

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 September 2020

Public Authority: Cabinet Office
Address: 70 Whitehall
London
W1A 2AS

Decision (including any steps ordered)

1. The complainant requested information relating to policy development regarding access to the electoral register from the Cabinet Office. Initially, it had relied on section 12 (costs exceed appropriate limit) but following the intervention of the Commissioner it revised its position and made a partial disclosure. However, it relied on provisions of section 35 (formulation/development of government policy) and section 42 (legal professional privilege) as its basis for withholding the remainder. It failed to deal with the complainant's request for internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 35(1)(b) as its basis for withholding the remainder of the requested information.
3. No steps are required.

Request and response

4. On 20 July 2018, the complainant requested information of the following description:

"Here's what I want – Can you state how the policy emerged in relation to the relevant legislation, i.e., was it party manifesto proposals, Minister's initiative, Officials suggestions, lobbying, etc? Please provide correspondence.

Please provide copies of relevant submissions, consultations and responses. Which politicians were consulted? What committees

scrutinized the legislation. Name the membership of such committees? Don't make me have to resort to the Information Commissioner again for this information."

5. Initially, the Cabinet Office had relied on section 12 of the Act as its basis for not responding to this request – this provision relates to the cost of compliance. Following the intervention of the Commissioner it revised this position and provided some information on 22 May 2019. It withheld other information that it held within the scope of the request on the basis of the exemptions at section 35 (formulation/development of government policy) and section 42 (legal professional privilege).
6. The complainant sought an internal review clearly referenced on 27 May 2019 but received a "bounce back" message that the email address to which he had sent the request was no longer used. He then sent the same message to the email address the bounce back message had directed him to. He received no further response.

Scope of the case

7. The complainant contacted the Commissioner on 13 December 2019 to complain about the way his request for information had been handled. He had advised the Commissioner previously that he had requested an internal review on 27 May 2019 and the Commissioner had written to the Cabinet Office about this already. The Commissioner took this case forward when no response to the request for internal review was forthcoming.
8. The Commissioner has considered whether the Cabinet Office is entitled to rely on sections 35(1)(a) and (b) and 42(2) as its basis for withholding the requested information.
9. In its response to the Commissioner, the Cabinet Office explained that it had searched its relevant email inbox and noted that it had overlooked the complainant's email of 27 May 2019 requesting an internal review. It apologised for this. The Commissioner notes this but also notes that she wrote to the Cabinet Office on 11 June 2019 to advise it of the internal review (and the date it was sent) and therefore she remains unclear as to why it was not actioned. Further comment is made about this in the Other Matters section of this Notice.

Reasons for decision

10. The Cabinet Office argued that all of the information was exempt on the basis of section 35 (formulation and development of government policy) and that some of the information was also exempt on the basis of section 42 (legal professional privilege).
11. The Commissioner has therefore considered the application of section 35 first.

Background

12. The request relates to legislative changes following the judgment in *R (on the application of Robertson) v City Of Wakefield Metropolitan Council* [2001] EWHC Admin 915 ("*Robertson*") where access to the electoral register was at issue. This found that selling the electoral register to commercial concerns without an individual on that register having a right to object to such a sale was incompatible with the European Convention on Human Rights.
13. Further detail about this can be found here:
<https://researchbriefings.files.parliament.uk/documents/SN01020/SN01020.pdf>

Section 35: Formulation of government policy

14. Section 35 FOIA states:

"(1) 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,
- (b) Ministerial communications

15. This decision notice is focussed on the application of section 35(1)(b). Before doing so, this notice will briefly address section 35(1)(a).
16. This information clearly falls within the class of information described in section 35(1)(a) – it relates to the formulation of government policy in respect of the electoral roll post-*Robertson*. The Cabinet Office explained that that the policy decision referred to in the request "is that which allows credit reference agencies to purchase the electoral register and use the names and addresses it contains to vet applications for credit, prevent and detect money laundering, or for the statistical analysis of credit risk assessments". The Commissioner accepts this explanation.
17. Section 35(1)(a) is subject to a public interest test. Information is only exempt under section 35(1)(a) if the public interest in maintaining this exemption outweighs the public interest in disclosure. In its submissions on this exemption, the Cabinet Office stressed the importance of

protecting the safe space in which government policy is developed which was a relevant factor in the consideration of the public interest even after the policy had been developed and implemented. The Commissioner has some sympathy with that argument but does not consider it is particularly compelling in respect of this information given its age. The Cabinet Office also argued that policy development is a very complex process and that the information withheld in this case would not give a full picture of that process in this case. The Commissioner acknowledges this but would observe that, although it is not an obligation, FOIA does not prevent a public authority from providing a commentary or other information relating to a disclosure. In any event the Commissioner is not persuaded that the public interest in maintaining section 35(1)(a) outweighs the public interest in disclosure in this case. There is a clear public interest in understanding the development of government policy on the use of electoral roll data following the *Robertson* case.

18. The Cabinet Office also said that “good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure – ‘premature’ meaning before transfer to The National Archives of any information worthy or permanent preservation. There is of course a place for public participation in the policy making process, and for public debate of policy options. However, it is not in the best interests of policy formulation, and therefore not in the public interest, that every stage of the policy making process should be made accountable via exposure to public scrutiny in a piecemeal fashion.”
19. The Commissioner would emphasise that section 35(1)(a) is not an absolute exemption and that information caught by this exemption should not automatically be withheld from disclosure under FOI prior to transfer to The National Archives. She disagrees with the Cabinet Office’s interpretation of “premature” in this context. She has therefore concluded that the Cabinet Office cannot rely on section 35(1)(a) as a basis for withholding the remainder of the requested information.
20. 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.”

21. Having read the requested information the Commissioner is satisfied that it also all falls within the description set out at section 35(1)(b), therefore the exemption is engaged. It is an exchange between members of the Cabinet Committee on Devolved Administrations.

Public interest test

22. Section 35(1)(b) is also a qualified exemption subject to a balance of public interest test. As noted above, the Commissioner has dismissed the application of section 35(1)(a) because the balance of public interest favoured disclosure for the reasons outlined above.

Public interest in favour of disclosing the withheld information

23. The Cabinet Office recognised the following points in favour of disclosure:
- there is a general public interest in openness
 - 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.
 - openness in government may increase public trust in and engagement with the government and has beneficial effects on the overall quality of government.
 - there is a wider public interest in the public being well-informed about the government's policy on managing how the electoral register is used.

Public interest in favour of maintaining the withheld information

24. The Cabinet Office repeated its argument about disclosure in this case being "premature" using the same analysis of that word. The Commissioner does not accept that argument as set out above. The exemption is class based which, in itself, reflects the importance of protecting such information. However, it is qualified by a public interest test which means that disclosure prior to transfer to The National Archives is envisaged as possible where the balance of public interest favours doing so.
25. It made the following additional arguments in favour of maintaining the exemption:
- there is a very strong public interest in protecting the confidentiality of all aspects of communications between ministers. It is about protecting

the deliberative process at this level as well as creating a safe space for discussion;

- there is a specific public interest in preserving the confidentiality of Cabinet discussions in order to protect the convention of Cabinet Collective Responsibility. It explained that this was expressly referred to in the Part 2, section 2.1 of the Ministerial Code and provided the following link:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf It said:

“Ministers should be able to express their views frankly in the expectation that they can correspond freely in private while maintaining a united front when decisions are reached. This requires that the privacy of opinions expressed via write-rounds 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 formal correspondence, 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.”

26. To counter the suggestion that this point was insufficiently specific to this case it said that such an observation was “superficial”. It stressed that “this public interest does relate directly to information on every subject of communication between ministers. It is, therefore, absolutely specific to this case.” It added that a specific exemption had been created to protect ministerial communications.
27. The Cabinet Office also observed that “[t]he [Information Rights] Tribunal has generally required evidence of an active public debate, not an historical or cultural interest, to justify overriding the constitutional convention and the confidentiality which maintains it.” It noted that in previous cases where the Tribunal had ordered disclosure this had only been “in matters of international military conflicts or where so many members of Cabinet have written about a particular meeting with differing views (i.e. Westland) that publication of the official record would provide clarity. Even in these cases, the Tribunal has only favoured releasing small extracts”

Balance of the public interest

28. As noted above, the Commissioner is satisfied that the exemption at section 35(1)(b) is engaged, however, as she has previously advised, she 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.
29. The Commissioner recognises that there is a strong public interest in understanding more detail about how ministers considered the issue described in the request. The matter in question involved a fundamental change to access to the electoral register (which had previously been freely available to all). The fact that it is not a matter of current high controversy does not, in the Commissioner's view, render it less appropriate to disclose the information.
30. Similarly, the Commissioner is not convinced that the potential for eventual disclosure of their views would inhibit a minister in the proper conduct of her/his role including using appropriate channels of communication. The Cabinet Office has asserted this speculatively.
31. That said, the Commissioner has concluded the public interest in protecting Cabinet collective responsibility by maintaining the exemption is stronger. There is a public interest in supporting this principle in the interests of good governance and the withheld information clearly demonstrates the operation of this process. The Commissioner has reached this view by a narrow margin, given the age of the information. The Commissioner recognises the strong public interest in protecting the principle of collective responsibility which would be served by maintaining the exemption in this case.

Conclusion

32. In the circumstances of this case the Commissioner considers that the public interest in maintaining the exemptions at section 35(1)(b) outweighs the public interest in disclosing the withheld information.
33. Given the Commissioner's conclusion in respect of section 35(1)(b) which applies to all the information withheld in this case, she has not addressed the Cabinet Office's reliance on section 42.

Other matters

34. The Commissioner remains concerned about the Cabinet Office's failure to conduct an internal review in this case because it overlooked the complainant's request for one and did not respond to the Commissioner's request that it undertake an internal review.

Right of appeal

35. 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

36. 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.
37. 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
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