

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2020

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested a copy of the information held for the last six month period of the file series MISC 13 Cabinet Committee on Animal Rights Activists. The public authority withheld the information relying on the exemptions at sections 35(1)(a), (b) and 31(1)(a), (b), (g) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on section 35(1)(b) FOIA.
3. No steps are required.

Request and response

4. On 17 October 2018, the complainant submitted a request for information to the public authority in the following terms:

“Further to your information " file series MISC 13 which runs from 2001 -2006" provided to me today with the suggestion I make fresh request.

 1. Please provide agenda, minutes, briefing notes, papers, emails, related to last 6 month period of your file series "MISC 13 Cabinet Ministerial Committee on Animal Rights Activists" and/or "Activism"
 2. Please provide a full list of names, MISC numbers and dates of MISC file series between 2001-2008..."
5. The public authority responded on 17 December 2018¹. The information held within the scope of item 1 of the request was withheld relying on the exemptions at sections 35(1)(a) and (b) FOIA (government policy and Ministerial communications). The information held within the scope of item 2 of the request was withheld on the basis of the exemption at section 21 FOIA (information reasonably accessible to an applicant).
6. On 17 December 2018 the complainant requested an internal review of the decision to rely on the exemptions at sections 35(1)(a) and (b) to withhold the information held within the scope of item 1 of his request.
7. The public authority wrote to the complainant on 11 January 2019 with details of the outcome of the internal review. The review upheld the decision to rely on sections 35(1)(a) and (b) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 28 January 2019 to complain about the way his request for information had been handled. He specifically disputed the decision to withhold the information held within the scope of item 1 of his request relying on sections 35(1)(a) and (b) FOIA (the withheld information).

¹ According to the public authority, although the response was originally sent on 15 November 2018, it did not reach the complainant because the authority had used an incorrect address. Consequently, it was resent on 17 December 2018.

9. During the course of the Commissioner's investigation the public authority additionally applied the exemptions at sections 31(1)(a), (b) and (g) FOIA to the withheld information².

Reasons for decision

The Withheld Information

10. According to the public authority, the withheld information comprises of the minutes and briefing papers of the Ministerial Group on Animal Rights Activists (MISC 13) held between 23 January 2006 and 26 June 2006. This date range corresponds to the complainant's request for the last six month period of the MISC 13 series.
11. The Commissioner has inspected "MISC13 (06) Ministerial Committee on Animal Rights Extremism" at the Cabinet Office³ and is satisfied that it comprises of minutes of meetings held by the Ministerial Committee on Animal Rights Extremism between 23 January 2006 and 26 June 2006 together with briefing papers for the meetings.

Section 35(1)(b)

12. The Commissioner initially considered whether the public authority was entitled to apply the exemption at section 35(1)(b) to the withheld information.
13. Section 35(1)(b) states:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to Ministerial Communications."⁴

² Likelihood of prejudice to; the prevention or detection of crime (31(1)(a)) and the apprehension or prosecution of offenders (31(1)(b)). The purpose of ascertaining whether any person has failed to comply with the law (31(1)(g) – 31(2)(a)).

³ The Cabinet Office asked the Commissioner to view the withheld information in situ because it considers that scanning/copying the bound material would damage the binding on the record. It explained that if an inquiry asked to see these records, they would also be asked to view in situ in the Cabinet Office to avoid damaging the library copies.

⁴ The full text of section 35 FOIA is available here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/35>

14. 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 would inevitably be considered within the framework of the competing public interest factors.
15. 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 itself does not have to be created as part of the activity. Any significant link between the information and the activity is enough. Any document attached to a Ministerial communication will relate to that communication so will be covered by the exemption at section 35(1)(b).
16. By virtue of section 35(5) FOIA, "Ministerial communications" includes proceedings of the Cabinet or of any committee of the Cabinet. Therefore, Cabinet minutes or minutes of Cabinet committees are covered as they relate to communications taking place between Ministers at the Cabinet or committee meeting.
17. In light of the above, the Commissioner considers that the public authority was entitled to engage the exemption at section 35(1)(b).

Public interest test

18. Section 35(1)(b) is however a qualified exemption which means the Commissioner must additionally consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Complainant's submissions

19. The complainant's pertinent submissions in support of the public interest in disclosing the withheld information are reproduced below.
20. "The [withheld information relates] to a Cabinet Committee and sub group from a previous government and the politicians named are no longer actively involved in government or formulation of government policy. The documents are several years old and some approach the 20 year rule so cannot be said to detail ongoing investigations, strategies or operations."
21. "The existence of an ongoing public inquiry that will be interested in these documents and with which the government departments claim to be co-operating, is not a reason to prevent disclosure under FOIA. We

cannot rely on the inquiry to investigate this committee and its sub groups anytime soon due to the inquiry's extensive delays and a real risk the government may shut it down before it reaches the later stage when it is due to look at these matters. Such government action has (worryingly) already been taken against the Levinson 2 public inquiry."

