

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 May 2013

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

Decision (including any steps ordered)

1. The complainant requested information on the number of times the Reducing Regulation Committee ("the RRC") has met. The Cabinet Office refused the request, stating that section 35(1)(a) and (b) applied. The Commissioner's decision is that section 35(1) is engaged but that the balance of the public interest favours disclosure of the information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. The RRC is a Cabinet sub-Committee, established to take strategic oversight of the delivery of the Government's regulatory framework. It has broad terms of reference to consider issues relating to regulation, including scrutinising, challenging and approving all new regulatory proposals.

Request and response

5. On 21 August 2012, the complainant wrote to the Cabinet Office and requested information in the following terms:

"How many times has the Reducing Regulation Committee has (sic) met since it was established?"

6. The Cabinet Office responded on 11 September 2012. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

- section 35(1)(a) information relating to the formulation or development of government policy; and
- section 35(1)(b) information relating to Ministerial communications.

7. It had assessed that the public interest favoured withholding the information to protect the constitutional convention of Cabinet collective decision making.

"Ministers will reach collective decisions more effectively if they are able to debate questions of policy freely and in confidence. Disclosure of the number of times a Committee met would damage collective responsibility by exposing the committee (and the Cabinet/Committee structure) to external accountability. Essentially, it is for Ministers to determine how often they meet to discuss policy. 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."

8. Following an internal review the Cabinet Office wrote to the complainant on 20 November 2012, upholding its decision. It stated that although release of the number of meetings might appear innocuous, the Ministerial code made it clear that information about the process by which government policy was arrived at should not be disclosed. It suggested that disclosure might have a chilling effect on Ministers' willingness to engage in full and frank discussions of all available options. It argued that they were entitled to a safe space in which to explore options as and when they deemed necessary, and to expose them to the pressure of public opinion as to whether the frequency of such meetings was adequate would be detrimental to the policy making process.

Scope of the case

9. The complainant contacted the Commissioner on 23 November 2012 to complain about the way her request for information had been handled.
10. She challenged the assertion that the disclosure would damage collective responsibility by exposing the committee (and the Cabinet/Committee structure) to external accountability. She argued that Ministers routinely highlight and publicise meetings they are involved in. She cited examples of press releases which reported both that Cabinet meetings had taken place, and, in some cases, what was discussed.
11. She argued that this was inconsistent with the approach outlined by the Cabinet Office in its refusal, and suggested it demonstrated that Ministers do not routinely consider that revealing a meeting has taken place damages collective responsibility or reduces their ability to discuss policy freely.
12. The Commissioner has considered the Cabinet Office's application of section 35(1)(a) and (b) to the requested information.

Reasons for decision

Section 35 – formulation of government policy etc

13. The Cabinet Office has cited the exemptions provided by section 35(1)(a) and (b).

Section 35(1)(a)

14. Section 35(1)(a) provides an exemption for information that relates to the formulation or development of government policy. Consideration of this exemption is a two-stage process; first, the information must fall within the class described in the exemption by relating to the formulation or development of government policy. Secondly, this exemption is qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in favour of disclosure.

15. Turning firstly to whether the requested information relates to the formulation or development of government policy, when arguing that this exemption was engaged the Cabinet Office referred to specific policy making processes which had or would come about through the work of the RRC.
16. The approach of the Commissioner is that the term 'relates to' as it is used in this exemption can safely be interpreted broadly and so he is satisfied that the information, which consists of the number of times the RRC has met, relates to both the formulation and development of government policy, and that section 35(1)(a) is therefore engaged.

Section 35(1)(b)

17. Section 35(1)(b) states that information is exempt from disclosure if it is held by a government department and relates to Ministerial communications. As stated above, the Commissioner interprets the phrase 'relates to' broadly. Information which refers to a specified Ministerial communication, whether written or verbal, would also engage this exemption because it would 'relate to' such communications.
18. The Cabinet Office has clarified that the RRC has a Ministerial membership. The Commissioner is therefore satisfied that information about its meetings relates to Ministerial communications and that section 35(1)(b) is therefore engaged.

Public interest test

19. Section 35 is a qualified exemption and subject to the public test at section 2 of the Act. 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.

Public interest arguments in favour of disclosing the requested information

20. The Cabinet Office submitted a single set of public interest arguments in respect of section 35(1)(a) and (b).
21. It noted that there is a public interest in improving public understanding of the development of government policy and the way Cabinet government operates more generally.

