

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 18 February 2019

Public Authority: Cabinet Office
Address: Room 405
70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information relating to Cabinet meetings and a Cabinet committee on devolution in 1997. The Cabinet Office refused the request in reliance on the exemptions at section 35(1)(a) and section 35(1)(b) of the FOIA.
2. The Commissioner's decision is that the exemptions are engaged in respect of the requested information. However the Commissioner is not satisfied that the public interest in maintaining the exemptions cited outweighs the public interest in disclosing the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
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 FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted the following request to the Cabinet Office on 19 January 2018:

"I would like to request a copy of the minutes of the 1997 cabinet meetings on devolution along with the terms of reference for the cabinet committee headed by Lord Irvine that the minutes relate to

along with any legal or departmental advice provided to the cabinet in relation to these minutes.”

6. The Cabinet Office responded on 16 February 2018, confirming that it held relevant information. The Cabinet Office refused the request, citing section 35(1)(a) and section 35(1)(b).
7. The complainant requested an internal review on 16 February 2018. The Cabinet Office wrote to him on 24 April 2018 advising that it was upholding its refusal.

Scope of the case

8. On 11 May 2018 the complainant wrote to the Commissioner to complain about the Cabinet Office’s response to his request.
9. The Commissioner wrote to the Cabinet Office on 21 May 2018, requesting a copy of the withheld information and further details of the Cabinet Office’s application of the exemptions.
10. The Commissioner did not receive a substantive response to this correspondence, and following various exchanges she issued an information notice under section 51 of the FOIA on 5 July 2018. The Cabinet Office responded to the information notice on 26 July 2018.
11. The Commissioner notes that the requested information in this case was the subject of a previous decision notice, issued in 2009.¹ However she would stress that her decision in this case is, as required by the FOIA, based on the circumstances at the time of the current request.

Reasons for decision

Section 35(1)(a): formulation or development of government policy

12. Section 35(1) (a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner is of the opinion that the
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¹ Decision notice FS50100665, issued 23 June 2009.

formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy however goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.

13. The Cabinet Office set out that the requested information relates to the formulation and development of government policy regarding devolution. The Commissioner accepts the Cabinet Office's position in this regard.
14. The Cabinet Office also stated that it was relying on the lower threshold that disclosure 'would be likely' to have a prejudicial effect. However, section 35(1)(a) is a class-based exemption and there is no requirement to consider the consequences of disclosure in order to engage the exemption. The information in question must merely meet the description set out in the exemption.
15. On this basis the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged in this case. She has considered the Cabinet Office's assessment of the likelihood of prejudice as part of the public interest analysis set out below.

Section 35(1)(b): ministerial communications

16. Section 35(1) (b) provides that information held by a government department is exempt information if it relates to ministerial communications. Section 35(5) defines 'ministerial communications' as any communication between a Minister of the Crown and;

"includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales."
17. The exemption at section 35(1)(b) therefore covers not only the formal minutes of cabinet meetings, committees of the Cabinet and the two executive committees but also includes information relating to timing, agendas, memoranda and other tabled papers. As with section 35(1)(a) it provides a class-based exemption.
18. Having inspected the requested information the Commissioner is satisfied that it falls within the description set out at section 35(1)(b), therefore the exemption is engaged.

19. Sections 35(1)(a) and 35(1)(b) are qualified exemptions and therefore subject to the public interest test. The Cabinet Office provided combined public interest arguments for section 35(1)(a) and section 35(1)(b). The Commissioner has therefore considered whether the public interest in favour of maintaining either or both of the exemptions outweighs the public interest in favour of disclosure of the information.

Public interest in favour of disclosing the withheld information

20. The Cabinet Office recognised the general public interest in openness. It further recognised that the decisions ministers make may have a significant impact on the lives of citizens across the UK, and there is a public interest in their deliberations being transparent.
21. The Cabinet Office acknowledged that openness in government may increase public trust in and engagement with the government, and has a beneficial effect on the overall quality of government. The Cabinet Office identified a specific, wider public interest in the public being well-informed about the government's policy on devolution.
22. The complainant argued that there was a strong public interest in disclosure of the information in question. He pointed to the fact that the information was 21 years old, and that only three members of the then Cabinet were still MPs, at the time of the request.

