

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 April 2015

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

Decision (including any steps ordered)

1. The complainant has requested Cabinet papers on the subject of the funeral of Diana, Princess of Wales. The Cabinet Office relied on section 35(3) as a basis for refusing to confirm or deny whether it held the requested information. It upheld this at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 35(3) as a basis for refusing to confirm or deny whether it holds the requested information.
3. No steps are required.

Request and response

4. On 22 September 2014 the complainant requested information of the following description:

"Please note that I am only interested in information which relates to the period 30 August 1997 until 2 March 1998.

For the aforementioned period can you please supply copies of all cabinet minutes which in any way touch upon the death of the Princess of Wales or preparations and arrangements for her funeral. Some of this material will pre-date the Princess's funeral while some of it will have been generated after her death."

5. The Cabinet Office responded on 26 September 2014. It refused to confirm or deny whether it held any of the information described in the

request and cited section 35(3) as its basis for doing so. It linked its use of section 35(3) to section 35(1) and made specific reference to ministerial communications and the formulation/development of government policy.

6. On 30 September 2014, the complainant requested an internal review.
7. In a letter of 8 October 2014, the Cabinet Office sent the complainant the outcome of its internal review. It upheld its position regarding section 35(3).

Scope of the case

8. The complainant first contacted the Commissioner on 24 October 2014 to complain about the Cabinet Office's refusal to provide confirmation or denial.
9. The Commissioner has therefore considered whether the Cabinet Office is entitled to rely on section 35(3) as its basis for refusing to confirm or deny whether it holds the requested information.
10. Unfortunately, despite repeated requests, the Cabinet Office did not readily provide a response to the Commissioner to assist him with his investigation. As a result, the Commissioner issued an Information Notice under section 51 of the Act on 10 February 2015 which required the Cabinet Office formally to provide its full and final response to a series of questions which the Commissioner had put to it. The Commissioner has set out further comment about this in the Other Matters section of this notice.

Reasons for decision

11. Section 1 of the FOIA sets out a two-part right to know. In accordance with the first part (section 1(1)(a)), a public authority must confirm or deny whether it holds information that is described in a request made to it. In accordance with the second part (section 1(1)(b)), a public authority must provide that information. Exemptions can apply to both parts.

Section 35(3)

12. 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 [section n 35] subsection (1)".

13. The practical consequence of this is that if the information described in the request falls within the descriptions of information set out in section 35(1), the Cabinet Office can refuse to confirm or deny whether it holds it, subject to a balance of public interest test.
14. 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, ..."
15. The information described in the request is "information which relates to the period 30 August 1997 until 2 March 1998". The complainant also described his request as being for "all cabinet minutes which in any way touch upon the death of the Princess of Wales or preparations and arrangements for her funeral. Some of this material will pre-date the Princess's funeral while some of it will have been generated after her death".
16. Cabinet minutes, by their nature, constitute a record of ministerial communications and it is equally likely that they would cover meetings where Government policy is formulated and developed. The Commissioner is satisfied that such information, if it were held, would fall within the descriptions of information set out in section 35(1). He is therefore satisfied that section 35(3) is engaged.
17. Section 35(3) is subject to a public interest test and therefore the Cabinet Office can only maintain this exclusion from its duty to provide confirmation or denial where the public interest in doing so outweighs the public interest in disclosure.

Section 35(3) – Balance of public interest test

The complainant's arguments

18. The complainant, in his request for internal review, drew attention to the widespread interest there is in the subject of his request and the uniqueness of the event in question. He questioned whether disclosure could therefore have any impact on future Cabinet discussions as asserted by the Cabinet Office in its refusal notice. He asserted that it

would be “understandable” that the Cabinet would have considered these matters at the time.

19. The Commissioner would note that Diana, Princess of Wales was killed in a car crash in the early hours of 31 August 1997.¹ He is somewhat puzzled by the complainant’s insistence on a timeframe that predates her death by one day. He is also puzzled at the complainant’s phrase “Some of this material will pre-date the Princess’s funeral while some of it will have been generated after her death”. He acknowledges that there may, at some point prior to her death, been a record made somewhere of Diana, Princess of Wales’ preferences for a funeral service, although it seems highly unlikely that this would have been discussed, and therefore minuted in Cabinet. He thinks it even less likely that there would have been such a discussion in Cabinet on the day prior to her death – 30 August 1997. The complainant did not elaborate on his choice of words or the timeframe for which relevant information could be held. The Commissioner notes that the second date, 2 March 1998 was the date on which Diana, Princess of Wales’ will was published.²

The Cabinet Office’s arguments

20. The Cabinet Office recognised that there is a general public interest in transparency to contribute to the public’s understanding of and participation in public affairs.
21. However, it gave particular focus to the countervailing arguments which support the protection of the safe space in which ministers can discuss matters at issue, particularly those which are high profile. It argued that disclosure would undermine this principle. Its arguments, in effect, conflated the arguments as to protecting the safe space in which policy is formulated and developed (relevant to the application of section 35(1)(a)) and in which Ministerial communications can take place (relevant to section 35(1)(b)).
22. It argued that it was for the Cabinet and the government to decide how decisions should be made and disclosing this information would undermine the Cabinet’s sovereignty in this regard. It also gave particular weight to the fact that the issues in question and the decisions taken with respect to them were taken recently and remain sensitive.

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http://news.bbc.co.uk/onthisday/hi/dates/stories/august/31/newsid_2510000/2510615.stm

² <http://news.bbc.co.uk/1/hi/uk/61285.stm>

23. The Cabinet Office referred to the Ministerial Code in support of its position. At paragraph 2.3, the Code states:

*"The internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed. Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned. On occasion, it may be desirable to emphasise the importance of a decision by stating specifically that it is the decision of Her Majesty's Government. This, however, is the exception rather than the rule."*³

The Commissioner's position

24. The Commissioner notes that the events in question are not recent. Arguably this lessens any negative impact that might arise as a consequence of confirmation or denial. The Commissioner is also concerned that the Cabinet Office is seeking to elevate section 35(3) to an absolute exemption not subject to a balance of public interest test whenever requests of this nature are made. He thinks that there are circumstances when confirmation or denial as to whether the Cabinet discussed a matter would be in the public interest.
25. However, he is not convinced that this is such a case. While there remains considerable interest in the circumstances surrounding the death of Diana, Princess of Wales, he does not think that this, of itself, amounts to a compelling argument as to the public interest in providing confirmation or denial. While the provision of confirmation or denial as to whether the Cabinet discussed this matter may be of interest generally, the Commissioner does not agree that this automatically equates to a compelling public interest factor in favour of providing that confirmation or denial.
26. The Commissioner recognises the strong public interest in protecting the safe space in which policy is formulated and developed and in which ministerial communications take place. He agrees that the provision even of confirmation or denial as to whether this matter was discussed at Cabinet level undermines that safe space. In particular, he thinks the arguments as to protecting a safe space for ministerial communications carry the most weight. He notes the expectation of confidentiality of communications set out in the Ministerial Code. He also notes that the Code asserts that it is within the gift of the Cabinet to determine any

³ <http://www.cabinetoffice.gov.uk/sites/default/files/resources/ministerial-code-may-2010.pdf>

variation to that confidentiality. While the Commissioner would reiterate his concern that the Cabinet Office may wish to treat section 35(3) as an absolute exemption, he does not see, in the circumstances of this case, a compelling reason to provide confirmation or denial.

27. The Commissioner notes the complainant's curious use of timeframe in this request to include one day prior to the Princess of Wales' death. He is aware of a number of "conspiracy theories" as to the key factors in the Princess' death, namely that there was some sort of high level/establishment conspiracy to murder her. The complainant made no further reference to any belief in such theories when making his complaint. The curious timeframe may well therefore have been a typographical error on the complainant's part. Even if the complainant had made such assertions, the Commissioner is firmly of the view that the Cabinet Office is not obliged to provide confirmation or denial in order to accommodate to such theories or to prove a negative.

Section 35(3) - Conclusion

28. In light of the above, the Commissioner has concluded that the Cabinet Office is excluded from its obligation to provide confirmation or denial in the circumstances of this case. In reaching this view, he has decided that the public interest in knowing whether this matter was discussed at Cabinet is not particularly compelling despite the passage of time. By contrast, he agrees that the public interest in maintaining Cabinet sovereignty as to what is discussed at Cabinet level carries greater weight in the circumstances of this case.

Other matters

Information Notice

29. The Commissioner is disappointed that the Cabinet Office was unable to provide its arguments upon request despite several extensions of time for response being offered to it. The Commissioner recognises that the subject matter is sensitive and takes this into account when setting deadlines by which he expects the Cabinet Office to respond. However, he remains dissatisfied by his interactions with the Cabinet Office in this regard.

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,
LEICESTER,
LE1 8DJ

Tel: 0300 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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.

Signed

Alexander Ganotis
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