

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2021

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

Decision (including any steps ordered)

1. The complainant has requested information on the dates of meetings of the Union Policy Implementation Committee and the attendees at the meetings for a specific time period.
2. The Commissioner's decision, which is a finely balanced decision, is that the Cabinet Office may rely on section 35(1)(a) and (b), formulation of government policy and Ministerial communications, to withhold the requested information. The Commissioner would stress that she determined that the public interest favoured maintaining the exemption by a very narrow margin in the circumstances of this case.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

4. The Union Policy Implementation ('UPI') Committee is a Cabinet Committee and was stood up on 29 June 2020. A Written Ministerial Statement to this effect was laid and the terms of reference and a list of

standing ministerial members of the UPI Committee can be found online¹.

5. The Cabinet Office advised the Commissioner that specific information on the frequency and content of Cabinet Committees and other official ministerial meetings is not routinely disclosed. It has been the practice of successive governments not to give an account of the totality of Cabinet Committee meetings, including specific information on the frequency, attendance and content of meetings. There is a long-standing convention that the frequency and attendance list of the Cabinet and its Committees are not made public.

Request and response

6. On 29 June 2020 the complainant wrote to the Cabinet Office and requested information in the following terms:

"Pursuant to the general right of access to information contained within the Freedom of Information Act 2000 I request the following information:

a) The dates and persons in attendance (including, but not limited to, Ministers and Special Advisers) at each meeting of the "Union Policy Implementation" Cabinet Committee for the period 13 December 2019 to 29 June 2020 (inclusive).

b) The dates of any planned meetings of the "Union Policy Implementation" Cabinet Committee from 30 June 2020 until 31 December 2020 (inclusive)."

7. The Cabinet Office responded on 16 July 2020. It stated:

"The current list of Cabinet Committees, including the membership of the Union Policy Implementation Committee, was published on 29 June 2020 and can be found on Gov.uk."

¹ <https://www.gov.uk/government/publications/the-cabinet-committees-system-and-list-of-cabinet-committees>

8. The Cabinet Office applied FOIA section 21, information accessible by other means and FOIA sections 35(1)(a) and (b), formulation of government policy and Ministerial communications.
9. Following an internal review the Cabinet Office wrote to the complainant on 12 August 2020. In requesting an internal review the complainant had pointed out that section 21 was not appropriately applied to his request, as the information in the public domain did not address his request. The Cabinet Office agreed with the complainant that it had incorrectly applied section 21. However, it maintained its application of section 35(1)(a) and (b) to withhold the requested information.

Scope of the case

10. The complainant contacted the Commissioner on 12 August 2020 to complain about the way his request for information had been handled. He explained:

"This complaint relates solely to the balancing of the public interest anent the application of sections 35(1)(a) and (b) of the Freedom of Information Act 2000... I remain unconvinced that the public interest in maintaining the exemptions outweighs the public interest in disclosure. The information requested would not indicate what matters were discussed, the course of those discussions or what decisions (if any) were taken. While on a strict reading of the law sections 35(1)(a) and (b) are engaged, it is hard to see how these interests would actually be harmed by the release of the information. While these are class based exemptions, rather than harm based ones, in my submission the public interests considerations require to consider to what extent, if any, the interests protected by the exemption would be harmed. The information in question is benign; albeit, it relates to a policy area with particular sensitivities surrounding it given the current polling position in respect of Scottish independence. However, this Committee is not concerned entirely with Scotland its place in the UK, but rather the UK as a whole."

11. The Commissioner considers the scope of her investigation to be the balance of the public interest regarding the application of the section 35 exemptions.

Reasons for decision

Section 35: Formulation of government policy

12. 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."

13. 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.
14. 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.
15. 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."
16. Both exemptions are class-based, 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.
17. The Commissioner understands the complainant's view which explains:

"The request for information is simply a request for dates of meetings and the names of persons who attended. It does not reveal what topics were discussed at any of those meetings nor would it reveal the views that were exchanged between those persons who attended the meeting."
18. In respect of section 35(1)(a) the Cabinet Office explained to the Commissioner that it considers that the scheduling of meetings forms part of the formulation of government policy with the policy being ongoing at the time of the request, and continues to be under development. It added:

"The Union Policy Implementation Committee is a Cabinet Committee.

Decisions made by the committee, either at a meeting or through correspondence, are considered to be binding across government as part of the operation of the principle of Cabinet Collective Responsibility. The committee was established by the Prime Minister to support the delivery of the Government's priorities in relation to the Union of the United Kingdom. A key part of this function is to take decisions on policy relating to these priorities that is still under development at the time that it is considered by the committee."

19. Furthermore the Cabinet Office stated:

"In our view, there is a clear and tangible relationship between the content of the information withheld under this exemption and the process that is being protected (i.e. the formulation or development of policy)."

20. Regarding section 35(1)(b), the Commissioner accepts that, as a Cabinet Committee, Ministerial communications relating to the UPI Committee would satisfy the section 35(5) definition.

21. The Commissioner questioned the Cabinet Office on how the specifically requested information, dates of meetings and persons in attendance, could be considered to be related to Ministerial communications.

22. The Cabinet Office explained, at length, the concept of Cabinet Collective Responsibility with Cabinet Committee meetings acting as a venue for the free and frank exchange of views between ministers prior to arriving at decisions about the development of policy. It stated:

"Collective decision making is at the heart of our Government so the code requires that Ministers can express views frankly in private, maintain a united front and that the internal process through which a decision has been made, or the level of Committee by which it was taken, should not be disclosed.

...if the details of these meetings were routinely made public ministers would feel less able to express their views candidly and the quality of debate, and decisions taken, at these meetings would decrease.

There is a longstanding precedent that details of these meetings beyond those published on gov.uk are not routinely disclosed, and the Government's working assumption is that information relating to the proceedings of Cabinet and its Committees should remain confidential, although each case should be considered on its merits."

23. The Commissioner empathises with the complainant's position as stated in paragraph 17. She easily understands his view that the specific

requested information is too remote from the material captured by the section 35 exemption, to be particularly relevant in respect of this case.

24. The Commissioner's view is that there is an indistinct relationship between the content of the requested information and the formulation of government policy. However, she accepts that any policy formulation at the UPI Committee would be, at the time of the request, under development.
25. Despite her reservations in the circumstances of this case, the Commissioner is cognisant of the broad interpretation of section 35. Her own guidance accepts that the term "relates to" captures a very wide spectrum of information. Therefore, she reluctantly accepts that the exemptions at section 35(1)(a) and (b) are engaged. This is because, in the broadest possible interpretation, the dates of scheduled committee meetings "relate to" the formulation of government policy, in that, the meetings exist to discuss policy regarding the Union. The Ministers attending the committee meetings clearly would communicate with each other, so again, a very broad interpretation of "relating to ministerial communications" would be the names of those Ministers attending.
26. Having accepted that the exemptions are engaged the Commissioner has gone on to consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest

27. The complainant has made his view clear. He considers that the public interest in maintaining the exemptions does not outweigh the public interest in disclosure.
28. The Cabinet Office takes the opposite view and has provided the Commissioner with the following:

"We recognise that the Government's position on the Union has a significant impact on the lives of citizens and that there is a consequent public interest in transparency. However, we also consider the strong public interest that policy development is of the highest quality. Premature disclosure of information relating to the development of that policy would be likely to damage future policy making and thus prevent good government."

29. In respect of the public interest considerations relating to section 35(1)(a) the Cabinet Office explained:

"In our view, the public interest in releasing the requested information is low, as the frequency of planned meetings could generate a misleading

impression of the time Ministers spend discussing policy related to the Union."

30. The Cabinet Office supported this view by advising the Commissioner that issues relating to the Union could be discussed in other ministerial meetings. Its point being that the number of times the UPI Committee plans to meet would, therefore, not increase public understanding of Government priorities. It added that disclosure of the requested information would undermine the Government's right to determine how to formulate and develop policy, including how and when to meet to discuss it.

31. The Cabinet Office also referenced the timing of the request. It stated that, in this case, policy formulation is ongoing and:

"... if the principle is established that the number and timing of ministerial meetings can be made public at a later date, this is likely to have an ongoing detrimental effect on the ability of ministers to have meetings at a frequency of their own choosing."

32. In respect of section 35(1)(b) the Cabinet Office maintains that there is a strong public interest in protecting the safe space at Cabinet Committees for Ministers to debate policy. It advised the Commissioner of the following points in favour of maintaining the exemption:

- Disclosure of the frequency of the meetings of the UPI committee would be likely to set a precedent for the release of frequency of other Cabinet Committee meetings.
- Publishing the frequency of meetings would allow the public to make informed assumptions about the broad agenda of each committee by cross referencing the dates of committee meetings with government announcements, significant news stories or other similar publicly available information.
- Making public the frequency of Committee meetings subjects the collective decision-making processes of Government to undue early scrutiny which damages the process as it can lead to perverse incentives and ultimately a lack of free and frank exchange of ideas.
- Ministers could be incentivised either to meet because they wish to be seen to do so, or will be concerned about calling too many meetings where they would be helpful to resolve wide deliberation.
- This would be detrimental to the operation of the safe space for Ministers to discuss policy issues before collective agreement has been reached.

- Perverse incentives caused by unduly premature scrutiny of the meeting and attendance of Cabinet Committees will undermine Ministers' discretion in organising themselves to respond to the policy issues of the day.
 - Release of the 'rhythm' of the UPI committee up to 31 December 2020 would be the 'thin end of the wedge'; if the frequency of all Cabinet committees were drip-fed into the public domain this would allow the public to infer, or to consider that they have been able to infer, the importance of one policy area relative to another policy area.
 - Disclosing the information on the planned frequency of meetings, whilst seemingly innocuous, would indicate, or appear to indicate, the level of direct ministerial attention to this policy area.
 - Release of the full attendance list of any UPI Committee meetings would allow the public to make informed assumptions regarding what views were expressed (or were not expressed, in instances of absences) by individual ministers. These assumptions could be informed by information in the public domain about a particular minister's opinions on a particular area of government policy.
 - Attendance at Cabinet Committees by third parties is strictly limited to individuals who will make a specific contribution. Release of information regarding the presence of third parties would allow the public to make reasonable assumptions about what additional information was contributed to the meeting by these individuals and was considered before collective agreement was reached.
 - Releasing such information will set a precedent whereby it would become public knowledge who contributed to meetings and when, which could be correlated with information about an individual's expertise that is in the public domain to ascertain what was discussed.
 - Disclosure of the requested information will not give officials or ministers the assurances 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.
33. The Cabinet Office added that it does not believe that disclosure of the requested information in this case would prevent ministers' or their advisers' ability to fulfil their duties and responsibilities in the proper manner, however, it considers that Ministers and their advisers could be put in a position where they would be required to have "an undue focus

on presentational concerns". The example provided by the Cabinet Office explained that:

"...ministers may feel pressured to schedule Cabinet Committee meetings for the sake of appearances, as opposed to when their input may best be utilised in the policy development process."

34. Furthermore the Cabinet Office stated:

"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.... 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.... Disclosure would be contrary to good government; which requires ministers and their officials to engage in full, frank and uninhibited consideration of policy options."

35. The Cabinet Office added:

"It may be argued that these concerns are too remote to be particularly pertinent in respect of this case, i.e. they are not sufficiently linked to this case. 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. 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 Commissioner's view

36. The Commissioner is aware that the principle of Cabinet Collective responsibility (and other ministerial communications) was deemed sufficiently important to warrant specific protection in the form of an express exemption in the FOIA. However, the Commissioner notes that although the section 35 exemption cited expressly covers the matters referenced by the Cabinet Office in paragraph 34, the exemption, nevertheless is not an absolute exemption. Both limbs of the exemption are therefore subject to the public interest test.
37. She does not agree that disclosure of information in one case sets any precedent in consideration of a different case. Each case must be considered on its own specific circumstances.
38. She considers that the Cabinet Office is assuming a very significant level of motivated extrapolation from the basic information requested, in this

case, for the public to determine agendas, content and contribution of the UPI Committee meetings.

39. The Commissioner notes the emphasis given by the Cabinet Office to suppositions as to what may be inferred from, or the impression created by, the requested information. The Commissioner notes the Cabinet Office's concerns regarding the "misleading impressions" the public may conclude from the requested information. She 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. She would remind the Cabinet Office that it could provide explanatory supplementary notes to guide public understanding when disclosing information it deems could give "misleading impressions".
40. The Commissioner would also expect Ministers to conduct themselves in a professional manner, capable of using their own judgment to organise themselves appropriately without being influenced by speculation. She is somewhat concerned that Ministers "may feel pressured to schedule Cabinet Committee meetings for the sake of appearances".
41. Notwithstanding the concerns identified by the Cabinet Office regarding behaviours for the sake of "appearances" the Commissioner notes that the Cabinet Office believes that Ministers would not be prevented from fulfilling their duties and responsibilities as would be expected of a Minister or other senior officials.
42. The Commissioner recognises the importance of sound policy development and for Ministers to be able to discuss and debate issues freely and frankly, resulting in the delivery of high quality outcomes and good government for the public. She would seek to avoid any action which could undermine the efficacy of the policy development process.
43. The Commissioner has very carefully deliberated on this distinct case and in particular the balance of the public interest. Her conclusion is that the decision is very finely balanced.
44. The Cabinet Office has provided her with full submissions on its view that the public interest favours withholding the requested information for the reasons detailed above. The Commissioner accepts that in requests asking for the *content* of discussions of such committees as the UPI Committee, her decision would be far less problematic. However, this is not the circumstance in this case.
45. The Commissioner is mindful of the timing of the request and the age of the requested information. The information is undoubtedly recent and this point carries some weight in favour of maintaining the exemption. She is also somewhat influenced by the convention described in

paragraph 5 above, that the frequency and attendance list of the Cabinet and its Committees are not made public.

46. The Commissioner considers there to be a very significant weight attributed to the public interest in transparency on matters pertaining to the Union of the United Kingdom. The UCI Committee was created to support the delivery of the Government's priorities in relation to the Union of the United Kingdom. The development of the Union going forward undoubtedly carries great significance for, and impact on, the people of the United Kingdom. Openness and transparency in the Government's policy and plans are therefore very much in the public interest.
47. However, in considering the particular information requested in this case, the Commissioner is not convinced that there are sufficiently compelling grounds weighing in favour of disclosure of the specific information requested. Despite the detailed submissions from the Cabinet Office explaining the utmost significance in withholding the requested information, she is also not convinced of that importance. Therefore, she must question whether disclosure of the information would achieve meaningful transparency to inform public knowledge of Government policy regarding the Union.
48. Ultimately, the Commissioner must take a pragmatic decision and in this case she has determined that the public interest, by a very narrow margin, favours maintaining the exemption.

Right of appeal

49. 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

50. 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.
51. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF