

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 July 2011

Public Authority: The Scotland Office
Address: Dover House
Whitehall
SW1A 2AU

Summary

The complainant requested the dates between May to October 2010 on which the Secretary of State for Scotland met the Secretary of State for Defence to discuss the Queen Elizabeth class aircraft carriers. The Scotland Office initially refused this request on the basis of sections 35(1)(b) and 35(1)(d) and varied this to sections 36(2)(b)(i) and (ii) at the internal review. In submissions to the Commissioner the Scotland Office confirmed that its position was that the information was in fact exempt from disclosure on the basis of sections 35(1)(b), although in the alternative it would seek to rely on section 36(2)(b)(ii). The Commissioner accepts that section 35(1)(b) is engaged but in all the circumstances of the case the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. As section 35(1)(b) is engaged, the Scotland Office cannot also rely on section 36(2)(b)(ii) as the exemptions contained within the two sections of the Act are mutually exclusive.

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 submitted the following requests to the Scotland Office on 5 October 2010:

- '1. Information on the dates between May – October 2010 when the Secretary of State for Scotland met the Secretary of State for Defence to discuss the Queen Elizabeth class aircraft carriers following the confirmation by BAE to the House of Commons Defence Select Committee that it had been asked by the Ministry of Defence to consider the possibility of cancelling one or both ships.
2. Information on what date the Secretary of State for Scotland was informed by the Ministry of Defence that it had asked BAE Systems to consider the implications of reducing the number of aircraft carriers from two to one to zero'.
3. The Scotland Office responded on 29 October 2010 and explained that the information that had been requested was exempt from disclosure on the basis of sections 35(1)(b) and 35(1)(d) of the Act.
4. The complainant contacted the Scotland Office on 4 November 2010 and asked for an internal review of this decision to be completed. The complainant argued that it was perverse to argue that the requested information was in any way governed by section 35 of the Act.
5. The Scotland Office informed the complainant of the outcome of the internal review on 7 February 2011. The review concluded that the requested information was in fact exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) of the Act.

The Investigation

Scope of the case

6. On 16 February 2011 the complainant contacted the Commissioner to complain about the way his requests for information had been handled.
7. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
8. The Scotland Office has now informed the complainant that it does not in fact hold any recorded information falling within the scope of his second request; the only recorded information it holds relates to his first request. The complainant has not informed the Commissioner that he disputes the Scotland Office's position that it does not hold any recorded information falling within the scope of the second request. Therefore this notice only considers the exemptions cited by the

Scotland Office to withhold the information falling within the scope of the first request.

Chronology

9. The Commissioner contacted the Scotland Office on 9 March 2011 and asked it to provide him with a copy of the requested information and details to support the application of the exemptions that had been cited in correspondence with the complainant.
10. On 11 April 2011 the Scotland Office provided the Commissioner with a copy of the requested information falling within the scope of the first request. It also confirmed to the Commissioner that its position now was that the original decision to withhold the information on the basis of section 35(1)(b) was the correct one and provided details to support its application of this exemption. However, the Scotland Office also explained to the Commissioner that if he concluded that the information was not exempt from disclosure under section 35(1)(b) then it would seek to rely on section 36(2)(b)(ii). (The Scotland Office's response did not mention section 35(1)(d) which had also been cited in the refusal notice).

Analysis

Exemptions

11. Section 35(1)(b) states that information is exempt disclosure if it is held by a government department and 'relates to' Ministerial communications. The Commissioner interprets the phrase 'relates to' broadly and information which only recounts or refers to a specified Ministerial communication, whether written or verbal, would also engage this exemption because it would 'relate to' such communications.
12. The Commissioner is therefore satisfied that the information held by the Scotland Office, namely the dates the two Ministers in question discussed the matter identified in the first request, clearly falls within the scope of the exemption contained at section 35(1)(b) of the Act.

Public interest test

13. Section 35 is a qualified exemption and subject to the public test at section 2 of the Act and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

14. In the particular circumstances of this case the Scotland Office's submissions in respect of the public interest test make direct reference to the actual content of the withheld information itself. Therefore the Commissioner's assessment of the public interest arguments set out below is deliberately brief. A more complete analysis of these arguments has been set out in the confidential annex which will be provided only to the Scotland Office.

Public interest arguments in favour of disclosing the requested information

15. The Scotland Office noted that the Strategic Defence and Security Review (SDSR) and decisions about the Queen Elizabeth class aircraft carriers have a significant impact on the lives of many people and there is a public interest in the decision making in respect of these issues being transparent.

Public interest arguments in favour of maintaining the exemption

16. There is a strong public interest in the Ministers being able to have the space to argue and debate freely and frankly. Final decisions about the outworkings (i.e. the lower level policy decisions) of the SDSR have yet to be made and announced. Unless the Secretary of State for Scotland can communicate freely and frankly with his Ministerial colleagues he cannot fulfil his function representing Scotland in matters which are reserved to the UK government, within the UK government. Disclosure of the dates upon which the two Ministers met would impact on the Secretary of State for Scotland's ability to ability to conduct such discussions in a candid manner.
17. In submitting these arguments the Scotland Office highlighted the sensitive nature of the subject matter to which the withheld information related. In particular in noted that the ongoing decision making about the SDSR include continuing discussions about the future of bases in Scotland. Debates around these issues are and were highly politically charged, engaging all political parties in the campaign for the Scottish Parliament elections in May 2011, and featuring heavily in the media. (Although the Commissioner would note that only the circumstances as they existed at the time of the request, in this case October 2010, can be taken into account when considering whether information is exempt from disclosure). The debate encompasses both the economic importance of bases to the parts of Scotland where they are located and also about the symbolic significance of the role of the armed forces within the Union of Great Britain, with the latter issue being a key factor in the constitutional future of Scotland.

Balance of the public interest arguments

18. Having considered the specific circumstances of this case carefully, including the content of the withheld information, the Commissioner has concluded that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. The Commissioner has reached this conclusion largely because he believes that the disclosure of the withheld information would not impede Ministerial discussions to the extent envisaged by the Scotland Office.

Section 36 – prejudice to effective the conduct of public affairs

19. The Scotland Office has asked the Commissioner to consider whether the information is exempt from disclosure under section 36(2)(b)(ii) should he conclude that information is not exempt from disclosure under section 35(1)(b). However, section 36(1)(a) states that information can only be exempt under section 36 if it is not exempt by virtue of section 35. In other words, the exemptions contained in section 35 and 36 are mutually exclusive.
20. As the Commissioner has concluded that the information is exempt from disclosure on the basis of section 35(1)(b) it follows that the same information cannot be exempt from disclosure on the basis of section 36(2)(b)(ii). The Commissioner's position is not altered by the fact that he has concluded that the public interest under section 35(1)(b) favours disclosure. This is because the effect of the public interest test is to determine whether or not information should be disclosed, even though it is exempt. It is not the case that where the public interest favours disclosure the information ceases to be exempt.

Procedural Requirements

21. Section 1(1) of the Act provides a general right of access to information and states that, subject to the application of an exemption,:

'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.'

22. Section 10(1) of the Act requires that a public authority complies with the requirements of section 1(1) promptly and in any event within 20 working days.
23. In the circumstances of this case, as the Commissioner has concluded that the information falling within the scope of the first request should be disclosed the Scotland Office should have provided this to the complainant within 20 working days of his request. The Scotland Office's failure to do this constitutes a breach of section 1(1)(b) and 10(1) of the Act.

The Decision

24. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

25. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - Provide the complainant with the information falling within the scope of the first request.
26. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

27. 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.

Other matters

28. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
29. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the

procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. In this case the complainant requested an internal review on 4 November 2010 and the Scotland Office did not inform him of the outcome until 7 February 2011. The Commissioner expects that the Scotland Office's future handling of internal reviews will conform to his recommended timescales.

Right of Appeal

30. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 28th day of July 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

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 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

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.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.