged.
27. The Cabinet Office also argued that section 35(1)(b) was engaged because the information related to a ministerial communication.
28. Section 35(5) of the FOIA defines “ministerial communications” as any communications:

“(a) between Ministers of the Crown,

(b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

1

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927770/exercise-cygnus-report.pdf

(c) between members of the Welsh Assembly Government

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;

29. The Cabinet Office argued that COBR is a sub-committee of the Cabinet and that, whilst the meetings were ones which were simulated, they were still meetings of a committee of the Cabinet – thus satisfying the definition.
30. The Commissioner accepts that, whilst the meetings of COBR were discussing an imaginary scenario, they were still meetings which, in every other respect, would have followed the usual process of COBR. She is therefore satisfied that the minutes of and the papers presented to, the simulated COBR meetings fall within the definition of “ministerial communications.” It thus follows that section 35(1)(b) of the FOIA is also engaged in respect of this information.

Public interest test

31. Section 35 is a qualified exemption and therefore, even where information falls within that class, it can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.
32. The complainant argued that there was a strong public interest in Exercise Cygnus and the findings generated from it, particularly insofar as it illustrates how approaches were adapted to take account of the lessons learned. He noted that Exercise Cygnus was the last exercise of its kind carried out prior to the pandemic and therefore the most recent opportunity to identify weaknesses.
33. Secondly, he argued that the Commissioner should give little weight to “chilling effect” arguments – particularly in relation to the COBR meetings – because those involved were, by definition, among the most senior members of the government and should therefore be the least likely to be deterred from providing robust advice in future.
34. Finally, he noted that a great deal of information about Exercise Cygnus had already been released into the public domain – apparently without overly-detering officials from speaking frankly. There was thus an expectation that this information would have marginal, if any, effect on the willingness of officials to express their views.

35. By contrast, the Cabinet Office, whilst recognising both the general interest in transparency and the particular interest in Exercise Cygnus, argued that such interests:

"have to be weighed against a strong public interest that policy-making and its implementation are of the highest quality and fully informed."

36. The Cabinet Office explained that:

"During emergency preparedness exercises, such as Exercise Cygnus, participating agencies 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 an exercise environment. There is a risk of exercise results being impacted or hampered by the release of this information, which could in turn hamper the development of robust emergency response plans. It is important that, following exercises, ministers and officials have space to objectively explore lessons identified with complete candour, and then develop policies and/or response plans to address these points. The policy development process therefore benefits from ministers and officials being in an environment that facilitates and encourages deliberation without undue external pressure. It provides officials with the scope to consider what recommendations to put to ministers, and gives ministers space to think through the implications for the ongoing policy on which advice is given."

"Release of the requested information will not give officials or ministers those assurances that they require to work effectively on the development of policy. They would be more mindful about public perception of the advice being developed. The effect of this would be to undermine the efficacy of the policy development process and would limit effective engagement of Local Resilience Forums in national level exercises."

37. In relation to section 35(1)(b) of the FOIA, the Cabinet Office argued 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. While the Cabinet Office 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. 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. 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.

"Disclosing information about where advice has been given or a decision taken, subjects the collective decision-making processes of government to undue early scrutiny. Successive governments have not disclosed information on COBR meetings. In the case of COBR and the management of a crisis such as a pandemic, 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 in the face of an emergency. 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 an effective UK response. Disclosure of the requested information would severely limit the ability of the Government to effectively manage future emergencies. Disclosing a paper discussed at COBR would be likely to give rise to commentary in respect of the appropriateness of the recommendation(s). This would undermine ministers' discretion in how they organise themselves to formulate response options during any future emergencies."

38. The Cabinet Office further explained that:

"There is also a very strong public interest in protecting the sovereignty of the deliberative process itself at this level. 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 principle underpins the accountability of governments to Parliament and is the foundation of Parliamentary sovereignty. The Ministerial Code refers to the application of this convention, which reinforces its importance, in particular at part 2, section 2.1. 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. This requires that the privacy of opinions expressed in Cabinet and Committees should be maintained. Disclosure would be contrary to good government; which requires ministers and their

officials to engage in full, frank and uninhibited consideration of policy options.”

The Commissioner’s view

39. The Commissioner’s view is that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.
40. In her recent decision notice IC-83706-P2P2, the Commissioner rejected similar arguments, about the effect of disclosure on free and frank discussion, cited by the Department for Health and Social Care (DHSC) to withhold information relating to Exercise Cygnus, to those cited here by the Cabinet Office.² However, in her view, there are sufficient differences between the two sets of withheld information and, crucially, the context in which each set was created, to allow her to take a different approach in this case.
41. Whilst the content of the withheld information itself is relatively mundane, the Commissioner has to consider the circumstances in which the information was created and what it represents.
42. In the DHSC case, the withheld information had been completed some time after Exercise Cygnus had taken place, with plenty of opportunity allowed for thorough analysis and reflection.
43. By contrast, the information being withheld in this particular case was not the product of cool reflection, but was created “in the heat of battle” and in conditions designed to place participants under the sorts of stress they would have been under, had they been dealing with a real pandemic.
44. The Commissioner considers that it would be neither practical nor desirable if those who participated in Exercise Cygnus were to present their views with half an eye on how those views would look if they were to be disclosed in future. Exercise Cygnus was designed to be an extreme scenario. It therefore follows that participants would need to consider extreme solutions that would never normally be considered. Disclosure would risk associating an extreme position, taken in a simulated exercise, with an organisation’s general policy.

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2620034/ic-83706-p2p2.pdf>

45. The Commissioner also recognises the importance of protecting the ability of ministers to discuss extreme scenarios freely and frankly in Cabinet without worrying that those views may become public or that they will be associated with a particular view because they expressed it in a simulated exercise.
46. The Commissioner is satisfied that the issues being flagged, both in the COBR minutes and in the reports from the LRFs, have been recorded in the Exercise Cygnus Report. She does not therefore consider that disclosing the raw material as well would make a significant contribution to the public debate – but it would inhibit ministers and officials from fully contributing to exercises such as Cygnus in the future. This would significantly reduce the effectiveness of such exercises and the role that they play in developing government policy.
47. The Commissioner is therefore satisfied that, in the circumstances of the case, the balance of the public interest lies in favour maintaining the exemption.

Procedural Matters

48. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
 - (b) specifies the exemption in question, and*
 - (c) states (if that would not otherwise be apparent) why the exemption applies.*
49. The Cabinet Office's refusal notice was not issued within 20 working days of the request being received and it did not include all the exemptions on which the Cabinet Office eventually relied.
 50. The Cabinet Office therefore breached section 17 of the FOIA in responding to the request.

Right of appeal

51. 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

52. 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.
53. 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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