

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 January 2019

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

Decision (including any steps ordered)

1. The complainant has requested polling information conducted since January 2018 on the strength of the Union (UK). The Cabinet Office refused to provide it citing section 35(1)(a) (formulation and development of government policy) as its basis for doing so. It upheld this at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 35(1)(a) as its basis for refusing the request.
3. No steps are required.

Request and response

4. On 3 June 2019, the complainant requested information of the following description:

"Please send me:

- All information relating to polling the general public on their perception on the strength of the union since January 2018. This includes any spending on such polling in each month by your Department.
- All information relating to contact from your Department with ipsos Mori in the last 6 months for polling on the general public's perception of the state of the union.

I would like the above information to be provided to me electronically at [email address].

If this understanding is too wide or unclear, I would be grateful if you contact me as I understand that under the Act, you are required to advise and assist requesters. If any of this information is already in the public domain, please can you direct me to it, with page references and URLs if necessary.”

5. On 1 July 2019, the Cabinet Office responded. It refused to provide the requested information. It cited section 35(1)(a) – formulation and development of government policy as its basis for doing so.
6. The complainant requested an internal review on 5 July 2019. The Cabinet Office sent him the outcome of its internal review on 14 August 2019. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 20 August 2019 to complain about the way his request for information had been handled. The complainant disagreed that section 35 was applicable.
8. The Commissioner has considered whether the Cabinet Office was entitled to rely on section 35(1)(a) as its basis for withholding the requested information.

Reasons for decision

9. Section 35(1)(a) 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'

10. 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.
11. 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.

12. Whether information relates to the formulation or development of government policy is a judgment that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
13. 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.
14. The Cabinet Office explained that the policy in question related to monitoring public opinion with respect to the Union of the United Kingdom and the government's "policy commitment to maintain the integrity of that Union between all four nations: England, Scotland, Wales and Northern Ireland".
15. It explained a timeline of polling and research it had commissioned on this broad subject including some which post dates the request and therefore falls outside the scope of the Commissioner's investigation. It argued that final data which fell within the scope of the request had only just been presented to it and therefore it had not yet had the opportunity to give it due consideration. It argued that the information, therefore, formed part of a policy consideration that was in its early stages of formulation. It also explained that some of the information within the scope of the request was now in the public domain: a redacted contract for 2019 research was available on the gov.uk website as was the contract for the previous year. Its spend on these projects from January 2018 to June 2018 was also publically available. It did not provide links to this but set out its spend as follows:

"(May 2018: £168,857.50 [including £33,771.50 VAT, which was recovered]; May 2018: £17,550.00 [including £3,510.00 VAT, which was recovered]; October 2018: £31,599.50 [including £6,319.90 VAT, which was recovered]; and May 2019: £46,800 [including VAT])".

The Cabinet Office did not cite section 21 in respect of this information. This section applies to requested information which is reasonably accessible to the complainant by other means.

16. The complainant was sceptical as to whether the requested information could fall within the scope of this exemption arguing that any polling

must be about the government's existing policy on the Union and that the government was not, to the best of the complainant's knowledge, changing its policy. If it were, he could understand the use of the exemption in this case. He further argued that if there was a change of policy, there would be a strong public interest, particularly in respect of the devolved administrations, of making this information public.

17. In its letter of internal review, the Cabinet Office explained that whilst the UK Government does have an overarching policy to maintain the integrity of the Union, this is underpinned by ongoing activity to support the development of that policy.
18. Having reviewed the information and having considered the arguments of both parties, the Commissioner is satisfied that the information in question relates to the early stages of reviewing or improving existing policy. The Cabinet Office's arguments to the Commissioner were not wholly clear on this point in correspondence with her. However, in its letter to the complainant setting out the outcome of its internal review and other comments in its letter to the Commissioner, the Cabinet Office appeared to argue that the information related to the development of policy rather than, strictly speaking, to its formulation. The Commissioner accepts that policy work is not necessarily conducted according to a prescribed formula, particularly where additional research is required in response to events. She considers this point particularly relevant here.
19. In light of all the above, she has concluded that the information in question is part of focussed research undertaken with a view to developing existing policy. The Commissioner is therefore satisfied that the withheld information falls within the scope of section 35(1)(a) of FOIA.

Public interest test

20. 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 information

21. The complainant's public interest arguments in respect of disclosing the information focussed on commenting that if there is a new policy, there is a strong public interest, particularly in the devolved administrations, in seeing the information used to inform it.

22. The Cabinet Office did not set out any arguments in favour of disclosure in its correspondence with the Commissioner. In its letter of refusal to the complainant it acknowledged that there was a public interest in disclosure noting that “the decision ministers make may have a significant impact on the lives of people across the UK”.

Public interest arguments in favour of maintaining the exemption

23. The complainant made no arguments in favour of maintaining the exemption, nor did the Commissioner require him to.

24. The Cabinet Office set out a number of points. It provided further detail about the way the information is used and stressed that, at the time of the request, it did not have the full analysed findings from the polling in question. The research was therefore still at an early stage. It said:

“The Cabinet Office was, therefore, at the time of the request, still in the process of taking forward its work (which is still ongoing) to develop the UK Government’s approach and policy for the Union Strategy based upon the commissioned research.”

25. It argued that the Cabinet Office was at such an early stage of policy development that disclosure would have been extremely premature and contrary to the public interest. It stressed the importance of officials and Ministers being allowed to explore the information and discuss options arising from it in a free and frank manner. It also referred to the importance of allowing officials and Ministers the space to understand possible implications. Disclosure would, it said, “adversely affect the quality of debate underlining effective decision making”. It also observed that the above applied currently as well.

Balance of the public interest arguments

26. The Commissioner recognises that there is a clear public interest in seeing what information the Cabinet Office is using to assess public attitudes to the Union. If viewed separately, the outcome of the Brexit referendum in England and Wales was different to the outcome in Scotland and Northern Ireland. The Commissioner recognises that there is a public interest in understanding more about any analysis the Cabinet Office is undertaking regarding the strength of the Union.
27. As negotiations with the EU have developed and proposed mechanisms for withdrawing from the EU have been concluded and voted upon in the UK Parliament, there has naturally been a considerable amount of discussion about how these developments are viewed across the Union with specific reference to the integrity of the Union itself, given the contrasting referendum outcomes in the different nations of the Union.

There is also a compelling public interest in informing these discussions with detailed polling data.

28. The Commissioner also recognises the merit of the complainant's point – if there is a new policy being developed in respect of the Union, there is a strong public interest in ensuring the constituent parts of that union are informed and involved.
29. The Commissioner also acknowledges a public interest in transparency regarding the use of public funds. While high level spending information has now been published, the Commissioner thinks that there is a clear public interest in knowing more about what that money paid for.
30. However, in the circumstances, the Commissioner is satisfied that the information is research on established policy to consider what, if any, developments to that policy should form part of further work. The Cabinet Office's arguments on this point were not fully clear at every stage but the Commissioner is satisfied that the information relates to the development of existing policy not the formulation of entirely new policy.
31. It is also information which represents work which is clearly in its early stages and had not, at the time of the request, been fully analysed or considered. There are therefore also compelling arguments to protect the safe space in which such work is undertaken. The Commissioner accepts that the government needs a safe space in this case to develop ideas, debate live issues and reach decisions away from external interference and distraction. At the time of the request, this was clearly a "live" matter. In such circumstances, the Commissioner thinks that greater weight can be added to the public interest argument in favour of protecting that safe space in which policy matters are discussed.
32. In the circumstances of this case, the Commissioner concludes that the public interest favours maintaining the exemption. Moving forward, where circumstances change, the balance of public interest may also change. In reaching this view, the Commissioner has given particular weight to the timing of the request. The Commissioner is satisfied that the information was informing live policy development at the time of the request and that there is a stronger public interest, in the circumstances of this case, of protecting the space in which that policy is being developed.
33. The Commissioner has concluded therefore that the Cabinet Office is entitled to rely on section 35(1)(a) as its basis for withholding the requested information.

Right of appeal

34. 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@justice.gov.uk

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

35. 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.
36. 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF