

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 July 2016

**Public Authority:** The Cabinet Office<sup>1</sup>

**Address:** Room 405  
70 Whitehall  
London  
SW1A 2AS

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Ministry of Justice (MoJ) seeking information about the consultation announced in 2011 to extend the Freedom of Information Act to awarding bodies. The MoJ withheld the requested information on the basis of sections 35(1)(a), 35(1)(b) and 40(2) of FOIA. The Commissioner has concluded that all of the withheld information falls within the scope of section 35(1)(a) and that for the majority of the information the public interest favours maintaining this exemption. However, for the remainder of the information the Commissioner has concluded that the public interest favours disclosing the information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with a copy of the MoJ's letter of 4 March 2011 inviting awarding bodies to submit responses in respect of the consultation, including the lists of questions sent to consultees.

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<sup>1</sup> Although the complainant submitted his request to the Ministry of Justice, following the move of policy responsibility for FOI to the Cabinet Office after the request, the Commissioner is satisfied that the Cabinet Office is the appropriate public authority upon which to serve this decision notice.

- Provide the complainant with a copy of the Impact Assessment regarding the extension of FOIA which was enclosed with the MoJ's letter of 4 March 2011.
  - Provide the complainant with a copy of the MoJ's letter of 2 September 2011 sent to the awarding bodies who had previously responded to the consultation.
  - Provide the complainant with a copy of the information identified in the confidential annex attached to this decision notice.
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.

## Request and response

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4. The complainant submitted the following request to the MoJ on 2 July 2015:

*'In light of the Ministry of Justice's announcement on 7 January 2011 about consultation on extending the Freedom of Information to cover examination boards (and other bodies), I would like to request the following information:*

- *What consultation has taken place with examination boards about extending the Freedom of Information Act to cover them and in what form did this happen. Please supply any relevant documentation;*
- *If any meetings have taken place between representatives of the Ministry of Justice and examination boards please provide dates of the meetings, lists of attendees, any papers that were prepared and any minutes that were taken;*
- *What was the outcome of any consultation that took place with examination boards and what advice was provided to ministers on this matter. Please supply any relevant documentation;*
- *What plans (if any) are in place to extend the Freedom of Information Act to cover examination boards and what is the timescale for this.<sup>2</sup>*

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<sup>2</sup> <https://www.gov.uk/government/news/opening-up-public-bodies-to-public-scrutiny>

5. The MoJ responded on 29 July 2015 and confirmed that it held information falling within the scope of the request but it considered it to be exempt from disclosure on the basis of section 35(1)(a) of FOIA.
6. The complainant contacted the MoJ on 3 August 2015 and asked it to conduct an internal review of this request.
7. The MoJ informed him of the outcome of the internal review on 11 November 2015. The review upheld the original application of section 35(1)(a) of FOIA.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 18 November 2015 in order to complain about the MoJ's handling of his request. The complainant argued that there was a public interest in the disclosure of information which would reveal further details as to why the MoJ decided not to extend FOIA to cover examination bodies. His full arguments to support this view are considered below.
9. The Cabinet Office has sought to withhold the following information in response to this request:
  - Correspondence between the MOJ and awarding bodies, and
  - Advice to ministers concerning possible extension of FOIA.
10. As noted above, in its responses to the complainant the MoJ explained that it considered the requested information to be exempt from disclosure on the basis of section 35(1)(a) of FOIA. However, the Cabinet Office explained that it also considered some of this information to be exempt from disclosure on the basis of section 35(1)(b), the ministerial communications exemption. Furthermore, the Cabinet Office explained that it considered the names and contact details of junior officials to be exempt from disclosure on the basis of section 40(2), the personal data exemption.

### **Reasons for decision**

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#### **Section 35(1)(a) – formulation and development of government policy**

11. Section 35(1)(a) of FOIA. This exemption states 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'*

12. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
13. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
14. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
15. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
  - the final decision will be made either by the Cabinet or the relevant Minister;
  - the government intends to achieve a particular outcome or change in the real world; and
  - the consequences of the decision will be wide-ranging.
16. The Cabinet Office argued that the withheld information related to the formulation and development of government policy regarding the extension of FOIA. The Commissioner has examined the withheld information and accepts that it falls within the scope of section 35(1)(a) as it clearly relates to the formulation and development of the policy identified by the Cabinet Office the intention of which was to achieve a clear tangible outcome in the real world. Moreover, it is clear that the decision to potentially extend the scope of FOIA involved the final decisions being made at a ministerial level.

## **Public interest test**

17. Section 35 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 contained at section 35(1)(a) outweighs the public interest in disclosing the information.

### Public interest arguments in favour of disclosing the withheld information

18. The complainant emphasised that in January 2011 the MoJ issued a public statement about its intention to consult awarding bodies with a view to them being covered by FOIA. The complainant argued that such a statement created a very clear expectation that the public would be told about the outcome of such consultation however this has not happened and the MoJ had refused to release any information in response to his request about the outcome.
19. Furthermore the complainant emphasised that exam boards deliver public examinations in England and therefore in his view there was a very strong public interest in understanding why the MoJ had apparently decided that it was not appropriate to extend FOIA to cover examination boards following the consultation. The complainant also suggested that this could be done without releasing any advice given to ministers for example.
20. Moreover, the complainant noted that there was an additional dimension to this issue. He explained OCR, a UK awarding body, was already subject to FOIA as it is part of the University of Cambridge. Moreover, so was Ofqual, the regulator of awarding bodies. Therefore he argued that there was a clear anomaly in the application of the legislation and he believed there is a strong public interest in understanding why this situation has been allowed to continue since the inception of FOIA in 2005 and releasing information on the outcome of the consultation with examination boards would help to inform the public about this matter.

