

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 May 2018

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested copies of information held in relation to the decision to change the name of the Department for Culture, Media and Sport to the Department for Digital, Culture, Media and Sport. The information was withheld by the public authority on the basis of the exemptions at sections 35(1)(a) and 42(1) FOIA.
2. The Commissioner's decision is that:
 - The public authority was entitled to rely on the exemption at section 42(1) FOIA to withhold some of the information held.
 - The public authority was not entitled to rely on the exemption at section 35(1)(a) FOIA to withhold all of the information held.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information save the information withheld on the basis of the exemption at section 42(1) FOIA.
4. 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

5. On 3 July 2017, the complainant wrote to the public authority and submitted a request for information in the following terms:

"I understand that DCMS has officially changed its name to "Department for Digital, Culture, Media and Sport" as of today.

As the Cabinet Office leads on Machinery of Government changes and cross-departmental coordination, I would assume that the Cabinet Office has been consulted on this departmental name change.

Please provide the documentation which you hold on this name change (namely any submissions to the Prime Minister, other Cabinet Office ministers or Cabinet Office senior civil servants, any internal file notes and any internal or cross-departmental correspondence).

A similar request is pending with DCMS, thus please consider Cabinet Office records (incl. Prime Minister's Office records) for this only."

6. The public authority responded on 23 August 2017. It confirmed that it held the information requested and explained that it considered the information exempt on the basis of sections, 42, 35(1)(a) and (b) FOIA.
7. The complainant requested an internal review of the public authority's decision on the same day – 23 August 2017.
8. The public authority wrote to the complainant on 8 September 2017 with details of the outcome of the internal review. The review upheld the original decision.

Scope of the case

9. The complainant contacted the Commissioner on 8 September 2017 to complain about the public authority's decision to withhold the information requested. The Commissioner has referred to his submissions at the relevant parts of her analysis below.
10. During the course of the investigation the public authority withdrew its reliance on the exemption at section 35(1)(b) FOIA.
11. The Commissioner has therefore considered whether the public authority was entitled to rely on the exemptions contained at section 35(1)(a) and 42(1) FOIA.

Reasons for decision

Withheld information

12. The withheld information comprises of 4 email chains and an advice note.

Section 35(1)(a)

13. The public authority has applied this exemption to all of the withheld information.

14. The exemption states:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy.”

15. The exemption is one of the class-based exemptions in the FOIA. This means that unlike a prejudice-based exemption, there is no requirement to show harm in order to engage it. The relevant information simply has to fall within the class described, and that would be enough to engage the exemption. The prejudicial effect of disclosure claimed would inevitably be considered within the framework of the competing public interest factors.
16. The Commissioner considers that the term ‘relates to’ in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that the information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough.
17. The public authority has argued that the withheld information relates to the formulation or development of government policy for the reasons summarised below.
18. A departmental name change is an executive act rather than a legislative act so is considered to be part of policy making rather than law making. The discussions on DCMS’ name change took place in the wider context of transfer of functions and Machinery of Government (MOG) changes following the Cabinet reshuffle in June 2017.
19. The withheld information relates to the government policy on digital and technology. DCMS has taken on significant new responsibilities in recent years, such that half of its policy and delivery work now covers the digital sectors.

Is the exemption engaged?

20. In order to engage the exemption the withheld information must relate to the formulation or development of government policy. The Commissioner is satisfied that the withheld information relates to the formulation or development of government policy for the reasons above primarily because the discussions took place in the wider context of the government's digital agenda and the responsibilities of DCMS in that regard. On that basis she has concluded that section 35(1)(a) was correctly engaged.

Public interest test

21. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
22. The complainant has not given any specific reasons in support of his view that the withheld information ought to be disclosed in the public interest. He however claims that "the public interest test [carried out by the public authority with respect to the application of both exemptions] shows no evidence of actual application to and engagement with the information sought in this particular request."
23. The public authority's submission on the balance of the public interest is summarised below.
24. It acknowledged that there is a general public interest in openness and transparency in government and a strong public interest in how the government develops policies including in relation to the DCMS name change.
25. It however argued that disclosure would be likely to undermine policy development in the future because officials would be less likely to be as free and frank as they were with their views in the withheld information if they had to have constant regard to the potential public reaction to their advice. Presentational concerns would assume disproportionate importance over the content of the advice. It argued that this would also undermine accountability since decision makers could claim that decisions made that were subsequently considered to be poor arose from inadequate advice.
26. The public authority further argued that there must be a safe space within which officials are able to discuss policy options freely and frankly. Government Ministers are rightly answerable for the decisions they take, not for the options they consider or the other influences on

the policy formulation process. Disclosure of information about how the decision to change the DCMS' name was taken would erode the safe space and ultimately this would be corrosive of parliamentary democracy since it would hold Ministers and their advisers accountable for the content of their discussion rather than the decision. It is not in the best interests of policy formulation, and therefore not in the public interest, that the policy making process should be made accountable via exposure to public scrutiny.

27. In concluding, it submitted that although the name change had been announced by the time the request was submitted, the withheld information is relatively recent and the specific public interest factors affected by disclosure remain key to maintaining the exemption.

