

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2020

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested a copy of the minutes of Ministerial committee meetings on Animal Rights Activists from 2003. The public authority withheld the minutes held relying on the exemptions at sections 35(1)(a) and (b) 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

4. On 6 September 2018 the complainant submitted a request for information to the public authority in the following terms:

"Please provide

Minutes of "MISC 13 MINISTERIAL COMMITTEE" and "HOME OFFICE DELIVERY GROUP" related to "ARE" "Animal Rights Extremism" "Animal Rights Activists" "Animal Rights Activism" "Domestic Extremists""Domestic Extremism""National Forum on Policing and Prosecution of Animal Rights Activists" from 2003-present."
5. The public authority provided a substantive response on 22 November 2018¹. It confirmed that it held the information requested which it considered exempt on the basis of sections 35(1)(a) (formulation or development of government policy) and 35(1)(b) (Ministerial Communications) FOIA.
6. The complainant requested an internal review of the decision on 16 December 2018.
7. The public authority wrote to the complainant on 4 February 2019 with details of the outcome of the internal review. The review upheld the decision to rely on section 35(1)(a) FOIA. It is unclear whether the application of the exemption at section 35(1)(b) was also considered.

Scope of the case

8. The complainant contacted the Commissioner on 20 March 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 his request.
9. During the course of the Commissioner's investigation the public authority additionally relied on the exemption at section 35(1)(b) FOIA.

¹ The Commissioner found the public authority in breach of section 10 FOIA for the delay in providing a substantive response to the request in a decision issued on 12 November 2018. <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2553856/fs50793613.pdf>

10. The scope of the investigation therefore was to consider whether the public authority was entitled to rely on the exemptions at sections 35(1)(a) and 35(1)(b) FOIA.

Reasons for decision

The Withheld Information

11. The withheld information consists of four sets of minutes all dated 2004 on the Ministerial Group on Animal Rights Activities. These were provided to the Commissioner for the purposes of her investigation.
12. The public authority explained that these were the only documents held in scope following searches throughout the department on electronic, hard copy and archived records. The public authority also explained that it had been advised by the Cabinet Office that these documents were held in error and that only the Cabinet Office should retain Cabinet Committee minutes.

Section 35(1)(b)

13. The Commissioner initially considered whether the public authority was entitled to apply the exemption at section 35(1)(b) to the withheld information.
14. 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.”²
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 would inevitably be considered within the framework of the competing public interest factors.

² The full text of section 35 FOIA is available here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/35>

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 itself does not have to be created as part of the activity. Any significant link between the information and the activity is enough.
17. 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.
18. The Commissioner is satisfied that the withheld information which consists of minutes of meetings of the Ministerial Group on Animal Rights Activities engages the exemption at section 35(1)(b).

Public interest test

19. 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

20. The complainant's pertinent submissions in support of the public interest in disclosing the withheld information are reproduced below.
21. "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."
22. "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."
23. "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)."

24. "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."
25. "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."
26. "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?"

27. "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

28. The public authority's submissions in support of the public interest in maintaining the exemption are summarised below.
29. The public authority acknowledged that there is a strong public interest in disclosing information which ensures transparency in the way in which the government operates. Disclosing the withheld information would promote transparency and contribute to the wider transparency agenda. It could encourage greater public involvement in the development of policy and increase public participation in the political process. It would increase the level of trust in the decisions made by government.
30. However, balanced against this is the public interest in safe-guarding the government's ability to discuss and develop ideas and to reach well-formed conclusions. The formulation and development of government policy should be protected to provide a free space for Ministers to have free and frank discussions. Therefore, maintaining the confidentiality of such material is in the public interest because the quality of any decision making process depends on the frankness and candour with which views are presented and policies scrutinised. Disclosure therefore would remove the space which allows Ministers to consider issues without inhibition and result in a poorer policy making process. Whilst the information is 15 years old, animal rights remains a very live emotive issue and connected to the Undercover Policing Inquiry. It continues to generate much debate and consideration today and as such the merits of chilling effect arguments are particularly compelling.
31. Furthermore, Cabinet Government and the confidential nature of Cabinet proceedings are longstanding and fundamental conventions of the United Kingdom's constitution. Disclosing the workings and discussions of Cabinet and Cabinet committees could reveal potential disagreements between Ministers on details of policy and even policies themselves which, if made public, would undermine the convention of collective Cabinet responsibility and hence undermine the working of Government.
32. Ministers must be at liberty to express their views frankly and candidly without the fear of their views being reported in public, otherwise they might express them less vigorously or even feel restrained from voicing them at all for fear that they will be misrepresented in the media or perceived to be in a minority in Cabinet.

33. Thus, discussion in Cabinet between Ministers would be constrained by the knowledge that such discussions could be made public and decision-making would not have the benefit of the full range of freely expressed opinions to inform it. Minutes of meetings would become increasingly anodyne and uninformative, to the detriment of good record-keeping and future decision-making where that relies on previous records of decisions taken to inform it on specific policy matters.
34. In support, the public authority drew the Commissioner's attention to the following observation by the First-Tier Information Rights Tribunal in *Cabinet Office v Information Commissioner (EA/2010/0031)*:

"By reason of the convention of collective responsibility, Cabinet minutes are always information of great sensitivity, which will usually outlive the particular administration, often by many years. The general interest in maintaining the exemption in respect of them is therefore always substantial, Disclosure within 30 years will very rarely be ordered and then only in circumstances where it involves no apparent threat to the cohesive working of Cabinet government, whether now or in the future..." (paragraph 48) and

"We repeat, however, that this Decision does not mean that the public interest will commonly require the disclosure of Cabinet minutes. We foresee that disclosure will be a rare event and that the interest in maintaining the exemption will be particularly strong where the meeting was held in the recent past" (paragraph 59).

The Commissioner's considerations - balance of the public interest

35. 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 Undercover Policing Inquiry (UCPI) which the Commissioner understands began in 2015 and was ongoing at the time of the request was set up further to some of those revelations. The Commissioner understands the UCPI will look into the full scope of undercover policing work and also examine whether people may have been wrongly convicted in cases involving undercover police officers.
36. 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. The Commissioner accepts that there is 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.³"
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

³ <https://hansard.parliament.uk/Lords/2001-04-26/debates/0b080c67-179d-4fe7-ad40-40c11b6a20bf/AnimalRightsExtremismMinisterialCommittee>

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

Other Matters

48. The FOIA does not contain a time limit within which public authorities have to complete internal reviews. However, the Commissioner's published guidance explains that in most cases an internal review should take no longer than 20 working days in most cases, or 40 working days in exceptional circumstances.
49. The complainant requested an internal review on 16 December 2018. The public authority responded on 4 February 2019.
50. The Commissioner is concerned that there was a slight delay in completing the internal review particularly given the fact that the original response had been delayed.

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
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