

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 23 June 2009

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

Summary

The complainant requested, from the Cabinet Office, copies of the minutes of the Cabinet Committee on devolution which dated from 1997. The Cabinet Office confirmed it held the information but refused to disclose the information under section 35(1) (a) and (b) the formulation and development of government policy and ministerial communications. The Commissioner has investigated and finds that sections 35(1) (a) and (b) are engaged but that the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information. He has therefore ordered disclosure of the minutes.

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 made his request to the Cabinet Office on 3 October 2005 for the following request information:

"I would like to make a request under Freedom of Information to see all the minutes of the Cabinet Sub-Committee on Devolution Scotland, Wales and the Regions (DSWR). The remit of this committee, under the Chairmanship of the then Lord Chancellor, Derry Irvine, was:

'To consider policy and other issues arising from the Government's policies for devolution to Scotland and Wales and the regions of England and to

promote and oversee progress of the relevant legislation through Parliament and its subsequent implementation.'

My understanding, from an article by the Constitution Unit, is that this Committee met 15 times from May to July 1997. Like all other Cabinet Sub-Committees, its meetings were held in private.

I would also be grateful for access to any briefing papers, supporting documentation or other materials relevant to the preparation of the White Paper 'Scotland's Parliament', published on July 24, 1997."

3. The Cabinet Office responded on 6 October 2005. In relation to the first part of the request, for the minutes of meetings, the Cabinet Office stated this information was being withheld as it falls under the exemption in sections 35(1) (a) and (b). In applying the exemption the Cabinet Office found that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information. In relation to the second part of the request the Cabinet Office explained that the request was widely framed and to provide the information requested would exceed the appropriate cost limit and so was exempt under section 12(1) of the Act. The Cabinet Office suggested that the complainant may wish to refine his request, and asked if there was any particular aspect of the preparation of the White Paper he was particularly interested in.
4. The complainant responded on 6 October 2005. He indicated that in relation to the first part of his request (for the Cabinet Sub-Committee minutes) he would be writing again to request an internal review of the decision to withhold this information. Regarding the second part of this request, the complainant outlined his specific interest in the preparation of the White Paper and therefore refined his request to be:

"for the briefing papers and supporting documentation prepared by civil servants and ministerial advisers for the first meeting of the Cabinet Sub-Committee (DSWR). My understanding is that the Committee met for the first time in early- May 1997."
5. The complainant wrote separately to the Cabinet Office on 6 October 2006 requesting an internal. He specifically asked the Cabinet office to review the public interest test in withholding information requested in the first part of his request.
6. On 4 November 2005 the Cabinet Office issued a refusal notice in respect of the refined request of 6 October 2005. The Cabinet Office confirmed it holds relevant information but found that the papers directly concerned the work of the Cabinet Committee and, like some of the information identified in the first part of the complainant's request, found this information to be exempt by virtue of section 35 (1) (a) and (b). In applying the public interest test the Cabinet Office found the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.

7. The Cabinet Office completed its internal review in relation to the first part of the complainant's request on 7 November 2005. The review upheld the original decision to withhold the information under sections 35(1) (a) and (b) of the Act.

The Investigation

Scope of the case

8. On 4 January 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant informed the Commissioner that his complaint only related to the handling of the first part of his request for: '*minutes of the Cabinet Sub-Committee on Devolution Scotland, Wales and the Regions (DSWR)*'.

Chronology

9. Regrettably, due to a significant backlog of complaints, the Commissioner only began his investigation on 26 July 2007 when he wrote to the Cabinet Office. The Commissioner requested a copy of the minutes being withheld and further explanation regarding the application of the exemption and the public interest test. In particular the Commissioner asked the Cabinet Office to consider its application of the public interest test in light of the passage of time since the information was created.
10. The Cabinet Office responded on 6 September 2007. The Cabinet Office explained that due to the sensitivity of the requested information it would be preferable for the Commissioner to view the information in situ at the Cabinet Office. Additionally the Cabinet Office provided further explanation regarding the application of section 35(1) (b) to the minutes as well as 35 (1) (a).
11. The Commissioner wrote on 19 September 2007 to arrange a viewing of the minutes and on 11 October 2007 the Commissioner viewed the information in situ at the Cabinet Office.

Findings of fact

12. The withheld information is the minutes of the Cabinet Committee on Devolution, Scotland, Wales and the Regions from 1997. This Committee was chaired by Lord Irvine of Lairg and was charged to give collective consideration to the details of the devolution proposals which had been outlined in broad terms in the Labour Party's manifesto for the 1997 election. The committee was also to consider the promotion of legislation to effect the devolution proposals and how such legislation could be implemented.

Analysis

Exemption: Section 35 'Formulation or Development of Government Policy'

13. Section 35(1) (a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. 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."

14. The exemption at section 35(1) (b) therefore covers not only the formal minutes of cabinet meetings, committees of the Cabinet and the two executive committees but also includes information relating to timing, agendas, memoranda and other tabled papers.
15. Section 35 is a class based exemption; this means that there is no need to consider the 'prejudice' test in relation to the requested information. To engage the exemptions, the information in question must either (a) relate to the formulation or development of government policy or (b) fall within the definition of ministerial communications.
16. The Commissioner accepts that the minutes of the Cabinet Committee meetings fall within the definition of 'ministerial communications' and are therefore exempt by virtue of section 35(1) (b).
17. The Commissioner takes the view that the 'formulation' of government policy comprises 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 already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
18. The Commissioner, having viewed the requested information, is satisfied that section 35(1) (a) is also engaged in respect of the withheld information.

Public Interest Test

19. Section 35 is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore consider where the balance of public interest lies and decide if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. In the circumstances of this case, as the protection of ministerial communications and the space that

ministers need to freely and frankly discuss new policy issues yet still preserve a united front is inextricably linked with the maintenance of a robust policy making process, the public interest in maintaining both of the exemptions claimed under section 35(1) is effectively the same. The public interest factors are therefore considered together below.

20. The Cabinet Office acknowledge that there is a public interest in disclosing information which would enable: greater transparency in how government operates; the public to assess the quality of debate between ministers and the quality of decision making; improved capability for the public to contribute knowledgeably to debate and also a strong public interest in ensuring that decision making is based upon full consideration of all the possible options.
21. However, the Cabinet Office argued that the requirements of openness must be balanced against the proper and effective functioning of government. They state that

“the very existence of the exemption at section 35(1) (b) is designed to protect the way in which government Ministers communicate with each other and conduct the business of government through the Cabinet and Cabinet Committee system. At the very heart of this system is the constitutional convention of collective responsibility (the convention). The maintenance of this convention is fundamental to the continued effectiveness of cabinet government, and its continued existence is therefore manifestly in the public interest. To release details of discussions between ministers in Cabinet committees would undermine this. Ministers should be able to discuss freely and frankly in private in the expectation that when decisions have been reached, they will present a united front. In order to safeguard the convention it must be applied consistently and therefore if it were only information that revealed disagreement between ministers that was withheld then it would soon become apparent that where information is withheld there must have been disagreement. The principle of collective responsibility would then have been breached”

22. The general principle of collective responsibility is outlined in the ‘Ministerial Code: A Code of Ethics and Procedural Guidance for Ministers’:¹

“Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence should be maintained.”

The Code goes on to state 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’.

¹ http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code.aspx

23. The Cabinet Office argue that the harm caused by disclosure of Cabinet and Cabinet Committee minutes will in most cases be twofold: the specific relating to the subject under discussion; and the general, relating to damage to the doctrine of collective responsibility through the impact on future behaviour. If Ministers cannot be confident that their discussions will be protected they may be inhibited in their deliberations. They may seek to have key discussions outside of the confines of meetings, or encourage minimal recording of discussions. This would be contrary to good government; which requires Ministers and their officials to engage in full, frank and uninhibited consideration of policy options.
24. The Cabinet Office state that there is a place for public participation in the policy making process and for public debate of policy options, however it is not in the best interest of policy formulation that every stage of the policy making process and every aspect of ministerial discussion should be exposed to public scrutiny.
25. The Commissioner recognises that the Cabinet Office's main argument for maintaining the exemption is that disclosure could undermine the convention of collective Cabinet responsibility.
26. In reaching a decision as to where the balance of the public interest lies the Commissioner has considered the findings of the Information Tribunal in *Scotland Office vs. Information Commissioner EA/2007/0070* in which the Tribunal stated:

"To the extent that the Appellant is suggesting that because of the importance of the convention, there is some form of presumption against disclosure of such information implicit in that exemption, or that the public interest in maintaining the exemption under section 35(1) (b) is inherently weighty, we must disagree.... Furthermore not all information coming within the scope of section 35(1) (b) will bring the convention of collective Cabinet responsibility into play. Some communication may be completely anodyne or may deal with processes rather than policy issues. Communications may also be purely for information purposes, such as when reports are circulated. The very fact that certain information constitutes Ministerial communications, does not, therefore, mean that there is a public interest in non disclosure..

Even where Ministerial communications engage the collective responsibility of ministers (where, for example, it reveals actual deliberations and exchanges of views), that in itself does not mean that the public interest against disclosure will inevitably be weighty. The maintenance of the convention of collective responsibility is a public interest like any other."

27. The Tribunal went onto explain that:

"Where Ministerial communication does engage the convention of collective responsibility, it is necessary in particular, to assess whether and to what extent the collective responsibility of Ministers would be undermined by disclosure. Factors such as the content of the information, whether it deals with issues that are still "live", the extent of the public

interest and debate in those issues, the specific view of different Ministers it reveals, the extent to which 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 a bearing on the assessment of the public interest balance.”

28. In this case the Committee minutes do not deal with ‘live’ policy issues as devolution as proposed in the Labour Party 1997 manifesto has been realised. Specifically the remit of the Committee was:

“To consider policy and other issues arising from the Government’s policies for devolution to Scotland and Wales and the regions of England and to promote and oversee progress of the relevant legislation through Parliament and its subject implementation.”

The relevant legislation was enacted and devolution in Scotland and Wales has long since been implemented.

29. The Commissioner has also considered the members of the Committee and notes that of those only one remains active in the government. Some have passed away and only a handful remain in any way involved in politics. In any event, the Commissioner also does not consider that the minutes attribute any specific opinions to any individual Minister.
30. The Commissioner also considered the findings of the Tribunal in relation to the notion of collective responsibility in *FoE vs Information Commissioner and The Export Credit Guarantee Department EA/2006/0073*. In considering the public interest the Tribunal found that:

“There is not and can be no immutable rule in terms of reliance upon the collective ministerial responsibility and / or the individual accountability of ministers to Parliament. The Tribunal refutes any suggestion that those notions, either singly or together represent some form of trump card in favour of maintaining the particular exemption.”

Whilst the Tribunal decision in this case related to regulation 12(4) (e) under the Environmental Information Regulations to all intents and purposes the consideration of the public interest in that case were equally applicable to section 35(1) (b).

31. Having viewed the withheld information the Commissioner does not consider that disclosure of the minutes in this case would undermine the convention of collective responsibility. The minutes themselves do not offer much insight into the nature of the debate or the contributions of individual ministers which would, as suggested by the Cabinet Office, undermine the convention.
32. The Commissioner notes that there are competing arguments as to whether the specific policy issue under discussion at the Committee is still ‘live’. The Commissioner accepts that political debate may continue on the nature of devolution in general. In that respect there is a strong public interest in disclosure

to inform current or future debate. However, the topics specifically under discussion in 1997 were no longer live at the time of the request as the resultant decisions in relation to the withheld information had been taken and implemented. The Commissioner considers that the policies discussed and the discussions themselves relate to historic decisions and that the current political climate differs significantly to the one in which the Committee operated. The devolved administrations have been in place since 1999 and the different options discussed within the sub-committee meetings were either rejected or implemented at the time.

33. The Commissioner's approach in this case is consistent with that advocated in the majority Tribunal decision in the Iraq Cabinet minutes case (EA/2008/0024 & 0029). The focus of the decision must turn on the facts of the each case and in particular the subject-matter of the issues under consideration. The Commissioner has weighed the competing public interest factors in this case. In line with the Tribunal decisions referred to above, he rejects the blanket approach taken by the Cabinet Office which is that disclosure of the minutes, regardless of content is not in the public interest as it would undermine the convention of collective responsibility. Whilst the convention and its maintenance is one of the public interest factors to be considered, and it is a factor that the Commissioner places much weight upon, it is only one element of the public interest test.
34. In this case, the issues discussed and recorded in the minutes continue to be of significant public interest, but the sensitivity of the specific content has reduced with the passage of time. The Commissioner finds that, on balance, the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information.

The Decision

35. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.
 - (i) The Cabinet Office incorrectly applied section 35(1) (a) and (b) to the withheld information, namely the minutes of the meetings held in 1997 of the Cabinet Committee on Devolution, Scotland, Wales and the Regions.
 - (ii) The Cabinet Office breached the requirements of section 1(1) (b) by failing to disclose the requested information to the complainant.

Steps Required

36. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose the information withheld under sections 35(1) (a) and (b) as described in paragraph 35 (i) above.

37. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

38. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

39. 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

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 23rd day of June 2009

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Formulation of Government Policy

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(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.”

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"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;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."