Public interest in favour of maintaining the exemptions

23. The Cabinet Office cited the comments of the Lord Chancellor in a Parliamentary debate during the passage of the Freedom of Information Bill. In that debate the Lord Chancellor set out the Government's view that:

*"the disclosure of certain types of information, such as ministerial communications, Cabinet papers and minutes would always be likely to prejudice the effective conduct of public affairs."*²

24. The Cabinet Office identified a strong public interest in maintaining the sovereignty of the process of policy formulation, especially at Cabinet level. It was concerned that disclosure of information about how government took decisions on devolution in 1997 would invite judgements about whether these decisions were taken correctly. This

² Hansard, House of Lords Debates, Volume 618 Column 283.

would be harmful to parliamentary democracy since it would hold ministers and their advisers accountable for the detail of the discussions rather than for the decisions taken.

25. The Cabinet Office maintained that the individuals who attended Cabinet meetings would expect that their detailed consideration of policy options would remain private unless there was a substantial countervailing public interest in disclosure. The Cabinet Office argued that no such public interest was evident in this case.
26. The Cabinet Office further argued that disclosure of the requested information would influence the content of future discussions. It suggested that there would be an unwarranted concern with the presentation rather than the content of policy. Over the long term, this would have a tendency to restrict consideration to issues that could be presented as reasonable by the standards of the time, and exclude from consideration other options that might prove unacceptable to vocal interest groups. The Cabinet Office considered that this risk was increased in relation to devolution since ministers' deliberations would be judged by the subjective standards of interest groups rather than by the objective standard of the wider public interest.
27. The Cabinet Office also identified a strong public interest in protecting the confidentiality of all aspects of communications between ministers. It acknowledged the public interest in creating a clear space, away from public glare, in which ministers can debate, discuss and refine proposals and options.
28. The Cabinet Office drew the Commissioner's attention to the specific public interest in preserving the confidentiality of Cabinet discussions in order to protect the convention of Cabinet collective responsibility. This principle underpins the accountability of governments to Parliament and is the foundation of Parliamentary sovereignty. It provides that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions are reached. This requires that the privacy of opinions expressed in Cabinet should be maintained. If Ministers cannot be confident that their discussions will be protected they may be inhibited in their deliberations. They may seek to have key discussions taken outside the confines of meetings, or encourage minimal recording of discussions. This would be contrary to good government; which requires Ministers and their officials to engage in full, frank and uninhibited consideration of policy options.

29. The Cabinet Office further maintained that the Tribunal and the Courts had consistently recognised the importance of Cabinet collective responsibility. The Cabinet Office argued that the Tribunal had generally required evidence of an active public debate, rather than historical or cultural interest, to justify setting aside the constitutional convention and the confidentiality which maintains it. The Cabinet Office found no evidence of urgent or wide public concern about devolution to add to the public interest in favour of disclosure. It claimed there was insufficient public interest, aside from the general public interest in openness, to weigh against the preservation of the convention of collective responsibility.
30. Finally, the Cabinet Office noted that the requested information was still within the period before which it would normally be made public, even under the transition from the 30 to 20 year rule. Given that the transitional period was (and remains) in operation, the requested information would not be expected to be released until the end of 2020. The Cabinet Office concluded that the age of the requested information was a public interest factor in favour of maintaining the exemptions.

Balance of the public interest

31. The Commissioner is satisfied that the exemptions at sections 35(1)(a) and section 35(1)(b) are engaged, but does not consider that there is an inherent or automatic public interest in maintaining them. The exemptions are not absolute but are subject to the public interest test. This means that Parliament was of the opinion that in some cases the public interest would lie in the disclosure of information into the public domain, despite the exemptions being engaged.
32. The weight to be attached to the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case.
33. In respect of the exemption at section 35(1)(a) the Commissioner notes that the policy in question was not under formulation or development at the time of the request. The remit of the Cabinet Committee referred to in the request was:

"To consider policy and other issues arising from the Government's policies for devolution to Scotland and Wales and the regions of England and to promote and oversee progress of the relevant legislation through Parliament and its subject implementation."

34. The relevant legislation was enacted and devolution in Scotland and Wales has long since been implemented. Therefore the Commissioner is not persuaded by the Cabinet Office's argument that disclosure of the requested information would influence the content of future discussions. The Commissioner accepts that disclosure would allow scrutiny of the decision making relating to devolution that took place in 1997. However she does not consider that it would hold any individual accountable for the detail of the discussions rather than for the decisions taken, as suggested by the Cabinet Office. Rather, the Commissioner is of the view that such scrutiny would assist the public's understanding as to how government considers issues of significance such as devolution.
35. The Commissioner is concerned at the Cabinet Office's suggestion that disclosure may result in Ministers seeking to have key discussions taken outside the confines of meetings, or encourage minimal recording of discussions. The Commissioner has seen no evidence to support this generic statement and considers it largely speculative. Moreover she believes that the public has a right to expect that government ministers will fulfil their responsibilities in the proper manner and maintain appropriate records.
36. Similarly the Commissioner has not attached significant weight to the Cabinet Office's argument that attendees would expect that their detailed consideration of policy options would remain private. The Commissioner notes that the withheld information does not attribute any specific opinions to any individual Minister. She does however consider that Ministers, as senior politicians and members of the Government, should acknowledge the strong and legitimate public interest accountability. In the Commissioner's opinion it is unreasonable for any minister to expect that policy development and decision making should be exempt from any scrutiny.
37. The Commissioner is mindful of the age of the requested information, especially given that the 30-year rule relating to historical records is in the process of being reduced to 20 years. The requested information was 21 years old at the time of the request, and if it were not for the transitional arrangements in place the information would have already been considered for transfer to The National Archive and potentially made open records. The Cabinet Office has presented this as an argument in favour of maintaining the exemption and not interfering with the transitional arrangements. However the Commissioner finds that there is at least an equally weighty public interest in disclosing the information now, rather than waiting until 2020 when it is due to be transferred and will be 23 years old.

38. The Commissioner has also carefully considered the Cabinet Office's public interest arguments relating to the convention of Cabinet collective responsibility. She has had regard to the Tribunal's comments in *Scotland Office vs. Information Commissioner*:³

"Where Ministerial communication does engage the convention of collective responsibility, it is necessary in particular, to assess whether and to what extent the collective responsibility of Ministers would be undermined by disclosure. Factors such as the content of the information, whether it deals with issues that are still "live", the extent of the public interest and debate in those issues, the specific view of different Ministers it reveals, the extent to which Ministers are identified, whether those Ministers are still in office or in politics as well as the wider political context, are all matters that are likely to have a bearing on the assessment of the public interest balance."

39. The Commissioner has considered the factors set out by the Tribunal in *Scotland Office*. As set out above, the Commissioner considers that the issues are no longer live in that the specific policy under development was implemented some time ago. The information in question does not reveal the specific views of different Ministers, and although a very small number of the individuals involved are still in politics, none of them is still in office.
40. The Commissioner does not accept the Cabinet Office's argument that there would need to be evidence of urgent or wide public concern about devolution in order to overturn the exemptions claimed. The Commissioner is satisfied that there is a strong public interest in the public being fully informed as to how the government of the day considered devolution. It affected a large number of people across the UK (not just in Wales and Scotland) and involved large sums of public money in terms of establishing institutions and devolving budgetary management.
41. Having inspected the withheld information the Commissioner is satisfied that the policies and discussions relate to historic decisions. The different options discussed were either rejected or implemented at the time, and the devolved administrations in Scotland and Wales have been in operation since 1999. Returning to the *Scotland Office* case, the Commissioner considers that the political climate and wider context at the time of the request differed significantly from that at the time the information was created. At the time the request was

³ Appeal no EA/2007/0070

submitted, ie January 2018, devolution was being discussed in the context of how the devolved administrations were functioning, and the impact of the UK leaving the European Union.

42. In conclusion, the Commissioner recognises that there are public interest arguments both in favour of maintaining the exemption and in favour of disclosure. Accordingly she has taken careful account of the competing public interest factors in this case.
43. The Commissioner acknowledges the significance of the convention of collective responsibility, but is mindful that it is not an overriding factor in the circumstances of this case. The Commissioner is satisfied that there is considerable public interest in the content of the withheld information. She has taken into account the fact that, except for the transitional arrangements, it would have been transferred to TNA, given that it was 23 years old at the time of the request. The Commissioner finds that the sensitivity of the specific withheld information has decreased since 1997.
44. Although the public interest is finely balanced the Commissioner finds that the public interest in maintaining the exemptions at section 35(1)(a) and section 35(1)(b) does not outweigh the public interest in disclosure of the information.

Right of appeal

45. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

46. 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.
47. 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**