22. "The documents refer to a cabinet committee MISC 13 and an associated implementation group, the Delivery Group or National Forum. These apparently co-ordinated cross departmental operations against individual activists. The ministers thereby authorised and tasked undercover police operations against lawful protest groups and activists, particularly animal rights activists. Revelations since the undercover policing scandal broke in 2011 show undercover officers engaged in sexual and psychological abuses of the human rights of activists. A key question for UCPI is to what extent high level politicians and government officials were aware of these abuses as they were taking place and to what extent they authorised such abuses, which have been admitted in at least one case to constitute breach of Article 2 of the ECHR (prohibition of torture)."
23. "Another question for UCPI is to what extent legal systems were abused by police and government authorities in targeting activists with undercover operations. FOIA disclosure from the Attorney General's Office in 2016 shows the discussion of use of creative and radical legal tactics to target animal rights activists including the use of injunctions by Biotech corporations under the Protection from Harassment Act 1997. The AGO 2016 disclosure also shows an operational concern for gathering detailed intelligence and data about targeted individuals. In one letter to the health minister there appears to be discussion concerning gathering health data on individuals, possibly medical records of activists."
24. "The AGO also disclosure [sic] reveals a coordinated, ministerial led national strategy targeting individual animal rights protesters that fused what would normally be expected to be separated powers in a democratic rule of law system, fusing executive, legislative, and judicial branches alongside the police, and intelligence. They apparently worked closely with private corporations via the National Extremism Tactical Co-ordination Unit (NETCU), a sister organisation to the National Public Order Intelligence Units (NPOIU) which is one of the secret police units under investigation by the UCPI. There is then a set of key questions that arise from these facts and require the release of these documents to investigate in the public interest."
25. "To what extent were ministers in these committees authorising and permitting the abusive police operations that are currently the subject of investigation by the UCPI? Was this particular Committee and delivery

group aware of such sexual relations by undercover officers through the intelligence and data they considered when strategizing against individual activists? Were individual target activist medical records discussed in these meetings? Were the terms of reference of the committee expanded beyond animal rights or did it act against activists beyond its terms of reference? To what extent did the private sector corporations influence government policy and operations in the targeting of these individuals and groups? What intelligence data from operations shared with ministers and how high did this data sharing go?"

26. "A wider question that goes beyond the scope of UCPI is to what extent this apparent fusion of powers strategy used to co-ordinate operations against individual activists, was an abuse of executive powers of the state, and evaded the checks and balances built into rule of law systems?"

Public authority's submissions

27. The public authority's submissions in support of the public interest in maintaining the exemption are summarised below.
28. It is first worth mentioning at this stage that further to the application of the exemptions at section 31 FOIA, the public authority explained that the UCPI started in 2015 and was ongoing at the time of the request. According to the public authority, this is an inquiry into "the full scope of undercover policing work and will look at the work of the Special Demonstration Squad, the National Public Order Intelligence Unit and police forces across England and Wales. The Inquiry will also examine whether people may have been wrongly convicted in cases involving undercover police officers, and refer any such cases to a separate panel for consideration." Certain government files were requested as part of the inquiry. However, the public authority did not say whether the withheld information was requested by or provided to the inquiry.
29. The public authority acknowledged that there is a general public interest in openness. Decisions Ministers make may have a significant impact on the lives of citizens and there is a public interest in their deliberations being transparent. Openness in government may increase public trust in and engagement with the government and has beneficial effects on the overall quality of government. More specifically, there is a public interest in the public being well-informed about the government's policy on managing a form of domestic extremism.
30. In favour of maintaining the exemption, the public authority argued that there is a very strong public interest in protecting the confidentiality of all aspects of communications between Ministers and the deliberative process at this level. This principle, generally referred to as the

convention of Cabinet Collective Responsibility, underpins the accountability of governments to Parliament and is set out in Part 2, section 2.1 of the Ministerial Code⁵. Ministers should be able to express their views freely and frankly 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.