22. It recognised that the decisions Ministers make have a significant impact on the lives of citizens and that there is a public interest in this process being transparent. It also recognised that greater transparency makes government more accountable to the electorate and increases trust. Specifically, it is in the public interest to know how many times Ministers meet to consider reducing regulation matters, as it may give some indication of the level of focus and priority they give to this area of work.

Public interest arguments in favour of maintaining the exemption at section 35(1)(a)

23. The Cabinet Office argued that it was important to maintain the exemption at section 35(1)(a) because of the contribution confidentiality of discussions makes to good government. In this case, disclosure of the requested information would usurp the government's right to determine how to formulate and develop policy, including how and when to meet to discuss it.
24. It argued that Ministers are answerable for the decisions they take and this is essential if they are to develop sound policies. Disclosure would invite comment on the procedures and the options considered (and possibly discarded) rather than on the policy proposals ultimately put forward. This would tend to make Ministers and their advisers accountable for the process of policy formulation rather than Ministers being accountable for its outcome. In turn, this would distort the formulation and development of policy and influence the conduct of Ministerial policy deliberations in the future.
25. The Cabinet Office argued that Ministers might feel pressurised to hold meetings or discuss certain subjects in specific forums, if the requested information is made public, and that this would interfere with the established process by which policy is generally formulated and developed. Matters falling under the RRC's remit might also be discussed in other meetings, including at Cabinet, in other Committee meetings and at bilateral Ministerial meetings. Policy is also formulated via correspondence. If the number of meetings held is made public, the Cabinet Office argued that Ministers are likely to feel pressurised into only formulating policy on reducing regulation within the allotted RRC meetings. This may not be the most appropriate forum to do so, and lead to other considerations which are normally raised through other channels being excluded.

26. The Cabinet Office went on to argue that because regulatory reform matters were often addressed via other forums, the public interest in releasing the requested information is low, as the number of times the Committee has met could generate a misleading impression of the time Ministers spend attending to reducing regulation. Releasing the number of times the Committee has met would not, therefore, significantly increase public understanding of government priorities in this area.
27. The Cabinet Office contends that the timing of the request is also key. The policy development and formulation undertaken by the RRC is ongoing. 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 times of their own choosing.

Public interest arguments in favour of maintaining the exemption at section 35(1)(b)

28. The Cabinet Office argued that disclosing the requested information might undermine Ministerial communications because the overlapping discussions at different Cabinet Committee meetings, outlined above, are a key way in which Ministers communicate and develop policy. Anything which interferes with the freedom that Ministers feel they have to discuss policies at the most appropriate level or Committee would be detrimental to policy development.
29. It also argued that a knock-on effect of disclosure would be Ministers being less willing to address policy matters via correspondence. This is because they might seek to hold more RRC meetings, simply so as to be able to report that fact, and thus would discuss matters in person instead of via letters. Letters, the Cabinet Office argued, are sometimes the most appropriate way of agreeing issues, and can allow a more detailed exploration of complex issues.
30. The damage which would be likely to flow from one Minister being less willing to communicate with another would be significant. It is not in the public interest, given the need for close connections between the Ministers that are members of the Committee, to inhibit that relationship or the free and frank provision of advice or exchange of views, not least because it would be likely to reduce the capacity for good decision making, and thus prejudice the convention of collective Cabinet responsibility.

31. The Cabinet Office stated that there is a strong public interest in protecting the constitutional convention of Cabinet collective decision making. Ministers will reach collective decisions more effectively if they are able to debate questions of policy freely and in confidence. The Cabinet Office considers that disclosure of the number of times a Committee has met would damage collective responsibility by exposing the committee (and the Cabinet/Committee structure) to external accountability. Essentially, it is for Ministers to determine how often they meet to discuss policy. The maintenance of the convention of collective decisions is fundamental to the continued effectiveness of Cabinet government, and its continued existence is therefore strongly in the public interest.
32. Although the frequency and number of meetings may seem innocuous, the Cabinet Office argued that there are good reasons why releasing this information could undermine the convention of collective decision making. It cited *The Ministerial Code* as specifying,

"The internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed".
33. It argued that if information on the process by which Ministers had reached a view on policy issues was to be released (such as the timing and sequencing of meetings), they might be less willing to engage in full and frank discussions about the available options. This in turn could jeopardise the ability of Ministers to take decisions based on full advice and thorough consideration, which would undermine the quality of policy making. Ministers need to be able set their own priorities and work in a "safe space" which allows them to explore issues as and when is deemed necessary.
34. Overall, the Cabinet Office considered that the information currently made available about Cabinet Committee structure (including the Cabinet Manual and a list of all Committees and their membership on its website) enables the public to understand a significant amount about the ways in which government decisions are reached. The public interest in added transparency, when applied to the information in this request, is outweighed by the risks that disclosure would damage the collective decision making process. The good functioning of government is manifestly in the public interest.

Balance of the public interest arguments

35. The Commissioner has considered the specific circumstances of this case carefully, in conjunction with the content of the withheld information. He has concluded that the public interest in maintaining the exemptions at section 35(1)(a) and (b) does not outweigh the public interest in disclosing the information. This is because he considers that the disclosure of the withheld information would not have the detrimental effect envisaged by the Cabinet Office.
36. The information requested by the complainant is simply the number of times the RRC has met since it was established. The complainant has made it clear that she does not wish to know who was in attendance at each meeting or what was discussed or even the dates.
37. The fact that the RRC exists is not confidential. Its remit is explained on the (now archived) website for the Department for Business, Innovations and Skills. A section of the Cabinet Office's website, *The Red Tape Challenge*, invites the public to submit suggestions about regulatory reform which might ultimately be considered by the RRC.
38. The Commissioner therefore considers that there is already information about the RRC in the public domain and that the public are, to a certain extent, invited to engage with its work. The Cabinet Office's own website states of *The Red Tape Challenge*:

"This interactive campaign signifies a dramatic shift in the culture of Whitehall, as we work together collaboratively to turn the regulatory default on its head"
39. The word "interactive" and "collaborative" are significant here, implying some acceptance of the public as active stakeholders in this initiative. The Commissioner considers this to be at odds with the stance taken by the Cabinet Office over a request to know merely the number of meetings of the RRC.
40. The complainant argues that the restrictive approach adopted by the Cabinet Office is inconsistent with instances when Cabinet meetings have been publicised. The Commissioner notes from internet searches that the RRC's inaugural meeting, in July 2010 was itself widely reported in the media, suggesting that at the time it was actively publicised. The Cabinet Office has supplied no evidence that public awareness of this particular

meeting had a demonstrable and detrimental effect on the Committee's ability to do its job.

41. Most of the Cabinet Office's arguments have centred on disclosure interfering with Ministerial autonomy over how best to go about developing policy. It is argued that disclosure would lead to the unwarranted manipulation of established ways of working that are not in the interests of good government, purely to satisfy the pressures of public scrutiny.
42. The Commissioner is familiar with such "safe space" and "chilling effect" arguments in the context of section 35(1)(a) and (b). He is satisfied that they represent a cogent and legitimate response to the general issue of preserving private thinking space during policy development and good working relationships, both for ministers and for civil servants.
43. However, he does not agree that they are applicable in this case. The content of the requested information is key here. The Commissioner has considered the detrimental effect of releasing the number of times the RRC has met and simply does not agree that the Cabinet Office has shown that it would lead to Ministers becoming more circumspect and less effective in the way they approach their work. It is very hard to believe that Ministers would consider themselves inhibited as a result of the disclosure of this piece of information.
44. The Cabinet Office has argued that the number of meetings could give the public a misleading impression as to the amount of work being done on the issue of reducing regulation. In response, the Commissioner considers that it is not for public authorities to withhold information based on concerns about how it might be interpreted. This is not a good reason for avoiding transparency. Disclosure always presents public authorities with an opportunity to provide context. If the Cabinet Office has concerns that disclosure of the number of meetings might not reflect the actual work done on regulatory reform, then an explanation could be given in order to prevent any misunderstanding.
45. Furthermore, the Commissioner believes the likelihood of procedures being changed in the manner the Cabinet Office has described to be highly unlikely. The Commissioner considers that the public has a right to expect that if challenged on such matters, Ministers will be robust enough to be able to defend

established, effective ways of working rather than altering them purely because of external scrutiny.

46. Had the request asked for information about the content of the RRC meetings, or their outcomes, then the Commissioner considers the Cabinet Office would be likely to have stronger grounds for arguing that disclosure would have an adverse inhibitory effect. Indeed, some of the arguments submitted by the Cabinet Office seem to be framed around the central idea that the request was for more than merely the number of RRC meetings.
47. As set out in paragraph 24, above, the Cabinet Office has argued that disclosure would invite comment on the procedures and the options considered (and possibly discarded) rather than on the policy proposals ultimately put forward. Since no revelation about what has been discussed in the meetings has been requested, the Commissioner does not accept that this is a natural consequence of the disclosure merely of their number.
48. The Cabinet Office specifically mentioned that disclosure would damage collective Cabinet responsibility. However, since the proposed disclosure does not involve any information which reveals the views of or is attributable to any individual Minister, the Commissioner does not agree that this is a sustainable argument in this context.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
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SK9 5AF**