Balance of the public interest

28. In the Commissioner's view, the public authority's arguments on the prejudicial impact of disclosure can be divided into two. Firstly, disclosure would erode the private thinking space necessary for discussions pursuant to policy formulation or development free from the distraction of external interference resulting from public/media reaction to the content of discussions and advice. Secondly, disclosure would be likely to have a chilling effect on free and frank exchange of views further to policy discussions for fear that their views would be made public.
29. The Commissioner considers that the two most important factors in this case with respect to the public interest in maintaining the exemption at section 35(1)(a) are the contents of withheld information itself and the timing of the request.
30. With respect to the timing of the request, the public authority has stated that once the development of policy is complete the public interest in maintaining the exemption at section 35(1)(a) will have less weight because the risk of prejudicing the policy process is likely to be diminished. In the Commissioner's view, the timing of the request is particularly crucial to the weight of the public interest in maintaining a safe space for policy discussions.¹ The Commissioner considers that the need for safe space will be strongest when the issue under consideration is still live. Once the government has made a decision, a safe space for

¹ This view was supported by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth EA/2007/0072* and has been by successive Tribunals since.

deliberation will no longer be required and this argument will carry little weight.

31. The request was submitted on 3 July 2017, shortly after the name change was announced.² Clearly at that point the proposal had become policy and there was very little need for a safe space for officials to deliberate on whether the name change should go ahead. Consequently, the Commissioner has attached little weight to the argument for withholding the withheld information in order to maintain a safe space for deliberation free from external interference. The public authority has not given any specific reasons in support of the view that the public interest in maintaining a safe space should carry substantial weight. The fact that withheld information was relatively recent at the time of the request does not in and of itself carry substantial weight in the public interest. Other considerations such as the nature of the withheld information and whether it relates to ongoing discussions in relation to a linked policy will be relevant.
32. Turning next to the chilling effect on free and frank discussions pursuant to policy formulation or development, the Commissioner has considered whether such an outcome would be likely in light of the withheld information she has examined and in the circumstances of this case.
33. The discussions focus primarily on the rationale for, and the process of, changing the name of DCMS to reflect the way the department's remit has evolved 25 years from when it was established. Parts of the exchanges are candid regarding the proposal itself. However, in the Commissioner's view, disclosure is unlikely to deter officials from expressing their views pursuant to similar and other policy deliberations in an impartial and robust manner. Put simply, disclosure is highly unlikely to affect the meticulousness with which officials carry out their responsibilities. Consequently, she has also attached little weight to the argument for withholding the withheld information in order to prevent a chilling effect on discussions pursuant to the formulation or development of policy.
34. On the other hand, in addition to the public interest in openness and transparency in government, the Commissioner considers that there is a public interest in understanding how the process evolved including the factors considered relevant to implementing the name change. The withheld information would provide some useful insight in that regard. Whilst this specific public interest might not be particularly significant in

² <https://www.gov.uk/government/news/change-of-name-for-dcms>

the circumstances, the public interest in withholding the withheld information is not stronger, and the public interest in openness and transparency in government should not be underestimated.

35. The Commissioner has therefore concluded that on balance the public interest in maintaining the exemption does not outweigh the public interest in disclosing the withheld information.

Section 42(1)

36. The public authority has applied this exemption to part of the withheld information, specifically 'Email Chain 2' and 'part of Email Chain 1' clearly highlighted by the public authority in its submission to the Commissioner.

37. The exemption states:

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."

38. The public authority has argued that the withheld information referred to above is covered by legal advice privilege. This is because the communications were made for the sole or dominant purpose of seeking or obtaining legal advice.

Is the exemption engaged?

39. The Commissioner endorses the description of Legal Professional Privilege (LPP) by the Information Tribunal in *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry*.³ The Tribunal described LPP as:

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation."

40. Having inspected the withheld information, the Commissioner is satisfied that it is information in respect of which a claim to confidentiality of

³ EA/2005/0023

communications could be maintained in legal proceedings. She has therefore concluded that the exemption was correctly engaged.

Public interest test

41. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
42. The public authority's submission on the balance of the public interest is summarised below.
43. It noted that the principle of LPP is a long-standing, fundamental principle of English law. It pointed out that the principle exists to ensure that a person may obtain legal advice in confidence, and that this applies no less to government than it does to individual citizens.
44. It argued that in order to ensure it complies with the law and that decisions are fully informed and thorough, the government needs full and frank legal advice. Disclosure could lead to officials not seeking legal advice when they should or not giving lawyers the full information. There is also a danger of lawyers not giving full and frank advice for fear it could be revealed. There is a substantial public interest in maintaining the principle of LPP and no clear, compelling and specific justification for disclosing the withheld information. The public interest in openness, transparency and accountability in government does not outweigh the public interest in maintaining the principle of LPP in the circumstances of this case.

Balance of the public interest

45. In addition to the public interest factors in favour of disclosure identified in relation to the application of section 35(1)(a), the Commissioner considers that there is a public interest in knowing whether the decision to rename the department had the benefit of robust legal advice. Members of the public will have informed views on this question should the withheld information be released.
46. There is however a strong public interest inherent in maintaining the exemption due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure full and frank legal advice which in turn is fundamental to the administration of justice. Indeed in the Bellamy case, the Tribunal concluded that there is a strong element of public interest inbuilt into LPP, and that at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. In Crawford v

Information Commissioner and Lincolnshire County Council⁴, the Tribunal concluded that these considerations must be clear, compelling and specific and at least equal the public interest in maintaining LPP.

47. Some of the factors that the Commissioner will take into account include, but are not limited to, whether the issue under consideration involves a large amount of money, affects a large number of people⁵, whether there was a lack of transparency in the public authority's actions, and whether the legal advice obtained was selectively disclosed or was misrepresented to the public. None of these factors are present in this case.
48. Therefore, in the circumstances, the Commissioner shares the view that there was no compelling justification for disclosing the legal advice in the public interest. She has therefore concluded that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

⁴ EA/2011/0145

⁵ Requiring them to take action(s) or resulting in a change to action(s) previously taken.

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

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