### Public interest arguments in favour of disclosing the withheld information

21. In its refusal notice the MoJ argued that good government depends upon good decision making and this needs to be based upon the best available advice available and a full consideration of all the policy options without fear of premature disclosure. The Cabinet Office also explained that on 17 July 2015 responsibility for FOI policy transferred from the MoJ to the Cabinet Office and at that point ministers within the latter department had yet to be provided with advice on the scope of the legislation and its possible extension. Consequently, the Cabinet Office argued that the policy making in this area remained active which strengthened the public interest against its disclosure.

22. At the Commissioner's request, the Cabinet Office provided some further justification to support its view that the policy making remained live at the time of the complainant's request. It explained that FOIA was the subject of active policy development at the time of the request as evidenced by the establishment of the FOI Commission designed to review the operation of the legislation, with a view to informing the development of FOI policy under the new administration. The Cabinet Office noted that the Commission's terms of reference were wide and its report explained that it received a considerable volume of representations about the scope of the legislation and that it commented on this issue.

#### Balance of the public interest test

23. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments made in a key Information Tribunal decision involving the application of the section 35(1)(a). In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.<sup>3</sup>
24. With regard to the timing of the request, the Commissioner is persuaded that at the point the complainant submitted his request it is plausible to conclude that the scope of FOIA, and indeed other issues associated with the operation of the legislation, was subject to active ongoing policy development. In reaching this conclusion the Commissioner acknowledges that at the date of the request ministers had yet to take specific policy advice on FOIA. However, this was in light of the legislation being the subject of an independent review, the outcome of which would then be subject to ministerial consideration.
25. The Commissioner accepts that significant weight should be given to safe space arguments – ie the concept that government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. Consequently, in the circumstances of this case the Commissioner believes that notable weight should be attributed to the safe space arguments. Furthermore, the Commissioner accepts that disclosure of parts of the information which contain free and frank comments about the possibility of extending the legislation could, given

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<sup>3</sup> *DFES v Information Commissioner and Evening Standard (EA/2006/0006)*



that the policy making remains live, plausibly have a chilling effect on future contributions to any debate about changes to the scope of FOIA.

26. However, there is a small caveat to these findings. The Commissioner has established that some of the information which the Cabinet Office has sought to withhold is already in the public domain. This information consists of the MoJ's letter of 4 March 2011 inviting awarding bodies to submit responses in respect of the consultation and the Impact Assessment regarding the extension of FOIA, a copy of which was enclosed with the MoJ's letter. Given that these two documents are in the public domain, the Commissioner cannot accept that the public interest could now favour withholding these documents for the reasons advanced by the Cabinet Office. Furthermore, the withheld information also includes an additional letter dated 2 September 2011 sent by the MoJ to the awarding bodies who had previously responded to the consultation. The Commissioner is not aware of this letter being in the public domain. However, it amounts to little more than a holding response and in the Commissioner's opinion could be disclosed without any infringement on the government's ongoing formulation of policy in this area.
27. With regard to attributing weight to the public interest in disclosing the withheld information, the Commissioner notes that the MoJ informed the complainant at the refusal notice stage that the previous government did not extend FOIA to awarding bodies as it prioritised Post Legislative Scrutiny of FOIA, a reduction of the point at which records are available at The National Archives and the later extension of FOIA to Network Rail. However, the Commissioner agrees with the complainant that as the consultation in respect of awarding bodies was publicly announced in January 2011 there is a reasonable expectation that the outcome of the consultation would also be publicly announced. The Commissioner is not aware of any public announcements or comments regarding the consultation in respect of extending FOIA to awarding bodies. Therefore, the Commissioner agrees with the complainant that there is a compelling public interest in disclosure of any information which could specifically explain why the government chose not to proceed with the extension of FOIA to awarding bodies. More broadly, the Commissioner also accepts that there is public interest in disclosing the consultation responses in order to allow the public to understand how the consultation questions were answered as there is in relation to the disclosure of submissions to ministers discussing the other issues associated the consultation announced in January 2011.
28. Having taken the above into account, and examined the withheld information carefully, the Commissioner is of the view that there is a small portion of information, the disclosure of which would add significantly to the public's understanding of previous administration's

decision not proceed with extending FOIA to awarding bodies.<sup>4</sup> The Commissioner is satisfied that the public interest in disclosing this information outweighs the public interest in maintaining the exemption, for the reasons indicated in the preceding paragraph. With regard to the remaining information, the Commissioner is satisfied that the public interest narrowly favours maintaining the exemption. This is because its disclosure would arguably contribute less to the public's understanding of the consultation process whereas disclosure would still represent a significant harm to the policy making process. Finally, for the reasons discussed at paragraph 26 the Commissioner has determined that the public interest favours disclosure of the MoJ's correspondence with the awarding bodies which is described in that paragraph.

29. The Commissioner has not gone on to consider the Cabinet Office's reliance on sections 35(1)(b) and 40(2). This is because the Cabinet Office only sought to apply this to parts of the information which the Commissioner has already determined should be withheld on the basis of section 35(1)(a).

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<sup>4</sup> The Commissioner has identified this information in a confidential annex which will be given to the Cabinet Office only.



## Right of appeal

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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 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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** .....

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
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