31. The public authority does not consider that there are exceptional circumstances in this case which reduce the weight of the strong public interest in upholding the principle of collective responsibility. It pointed out that the withheld information will not become a historical record within the meaning of section 62 FOIA until 2026 when it would normally be considered for disclosure to the public.
32. Furthermore, there is a very strong public interest in protecting very sensitive information related to government policy discussions. Ministers are rightly answerable for the decisions they take, not for the options they consider or the other influences on the policy formulation process. Disclosing information about how the government took decisions on domestic extremism would invite judgements about whether these decisions were taken correctly and the success or otherwise of the policy. Ultimately, this would be corrosive to parliamentary democracy since it would hold Ministers and their advisers accountable for the details and the level at which discussions occurred rather than for the decisions taken.
33. The expectation of the participants is that their detailed consideration of policy options, including the level at which discussions took place, will remain private unless there is a very strong countervailing public interest in disclosure. However, no such public interest is present in this case. Ministers would not shrink from their duty to take decisions based upon the relevant information and in full consideration of all options presented to them. However, if Ministers are required to constantly look over their shoulders to consider how the public would react to the level at which a decision was taken, there would be pressure for decisions to

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672633/2018-01-08_MINISTERIAL_CODE_JANUARY_2018_FINAL_3.pdf

be taken at a higher level than required, placing an unnecessary burden on the most senior levels of decision making.

34. There would also be an influence on the content of discussions at that level. There would, for instance, be an unwarranted concern with the presentation rather than the content of the 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.
35. Finally, although not directly relevant to the application of the exemption, the public authority submitted that disclosing the withheld information prematurely could prejudice the ongoing UCPI.

The Commissioner's considerations - balance of the public interest

36. The Commissioner considers that the public interest factors identified by the complainant should not be underestimated in view of the revelations about some of the methods deployed by undercover police officers against activists. The fact that an inquiry has been set up to examine historical undercover policing work is evidence of the strong public interest in getting to the bottom of the revelations. It is clearly in the public interest to know what and how much Ministers knew about some of the methods deployed against animal rights activists by undercover police officers and public bodies.
37. There is generally a significant public interest in protecting the convention of Cabinet Collective Responsibility because of the fundamental importance of the general constitutional principle. Section 2.1 of the Ministerial Code states:
38. "The principle of collective responsibility requires 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 have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence, should be maintained."
39. Generally speaking, the significant weight of the public interest in upholding the principle of collective responsibility may be reduced to some extent if the individuals concerned are no longer politically active. However, each case is different and the extent will depend on all the circumstances of each individual case.
40. The first thing to note is that some of the individuals concerned in this case are still politically active and as such the significant weight of the

public interest in upholding the principle of collective responsibility has not reduced for that reason.

41. Furthermore, the Terms of Reference of the Ministerial Group on Animal Rights Activists were as follows:

“To co-ordinate policy to protect those who work in, or are connected with, legitimate animal research establishments against intimidation by extremist groups.⁶”

42. Therefore, the UCPI’s considerations could well touch upon the question of whether government policy may have played a role in some of the methods deployed against animal rights activists by undercover police officers and public bodies. The public authority clearly considers that disclosure is likely to be prejudicial to the work of the inquiry.
43. Against that backdrop, significant weight must be attached to upholding the principle of collective responsibility in this case. Disclosing the withheld information could leave individuals open to criticism for the contributions they made and decisions they took as part of the government of the day. This would undermine the longstanding convention that all Ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions.
44. The fact that there is an ongoing inquiry which will consider some of the key concerns raised by the complainant reduces the weight of the public interest in not upholding the principle of collective responsibility in this case. The speculation that the inquiry might not complete its work is not backed by any real evidence.
45. Furthermore, disclosing the withheld information whilst the inquiry is ongoing could result in Ministers becoming more focussed on the presentation of policy rather than on content in future for fear that their contributions may be released prematurely. It is in the public interest for Ministers and their advisers to consider all options including those that might be unpopular with particular groups in the course of policy deliberations.
46. The Commissioner therefore considers that on balance, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

⁶ <https://hansard.parliament.uk/Lords/2001-04-26/debates/0b080c67-179d-4fe7-ad40-40c11b6a20bf/AnimalRightsExtremismMinisterialCommittee>

47. In light of this conclusion, the Commissioner has not considered the application of the remaining exemptions cited by the public authority.

Procedural matters

48. The Commissioner has also considered whether the public authority is in breach of section 17(1) FOIA.
49. By virtue of section 17(1) a public authority refusing to disclose requested information is required to notify the applicant within 20 workings following the request of that fact, specify the exemption it is relying on, and state why the exemption applies.⁷
50. The Commissioner therefore finds the public authority in breach of section 17(1) for not issuing the complainant with its response to the request until 17 December 2018.

⁷ The full text of section 17 FOIA: <http://www.legislation.gov.uk/ukpga/2000/36/section/17>

Right of appeal

66. 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@justice.gov.uk

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

67. 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.
68. 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

Terna Waya
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF