

Freedom of Information Act 2000 (Section 50)

Decision Notice

15 December 2008

Public Authority: Cabinet Office
Address: Propriety and Ethics Team
Room 118
70 Whitehall
London
SW1A 2AS

Summary

The complainant requested copies of Cabinet meeting minutes where reform of mental health legislation was either on the agenda or discussed even if it was not on the agenda for the period from December 1998 until the date of his request in October 2006. The Cabinet Office confirmed that it held the information requested by the complainant but it considered it to be exempt from disclosure on the basis of exemptions contained at section 35(1)(a) and 35(1)(b) of the Act. The Commissioner has concluded that the information is exempt from disclosure on the basis of section 35(1)(a) and 35(1)(b) and that in all the circumstances of the case the public interest favours maintaining the exemptions.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant initially submitted the following request to the Cabinet Office on 5 April 2006:

'I wish to understand the process and events associated with reforming the Mental Health Act 1983 and as such, the factors that contributed to

the decisions made during the legislative reform process.

I am interested in information from that which informed the announcement by the Government in December 1998 that it intended to introduce a new legal framework, up to and including, that which informed the decision to amend the 1983 Act, rather than continue to introduce new statute (announced 23 March 2006).

I would like to receive any information that documents meeting minutes, internal contributions, correspondence, representations and views to the reform of the Mental Health Act 1983 and the process of introducing new legislation to Parliament.

I would also like to receive any documentation that the Cabinet Office holds which illustrates how decisions were made with respect to the development and process of this legislative reform.'

3. The Cabinet Office replied to this request on 4 May 2006 and explained that although it held information covered by the scope of this request it has estimated that to provide this information would exceed the appropriate cost limit and therefore it was refusing this request on the basis of section 12 of the Act. The Cabinet Office did however suggest to the complainant that if he refined his request by specifying a particular time period and/or restricted the type of information he was requesting, this may bring the request within the scope of the fees limit. Although the Cabinet Office noted that it was possible that any information falling within the scope of a refined request may be exempt from disclosure.

4. The complainant submitted the following refined, second request to the Cabinet Office on 19 October 2006:

'Might I suggest an attempt to refine this application that reduces it down to minutes of Cabinet meetings, where the reform of mental health legislation was a) on the agenda and perhaps b) discussed if not actually an agenda item? If possible, might I retain the same time frame as before?'

5. On 16 November 2006 the Cabinet Office informed the complainant that although it could provide the information covered by his second request (from herein referred to as 'the request') within the cost limit, it considered it exempt from disclosure on the basis of section 35(1)(a) and section 35(1)(b) of the Act and that the public interest favoured maintaining these exemptions.

6. The complainant asked the Cabinet Office to conduct an internal review of this decision on 24 November 2006.

7. On 31 January 2007 the Cabinet Office informed the complainant that it had completed an internal review which upheld the decision to withhold the information on the grounds contained in its letter of 24 November 2006.

The Investigation

Scope of the case

8. On 27 February 2007 the complainant contacted the Commissioner to complain about the Cabinet Office's decision to withhold the information covered by his request on the basis of the aforementioned exemptions contained at section 35 of the Act.

Chronology

9. The Commissioner wrote to the Cabinet Office on 17 December 2007 and asked to be provided with a copy of the information that had been withheld and a detailed explanation as to why the Cabinet Office considered section 35 to apply to this information.
10. In January 2008 the Cabinet Office contacted the Commissioner's office in order to discuss the Commissioner's investigation of this case noting that in previous cases involving requests for Cabinet Minutes, the information has been viewed in situ, rather than being sent to the Commissioner's offices. The Cabinet Office noted that this was one of a number of cases involving requests for Cabinet Minutes and that it was considering a revised approach to such cases so that it would be possible for the Commissioner's office to be provided with copies of Cabinet minutes rather than having to view the information in situ.
11. On 1 July 2008 the Commissioner wrote to the Cabinet Office and suggested that it would seem practical for one of his representatives to visit the Cabinet Office in order to view this information in situ. The Commissioner asked that before this visit, the Cabinet Office provide a detailed explanation as to why it considered section 35 to apply to the withheld information.
12. The Cabinet Office provided the Commissioner with a detailed reasoning behind its application of section 35 in a letter dated 17 July 2008.
13. The Commissioner subsequently visited the Cabinet Office on 15 August 2008 in order to review the information falling within the scope of the complainant's request.

Findings of fact

14. In 1998 the then Secretary of State for Health, Frank Dobson, announced that the government intended to legislate to replace the existing Mental Health Act 1983. Subsequent to this announcement the Government published a green paper which was followed by a White Paper in 1999.
15. In June 2002 the Government published a draft Mental Health Bill alongside a consultation exercise which invited responses from stakeholders on the proposed legislative changes.

16. In September 2004 the Government published a second draft Mental Health Bill which took account of engagement with stakeholders following the first draft published in June 2002.
17. A Mental Health Bill was announced at the beginning of two Parliamentary Sessions, 2003/4 and 2005/6 but neither Bill was ever introduced.
18. On 23 March 2006 the Government announced that it would be introducing a shorter Bill that would amend the 1983 Act rather than replace it.
19. In November 2006 this amending Bill was introduced to Parliament and following passage through both Houses of Parliament received Royal Assent on 16 July 2007.¹
20. The information which the Cabinet Office provided the Commissioner with access to consisted of 8 sets of minutes from the Cabinet Legislation Committee, 3 from 2002; 1 from 2003 and 4 from 2006 and 2 sets of Cabinet Minutes both from 2005. However, when reviewing this information, the Commissioner established that two of sets of the minutes from the Cabinet Legislation Committee were created following the complainant's request. That is to say the complainant submitted his request in 19 October 2006 and these two sets of minutes relate to Committees which sat in November 2006. Therefore, the Commissioner's position is that these two minutes do not fall within the scope of the complainant's requests.

Analysis

Exemptions

21. The Cabinet Office has argued that all of the minutes falling within the scope of this request are exempt on the basis of sections 35(1)(a) and 35(1)(b). These sections state that:

'35(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'*

22. Section 35(5) notes that "Ministerial communications" includes 'proceedings of the Cabinet or any committee of the Cabinet'.

Section 35(1)(a)

¹ Findings of fact content drawn from The House of Commons Research Paper 07/33 'The Mental Health Bill' <http://www.parliament.uk/commons/lib/research/rp2007/rp07-033.pdf>

23. The Commissioner takes the view that the 'formulation' of government policy focuses on the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a minister. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy – piloting, monitoring, reviewing, analysing or recording the effects of existing policy. Moreover, 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Section 35(1)(a) cannot apply to a finished product or policy which has been agreed, in operation or already implemented. Once a decision has been taken on a policy line, then it is no longer in the formulation or development stage.
24. Furthermore, for information to fall within section 35 it must relate to 'government' rather than 'departmental' or any other type of policy. The Commissioner takes the view that government policy is therefore likely to be a political process which requires Cabinet input, or applies across government, or represents the collective view of ministers.
25. In consideration of this case the Commissioner has been guided by the Information Tribunal decision in the case *DFES v Information Commissioner & the Evening Standard (EA/2006/0006)* in which the Tribunal commented on the term 'relates to' contained in section 35(1). The Tribunal suggested that the term 'relates to' could be interpreted broadly, and although this approach has the potential to capture a lot of information, the fact that the exemption is qualified means that public authorities are obliged to disclose any information which caused no significant harm to the public interest. The Tribunal's approach also demonstrates that where the majority of the information relates to the formulation or development of government policy then any associated or incidental information that informs a policy debate should also be considered as relating to section 35(1)(a).
26. Having had the opportunity to review the information falling within the scope of this request the Commissioner is satisfied that it all falls within the scope of section 35(1)(a). Although these minutes date from some time since the Government had originally announced its decision to reform mental health legislation and published the 1999 White Paper, the Commissioner is satisfied that even by mid 2006 (the date of the final minute falling within the scope of the request) the Government's policy in relation to this matter was one that was still being actively developed, even if the initial stages of formulation were in fact complete. This is because it is clear from the minutes that the policy making process was ongoing until the Bill received Royal Assent in July 2007.
27. Clearly, given the nature of the minutes (i.e. Cabinet level and Cabinet committee discussions) it may be argued that the information does not relate to micro level, detailed policy discussions about changes to mental health legislation. However, in the Commissioner's opinion even macro level discussions of an inevitably top level nature can still relate to the formulation or development of government policy. (Such an approach would appear to be supported by the Tribunal's comments that the term 'relates to' must be read widely; the Commissioner takes

this to mean not only that information incidental to the policy-making process can fall within the scope of section 35(1)(a) but also that information about both micro **and** macro policy fall within the scope of the exemption.)

Section 35(1)(b)

28. The 8 documents which the Cabinet Office has withheld on the basis of section 35(1)(b) are all minutes of Cabinet sub-committees or Cabinet minutes and therefore the Commissioner is satisfied that these documents fall within the scope of the exemption contained at section 35(1)(b).

The public interest test

29. However, section 35 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of this case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.
30. The Commissioner has considered what the correct approach in applying the public interest test in context of sections 35(1)(a) and 35(1)(b) is and if there is any material difference between how the public interest test applies between the two sub-sections. In the Commissioner's opinion there will be occasions where there will be some crossover between the two exemptions, particularly in the context of this case where the withheld information comprises policy discussions which took place at Cabinet committees. However, the Commissioner is mindful of the fact that a number of Tribunal's decisions have indicated that the public interest in favour of maintaining each exemption, or each limb of exemption, should be considered separately. Therefore, whilst the Commissioner has outlined below the public interest factors in favour of disclosing the information in relation to both limbs together, he has considered separately the factors in maintaining each exemption, and has gone on to consider the balance of these factors under section 35(1)(a) and then under section 35(1)(b).

Public interest factors in favour of disclosing the minutes

31. There is a general public interest in transparency regarding how the Government operates and increasing the public's understanding of such issues. In particular, disclosure of this information would help inform the public about how complex changes to existing legislation are managed, e.g. by explaining how or why Government decides to introduce new legislation, how that legislation becomes a Bill and ultimately how that Bill becomes law. Moreover, disclosure would reveal how the Cabinet decision making process operates.
32. Disclosure may also re-assure the public that the process of reforming mental health legislation in this period was well managed and effective and thus increase public confidence in the Government's ability to manage the amendments to significant pieces of legislation.
33. Moreover, there is a clear public interest in the Government being accountable for decisions it has taken. In this case, it was nearly ten years since the Government

first announced its desire to change mental health legislation before the Mental Health Act 2007 became law. Disclosure of the withheld minutes would ensure that the Government was accountable for the length of time it had taken to bring its initial policy to fruition. Notably, disclosure may address the complainant's desire for clarification as to why the Government decided in March 2006 to amend the 1983 Act rather than replace it as originally announced.

34. The Government's attempts to amend mental health legislation were seen as controversial by many stakeholders and concerns were raised at various stages of the policy making process from initial announcement in 1998 to the introduction of the new Mental Health Act in 2007. By disclosing the minutes, interested parties and stakeholders could develop a greater understanding of the Government's position leading to a more informed public debate surrounding the controversial aspects of legislative changes. If the minutes were disclosed at the time of the complainant's request in October 2006, this would have allowed a significant period of time during which stakeholders could have further debated and contributed to the policy making process given that the Bill did not receive Royal Assent until July the following year. Furthermore, disclosure of some of the minutes may educate stakeholders as to how best to contribute to future consultations.
35. The Mental Health Bill is a significant piece of legislation with the potential to have an impact on all members of society; it forms not just part of Department of Health policy but is also part of the Home Office's policies to protect the public from those with mental health issues who pose a risk to others. Given the wide ranging and significant impact the legislation has the potential to have, it could be argued that it is in the public interest that the public's understanding of this legislation and surrounding issues is as full as possible.

Public interest factors in favour of upholding section 35(1)(a)

36. Policy makers, including Government ministers, need a private space to discuss issues freely and frankly without fear that such discussions will be subject to public scrutiny. Such debate makes for robust and strong policy making and it is not in the public interest that the policy making process is undermined.
37. Such a need for a private space is particularly true when policy makers are considering and discussing difficult and controversial decisions such as those related to the amendments of mental health legislation.
38. It is not in the public interest that every aspect of the policy making process is open to public scrutiny because if there was too much public input the policy making process may become cumbersome and inefficient. The ultimate consequence of such a position is that the policy agenda is led not by policy makers but in fact by the public.
39. Moreover, during the period in question there had been numerous opportunities for the public and stakeholders to feed into the policy making process, notably the 2004 consultation exercise announced at the time the second draft bill was announced.

Public interest factors in favour of upholding section 35(1)(b)

40. The Cabinet Office has highlighted the significance of the convention of collective responsibility which allows Ministers to be able to express and argue their points of view in private whilst maintaining a united front. Premature disclosure of Cabinet minutes would undermine this convention by reducing the candour by which Ministers would discuss issues which would result in the quality of ministerial debates and ultimately decisions being undermined. This is particularly true when discussions relate to the legislative programme; Ministers need to be able to free to determine the Government's priorities for forthcoming Parliamentary sessions and identify where resources across Government should be deployed.

Balance of public interest arguments under section 35(1)(a)

41. In considering the balance of the public interest arguments under section 35(1)(a), the Commissioner has taken into account the comments of the Tribunal in the *DFES* decision along with the more recent comments contained in judgments High Court judgments in which this the *DFES* decision was referenced.²

42. In particular the Commissioner has considered key two principles outlined in the *DFES* decision. The first was that the importance of the timing of the request when considering the public interest in relation to section 35(1)(a):

‘Whilst policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure unless for example it would expose wrongdoing in government. Both ministers and officials are entitled to hammer out policy without the “...threat of lurid headlines depicting that which has been merely broached as agreed policy.”

43. The second being:

‘The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case.’ (Para 75(i)).

44. With regard to the timing of this request, the complainant submitted his request in October 2006 and as the Commissioner has established above, the policy development process continued up until the date which the Mental Health Act received Royal Assent in July 2007. The Commissioner therefore agrees that in the context of this case the policy makers involved were entitled to develop the mental health legislation without the risk of ‘lurid headlines’ something which may

² *Export Credit Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) (17 March 2008) <http://www.bailii.org/ew/cases/EWHC/Admin/2008/638.html> and *Office of Government Commerce v Information Commissioner & the Attorney General* [2008] EWHC 737 (Admin) (11 April 2008) <http://www.bailii.org/ew/cases/EWHC/Admin/2008/737.html>

have occurred if the minutes were disclosed at the time of the request especially been very likely given the controversial nature of the proposed legislative changes.

45. With regard to the second guiding principle, clearly the Commissioner cannot comment in great detail on the content of the information itself as to do so would reveal the content of the withheld information itself. However, the Commissioner believes that he can reveal that the discussions can be correctly described as ones that are genuinely free and frank and thus deserving of the protection of a private space which the exemption contained at section 35(1)(a) is intended to provide.
46. Nevertheless, the Commissioner accepts that the arguments surrounding accountability and transparency are strong, particular with regard to how disclosure may explain the delays in the policy making process involved in introducing new mental health legislation and the decision to amend rather than implement completely new legislation. However, the Commissioner is somewhat sceptical that the disclosure of the requested information would *greatly* inform the public debate surrounding the controversial aspects of the mental health reforms.
47. In summary, the Commissioner is mindful of the valid public interest arguments in favour of disclosure of the information under section 35(1)(a). However, having had the opportunity to review the withheld information he is of the opinion that the arguments surrounding the need to provide a private space for policy makers should be given significant weight and therefore the Commissioner has concluded that in this case the public interest in withholding the information under section 35(1)(a) outweighs the public interest in disclosing the information.

Balance of public interest arguments under section 35(1)(b)

48. In considering the balance of the public interest under section 35(1)(b), the Commissioner has been guided by the approach of the Tribunal in the case *Scotland Office v Information Commissioner (EA/2007/0070)*. In this case the Tribunal noted that 'the maintenance of the convention of collective Cabinet responsibility is a public interest like any other, in the sense that the weight to accorded to it must depend on the particular circumstances of the case.' (Tribunal at paragraph 86). In other words, the principle of collective responsibility does not set a threshold so high that disclosure of such information will be akin to creating an absolute exemption. In considering the weight which should be attributed to the convention of collective responsibility, the Tribunal highlighted the following factors which should be considered:

'...the content of the information, whether it deals with issues that are still "live", the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context, are all matters that are likely to have bearing on the assessment of the public interest balance.' (Tribunal at paragraph 87).

49. With regard to the withheld information in this case, the Commissioner notes that a significant number of Ministers who are identified in the various Cabinet minutes are still in government (albeit that they may no longer be in the same ministerial post as they were at the time of the meetings in question) or are still sitting MPs. Moreover, the minutes attribute a number of comments and arguments to specific individuals and as noted above, the content of the minutes does reflect a genuinely free and frank debate on the introduction of new mental health legislation. Therefore, in the Commissioner's opinion a number of the factors identified by the Tribunal in paragraph 87 of its decision have to be given a significant amount of weight in this case.
50. Again, as with the consideration of the public interest under section 35(1)(a), the Commissioner accepts that the arguments in favour of disclosing the information are strong, particular as disclosure of the requested information would hold the Ministers to account for the decisions they made at Cabinet meetings in relation to reforms to the mental health legislation. However, as also noted above, the Commissioner is unsure whether disclosure of the minutes would add materially to the public's understanding of the more controversial aspects of the mental health reforms and how these aspects were discussed at Cabinet meetings.
51. On balance the Commissioner has therefore concluded that in the circumstances of this case, the public interest in maintaining the exemption contained at section 35(1)(b) outweighs the public interest in disclosing the information.

The Decision

52. The Commissioner's decision is that the Cabinet Office were correct to withhold the 8 sets of minutes falling within the scope of the complainant's request on the basis of sections 35(1)(a) and (b).

Steps Required

53. The Commissioner requires no steps to be taken.

Right of Appeal

54. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 15th day of December 2008

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

Section 1(2) provides that -

“Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.”

Section 2(1) provides that –

“Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that either –

(a) the provision confers absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information

section 1(1)(a) does not apply.”

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

(a) the information is exempt information by virtue of a provision conferring absolute exemption, or

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Section 35(1) provides that –

“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,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(5) provides that –

“In this section-

“Ministerial communications” means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, 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;”