

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 June 2016

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

Decision (including any steps ordered)

1. The complainant has requested the dates of interviews and names of those interviewed in relation to an inquiry into the leaking of a memo from the Scottish Office to the Daily Telegraph. The Cabinet Office cited section 31 (Law enforcement exemption) as its basis for refusal and upheld this at internal review. It also cited section 40 (unfair disclosure of personal data) and section 38 (prejudice to health and safety).
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 31 and section 40 as its basis for refusing to provide the requested information.
3. No steps are required.

Request and response

4. On 29 May 2015, the complainant requested information of the following description:

"Dates of interviews and names those interviewed in relation to the Cabinet Office Enquiry into the Leaking of the Memo dated 6th March from the Scottish Office to the Daily Telegraph.

I would be grateful if you could provide a full list of the dates and names of those who were interviewed for the above enquiry that reported recently.

If a full list of names and dates is unavailable, I would be grateful if you could confirm the date of the last interview to be held”.

5. On 30 June 2015, the Cabinet Office responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - section 31(1)(g) in conjunction with section 31(2)(b)(law enforcement);
 - section 40(2) (unfair disclosure of personal data); and
 - section 38(1) (health and safety).
6. The complainant requested an internal review on 30 June 2015. He said: “I would be grateful if you clarify why you are unable to provide the date of the last interview held and/or the other dates of interviews. This request does not ask for any names and does not appear to fall within the scope of the reasons for non-disclosure that you have given. I would be grateful if you could provide this information”
7. The Cabinet Office sent him the outcome of its internal review on 19 August 2015. It upheld its original position with regard to section 31. It was silent as to whether it still wished to rely on section 40 and section 38.
8. During the course of the Commissioner’s investigation, it explained that it considered that the request for internal review was focussed solely on the dates. This is why its letter setting out the outcome of its internal review explained its position with regard to section 31. However, it explained that it would maintain reliance on section 40 and section 38 for that information which was broader than the dates.

Scope of the case

9. The complainant contacted the Commissioner on 11 September 2015 to complain about the way his request for information had been handled.
10. The Commissioner has considered whether the Cabinet Office is entitled to rely on the section 31 exemptions it has cited as a basis for refusing to provide the dates (the “date information”) and any other information within the scope of the request to which section 31 has been applied. The Commissioner has also considered whether it is entitled to rely on sections 40 and 38 for other information within the scope of the request. The Commissioner does not agree that the complainant has narrowed his request to the date information as part of his request for internal

review. Implicit in his request for internal review is the question why he could not, at least, receive the date information in his request for internal review because he is not satisfied with the Cabinet Office's refusal. His original request cites access to the date information in the alternative where the other information is not held. In any event, the Cabinet Office has set out its arguments as to section 40 and 38 for the Commissioner in response to his, the Commissioner's letter of enquiry about this request.

Background

11. On 3 April 2015, the Daily Telegraph published an article based on a leak that came from the Scotland Office.¹ The Independent Press Standards Organisation later upheld a complaint about the article.² There was an inquiry into the leak (the subject of this request) the completion of which was announced on 22 May 2015.³ Alistair Carmichael MP (then Secretary of State at the Scotland Office) and his then Special Adviser, Euan Roddin, who was also connected to the matter accepted the conclusions of the inquiry. Shortly afterwards, legal proceedings were initiated by some of Mr Carmichael's constituents against the former Scotland Office minister. These legal proceedings post-date the request and were ultimately unsuccessful in overturning Mr Carmichael's election as the MP for Orkney and Shetland.⁴

Reasons for decision

Section 31 - law enforcement

12. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. In this case the Cabinet Office considers that section 31(1)(g) applies in conjunction with section 31(2)b.

¹ <http://www.telegraph.co.uk/news/politics/SNP/11514933/Nicola-Sturgeon-secretly-backs-David-Cameron.html>

² <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-33408441>

³ <https://www.gov.uk/government/news/scotland-office-memorandum-leak-cabinet-office-inquiry-statement>

⁴ <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-35521442>

13. Section 31(1)(g) states:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),"

14. Section 31(2)(b) states:

"The purposes referred to in subsection (1)(g) to (i) are-

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

15. The Commissioner first considered whether the Cabinet Office has the authority to exercise a relevant function. The Cabinet Office explained:

"All civil servants must abide by the Civil Service Code which sets out the standards of behaviour expected of civil servants, including special advisers. In particular, it states that civil servants must not 'disclose information without authority'. In addition, special advisers also have their own code of conduct and Ministers have the Ministerial Code. Government Departments have a duty to investigate any perceived breaches of these codes and establish if there has been any unauthorised contact with a journalist and if there has been any other improper behaviour".

16. The Commissioner is satisfied that part of the Cabinet Office's functions include investigating breaches of the Civil Service Code⁵ such that section 31(1)(g) can be engaged, provided the prejudice envisaged would or would be likely to arise.

17. The Commissioner has dealt first with whether the exemption is engaged. Consideration of prejudice based exemptions such as 31(1)(g) involves two stages. First, in order to be engaged, the following criteria must be met:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;

⁵ <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>

- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
18. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
19. Covering first whether the exemption is engaged, the relevant applicable interests cited in this exemption are "*ascertaining whether any person is responsible for any conduct which is improper*". The Commissioner is satisfied that the withheld information is about this topic. He has considered the withheld information and it clearly relates to these applicable interests.
20. Next, the Commissioner has considered whether there would be a causal relationship between disclosure and the prejudice which the exemption is designed to protect against. He has also looked at whether the resultant prejudice which is alleged is real, actual or of substance.
21. The information requested is the dates of the interviews and the names of those interviewed. The Cabinet Office argued the importance of protecting the confidentiality of the process. If this was undermined, it would make it more difficult to conduct similar investigations in the future because individuals would not be reassured that the process would remain confidential. This would make it more difficult to obtain co-operation from anyone with relevant testimony or evidence. This applied not only to the Cabinet Office but also to any other department conducting a similar inquiry in the future.
22. The Cabinet Office also argued the negative outcome of releasing even a small amount of information, for example, just the dates, would constitute the release of an incomplete picture which would lead to speculation that, of itself, would require a response. Such a response may lead to further disclosure of sensitive detail in order to clarify any inaccurate speculation that arose as a result of a limited disclosure. This particular inquiry was unusual in the amount of coverage it received but that did not lessen the importance of maintaining confidentiality in the process.

23. The Commissioner agrees that there is a causal link between disclosure and the prejudicial outcome covered by the exemption and that the alleged resultant prejudice would be of substance. He accepts the proposition that disclosure even of the date information could undermine the confidentiality of the process. The Commissioner recognises the importance of confidentiality in ensuring the effectiveness of the process.
24. The Cabinet Office has argued that the higher level of prejudice is applicable here. In other words, it asserts that the prejudicial outcome "would" arise as a result of disclosure.
25. The Commissioner notes that the request was made shortly after an announcement of the completion of an investigation into the leak of a Scotland Office memo.⁶ In the Commissioner's view, this adds to the sensitivity that release of any detail of the investigation would have. He further agrees that, in the light of the timing of the request, disclosure even of the date information would give rise to the prejudicial outcome described in the request.
26. As the Commissioner accepts that the outcome of disclosure predicted by the public authority would occur he is therefore satisfied that the exemption provided by section 31(1)(g) in conjunction with section 31(2)(b) is engaged.

The public interest test

27. Section 31 is a qualified exemption 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.

Public interest arguments in favour of disclosing the requested information

28. The Cabinet Office acknowledged the strong public interest in disclosing the information, in particular to Alistair Carmichael MP's constituents. Mr Carmichael was, at the time, Secretary of State at the Scotland Office and was closely connected to events surrounding the leak. As noted above, legal proceedings were initiated against Mr Carmichael by a group of his constituents. The Cabinet Office explained that it took these points into account when it considering this matter.

29. The events in question took place around the time of the UK general election in 2015. There is a public interest in making public whether or to what extent the timing of the general election had an impact on the investigation. This would be served by disclosure in this case.

Public interest arguments in favour of maintaining the exemption

30. In favour of maintaining the exemption, the Cabinet Office stressed the public interest in maintaining the confidentiality of the investigation process. Individuals would be less likely to co-operate where confidentiality could not be secured. It stressed the need for a safe space in which such investigations are undertaken to allow free and frank cooperation. It also drew attention to the relatively small numbers and the ease with which individuals could be identified.
31. In its view, even though the investigation had been completed at the time of the request, this did not lessen the public interest in protecting the safe space in which such investigations are conducted.
32. It also argued that public trust in the process would be undermined, particularly where only small amounts of information out of context were put into the public domain. Providing context, in the case of investigation information, could be damaging to that investigation.
33. Disclosure here would also set expectations for disclosure in any future investigations. This could damage investigations where too much emphasis needed to be made on presentation. Again, the damage this would cause to the investigation process would not be in the public interest.
34. In summary, it said:

"It is in the public interest that the public has confidence in the Civil Service and HM Government and the processes in place to detect issues of impropriety. Releasing the requested information would create unhelpful and inappropriate expectations of these processes, encourage unnecessary speculation on the involvement of individuals in these processes and have a negative effect on the confidence of the general public in the ability of departments to identify the source of leaks as well as indicating to potential leakers how we undertake investigations so they can avoid being caught".

Balance of the public interest arguments

35. The Commissioner is not convinced that a potential leaker could learn much about the investigation process from the withheld information such they could evade detection. However, the Commissioner agrees that there is a strong public interest in protecting the safe space in

which such investigations are conducted. He also agrees that this would be undermined by disclosure.

36. The Commissioner also accepts that the disclosure of even small amounts of information such as that requested in this case could create a distraction from the investigation process itself. Presentation of such information may well require additional context. Disclosing context may, of itself, be prejudicial to the inquiry.
37. The Commissioner is mindful of the fact that there may be considerable public distrust around any investigation, particularly where the leak is damaging to the government. However, that is not, in the Commissioner's view, good reason to undermine any investigation into the leak through disclosure of details of that investigation.
38. The Commissioner recognises that, to an extent, the public interest in maintaining the exemption for information to do with a specific leak investigation may diminish over time. However, he is satisfied that this is not such a case here. The request came only a few days after the reported conclusion of the investigation and, as such, the information remains sensitive. This, in the Commissioner's view, adds weight to the public interest in maintaining the exemption in this case.

Conclusion

39. The Commission has concluded that the public interest in maintaining the exemption provided by section 31(1)(g) in conjunction with section 31(2)(b) outweighs the public interest in disclosure. In reaching this view he has given particular weight to the public interest in protecting the safe space in which such investigations are conducted. He has also given weight to the fact that the information was created relatively recently. This adds to its sensitivity in the Commissioner's view. He has reached this view in respect of disclosure of the dates on their own and the names and dates combined.

Section 40 – unfair disclosure of personal data

40. Section 40 applies if disclosure would breach one of the data protection principles of the Data Protection Act ("DPA"). The principle most regularly relied upon is the first data protection principle. This requires information to be processed fairly and lawfully and in accordance with at least one of a list of conditions set out in Schedule 2 of the DPA. The condition most regularly considered is Condition 6 where the necessity of processing (in this case, disclosure under FOIA) is balanced with the reasonable expectations and legitimate interests of the individual whose personal data it is.

41. The Commissioner has considered this exemption for completeness where it would just be a disclosure of the names of people interviewed. For reasons outline above, he is already satisfied that the dates and names disclosed together or the dates on their own would be exempt under section 31.
42. Personal data is information about a living individual from which they can be identified and which is biographically significant about them. The Commissioner is satisfied that the information to which section 40 has been applied is personal data. It is the names of living individuals and, given the context, it is biographically significant about them.
43. The MP in question has been named publically. He has also put information about his connection to this matter into the public domain. His then Special Adviser has also been named. Therefore, the Commissioner does not consider it would be unfair or unlawful to mention their names again in connection with this matter so soon after the events in question. However, for the reasons outlined above, information about interview dates is exempt from disclosure. It would therefore be meaningless for the Cabinet Office to disclose just their names on the grounds that they are already in the public domain in connection with this matter.
44. As for anyone else contacted as part of this matter, disclosure, in this case, would simply be a list of names. The Commissioner does not consider it would be fair to publish a list of names in this context, particularly where the individual concerned is a junior member of staff. He also considers there is little need to do so given the amount of explanatory information that is already in the public domain. In the Commissioner's view, a junior member of staff would not reasonably expect their name to be published here. Given the expectation of confidentiality and the importance of confidentiality to the process, the Commissioner is satisfied that disclosure of any names in this instance would be unfair.
45. The Commissioner has concluded that disclosure of a list of names would add little to advance public understanding of the matter. He therefore concludes that disclosure of the names would contravene the first data protection principle of the DPA. The names are therefore exempt from disclosure under section 40 of the FOIA.
46. The Commissioner has not gone on to consider the application of section 38 because he is satisfied that the information in question is exempt under section 40 of the FOIA.

Right of appeal

47. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

48. 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.
49. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF