



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 31 May 2006

Cabinet Office: The Cabinet Office

**Address: 70 Whitehall
 London
 SW1A 2AS**

Summary Decision and Action Required

The Commissioner's decision in this matter is that the Cabinet Office has not dealt with the Complainant's request in accordance with Part I of the Act in that it has failed to comply with its obligations under section 1(1).

1. Freedom of Information Act 2000 (the 'Act') – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a Complainant has made an application for a decision, unless:

- a Complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

1.3 The Commissioner shall either notify the Complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the Complainant and the public authority.

2. The Complaint

2.1 The Complainant has advised that on 29 March 2005 the following request for information was made to the Cabinet Office in accordance with section 1 of the Act.

- 2.2 “I seek the publication of a report produced by the Downing Street Strategy Unit on drug misuse.”

The proper title of the requested report is the ‘Strategy Unit Drugs Report’ – “the Report”. The Strategy Unit is part of the Cabinet Office. The Report was produced in two phases during 2003. This Report formed the basis for the Home Office report “Tackling Drugs, Changing Lives”, published in November 2004.

The Complainant’s request was acknowledged on 30 March 2005. On 7 April 2005 the Cabinet Office confirmed that it held the Report but refused the Complainant’s request for access to it. The Cabinet Office did not offer the Complainant an internal review of its decision not to provide the information. However, on 17 April 2005 the Complainant did request an internal review. On 1 July 2005 the Cabinet Office again refused to provide the requested information. On 5 July 2005 the Complainant asked the Information Commissioner to adjudicate on the Cabinet Office’s handling of his request. By the time the Complainant contacted the Commissioner a substantial part of Phase 1 of the Report had been published by the Cabinet Office, and a more complete ‘leaked’ version of Phase 1 had appeared on The Guardian’s ‘Guardian Unlimited’ website. At that time Phase 2 of the Report had not been published. The Complainant specified that he sought the Commissioner’s adjudication on three points:

- 1) Whether information on page 12 of Phase 1 should have been withheld.
- 2) Whether the final 50 pages of Phase 1 of the Report [that had not at that time been published by the Cabinet Office] ought to have been made available.
- 3) Whether Phase 2 of the Report ought to be disclosed.

In this Decision Notice Page 12 of Phase 1 of the Report, the final 50 pages of Phase 1 of the Report and the whole of Phase 2 of the Report are referred to as ‘the requested information’.

3. Relevant Statutory Obligations under the Act

Section 1(1) provides that any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.

Section 17 (7) provides that a refusal notice must contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure.

4. Review of the case

Scope of the Review

The Complainant sought the Commissioner's adjudication on whether:

- information on page 12 of Phase 1 of the Report should have been withheld.
- the final 50 pages of Phase 1 of the Report [that had not at that time been published by the Cabinet Office] ought to have been made available.
- Phase 2 of the Report ought to have been disclosed.

Phase 1 of the Strategy Unit Drugs Report consists of information about:

- the type of drugs available in the UK
- their cost
- their importation into the UK
- levels of drug use
- the social and geographical distribution of drug users
- take-up and effectiveness of treatment for addiction to drugs
- the effect of various drugs on those that use them
- the cost and nature crime arising from drug use
- drug production, eradication and connection with other sorts of crime
- the effectiveness of attempts to disrupt the supply chain
- the effect of drug prices on drug use

Phase 2 of the Report consists of information about:

- the effectiveness of current anti-drug initiatives
- policy options for tackling drugs and their associated harms
- the nature and effectiveness of treatment for addiction
- possible changes to the system for dealing with the drug problem, including changes to the criminal justice system
- options for possible implementation of change

The Commissioner's Investigation

The Commissioner requested a copy of the withheld information on 25 August 2005. At the time the Commissioner also asked the Cabinet Office whether it had anything to add to the explanation it had already given to the Complainant to justify its decision to withhold the requested information. There was an exchange of correspondence between the Commissioner and the Cabinet Office concerning the security of the information. However, a copy of Phase 2 of the Report was provided to the Commissioner on 28 November 2005.

5. The Commissioner's Decision

The Commissioner's decision in this matter is that the public authority has not dealt with the Complainant's request in accordance with the following requirements of Part 1 of the Act:

Section 1(1) in that it failed to communicate to the Complainant such of the information specified in his request as did not fall within any of the absolute exemptions from the right of access nor within any of the qualified exemptions under which the consideration of the public interest in accordance with section 2 would authorise the public authority to refuse access.

Section 17(7) in that in refusing the Complainant's request the Cabinet Office failed to provide particulars of any procedure provided by it for dealing with complaints about the handling of requests for information or state that it does not provide such a procedure.

The Cabinet Office's reliance on the exemptions in the Act.

The Cabinet Office cited the following exemptions as its basis for refusing the Complainant's request for access to the requested information:

- S.23 (information supplied by, or relating to, bodies dealing with security matters).
- S.35 (formulation of government policy etc.)
- S.36 (prejudice to conduct of public affairs)

The Cabinet Office did not specify which parts of the requested information fell under each exemption, but applied the exemptions in a more general manner. It said, for example, that with respect to the unreleased information in Phase 1 of the Report and that in Phase 2, information that is not exempt by virtue of s.35 of the Act is exempt by virtue of s.36.

The s.23 exemption.

The Complainant asked the Commissioner to decide whether the information on Page 12 of Phase 1 of the Report is exempt from disclosure by virtue of s.23 of the Act (information supplied by, or relating to, bodies dealing with security matters).

The Commissioner asked the Cabinet Office to provide more detailed information about which information was supplied to it by a body dealing with security matters. The Cabinet Office declined to do so, arguing that as the information is now in the public domain, providing this information would undermine the integrity of the s.23 exemption. Clearly, this makes it impossible for the Commissioner to determine whether any other information in the Report falls within the s.23 exemption. The only information specifically identified as having NCIS as its origin is on part of page 12 and on pages 80, 82 and 84 of Phase 1 of the Report and page 83 of Phase 2 of the Report. The Commissioner is satisfied that this information was supplied by a body dealing with security matters and is therefore exempt from disclosure. The information in question is about the cost to drug users of various types of drug. It lists various drugs, their unit of measure, their cost per unit, unit use per week and total cost to users per week. The price of drugs has been frequently reported and information about this is readily available through drugs

charities and similar bodies. It seems unlikely that there is any information contained in this part of the Report that would not already be available to anyone who consumes drugs, supplies them or who has an interest in the drugs debate. It is difficult to envisage any harm that might result from the disclosure of this information. Indeed, disclosure might inform public debate about drugs issues. However, information is absolutely exempt from disclosure under the Act if, as a matter of fact, it was directly or indirectly supplied to the public authority by a body dealing with security matters – the National Criminal Intelligence Service (NCIS) is such a body. NCIS is cited as one of the sources of the information on page 12 of the Report. (Other information about cocaine use apparently emanated from a hospital's user records.) The Commissioner accepts that NCIS is the source of the majority of the information on Page 12 of Phase 1. His decision is, therefore, that the information in question is absolutely exempt from disclosure by virtue of s.23 of the Act, apart from that obtained from a hospital's user records.

The s.35 and s.36 exemptions.

The Complainant asked the Commissioner to decide whether the remainder of Phase 1 of the Report and the whole of Phase 2 of the Report ought to have been made available.

The Commissioner has carried out a detailed examination of both phases of the Strategy Unit Drugs Report with a view to ascertaining whether any of the requested information is exempt from disclosure by virtue of either s.35 or s.36 of the Act. The Cabinet Office argued that information that is not exempt by virtue of s.35 of the Act is exempt by virtue of s.36. The Cabinet Office did not specify which information falls under the s.35 exemption and which under s.36. If a public authority wishes to rely on a particular exemption, s.36 in this case, as its basis for withholding certain information contained in the Report, it must explain which information the exemption applies to and why it applies, if this is not otherwise apparent. The public authority's failure to do this has disadvantaged the Complainant by not providing him with the information he needs to rebut the public authority's use of the exemptions in the Act. It has also made it difficult for the Commissioner to decide whether, in citing the s.35 and 36 exemptions, the public authority has handled the Complainant's request in compliance with the Act.

The s.35 exemption.

The Cabinet Office argued that some of the requested information is exempt by virtue of s.35(1)(a) of the Act. This exempts information from disclosure if it relates to the formulation or development of government policy. This exemption is subject to the public interest test.

The Commissioner accepts that the s.35 exemption is engaged in respect of the whole Report because it relates to the formulation of government policy. The Report was clearly commissioned by the Strategy Unit with the intention of providing background information about the UK's drugs problem to the Prime Minister and providing him and relevant Secretaries of State with a range of policy options for tackling the various problems associated with drug use.

The s.36 exemption (Prejudice to the Effective Conduct of Public Affairs).

The Cabinet Office argued that information that is not exempt by virtue of s.35 is exempt by virtue of s.36. S.36 exempts information from disclosure if, in the reasonable opinion of a qualified person, disclosure would, or would be likely, to inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. Various senior figures at the Cabinet Office, including its former Managing Director and the Private Secretary to the Minister, were involved in dealing with the Complainant's request and the Commissioner's subsequent investigation of it. The Commissioner has various items of correspondence, for example a letter from the Managing Director of the Cabinet Office to the Complainant dated 1 July 2005, that provide evidence of the opinion that disclosure of the requested information would prejudice certain purposes described in the s.36 exemption. The Commissioner accepted the reasonableness of that opinion and that the s.36 exemption was therefore engaged. He also accepted that those senior figures were speaking on behalf of the Cabinet Office, including the Minister of State with responsibility for it. However, for the purposes of the Act the 'qualified person' for the Cabinet Office is a Minister of the Crown. In retrospect, the Commissioner should have obtained evidence that a Minister held that the 'reasonable opinion'. However, given that the Commissioner is satisfied that the s.35 exemption is engaged in respect of the entire Report, the Commissioner does not intend to investigate further the applicability of the s.36 exemption or the opinion of the qualified person.

The Public Interest Test.

In the Commissioner's view that the exemption at s.35 of the Act is engaged in respect of the entire Report. He therefore only intends to consider the public interest in the context of that exemption. In any case, even if s.36 does apply to some of the information, the public interest considerations will be the same in the context of either exemption.

It is worth noting that s.35(4) of the Act states that when assessing the public interest in the context of the s.35 exemption, regard shall be had to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking. This provides an explicit indication that there is a strong public interest in the disclosure of such factual information.

The Report contains a great deal of statistical information, and s.35(2) of the Act specifies that once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded as relating to the formulation or government policy or as relating to Ministerial communications. Again, this makes it clear that the s.35 exemption is substantially weakened once a decision as to government policy has been taken.

Much of the requested information is factual in nature - the Commissioner has born this in mind in his assessment of the public interest. S.35(2) of the Act states that

once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded as relating to the formulation of government policy. Again, the Commissioner has borne this in mind in assessing the public interest in the context of the Complainant's request.

It is worth noting that s.19(3),(b) of the Act requires that in adopting or reviewing a publication scheme, a public authority shall have regard to the public interest in the publication of reasons for decisions made by the authority. Again, this makes it clear that there is a public interest in members of the public understanding why public authorities make the decisions they do, including decisions concerning the adoption of policy.

Arguments against disclosure.

The Cabinet Office has provided the following public interest arguments against disclosure of the requested information:

- It is not in the public interest for policy advice to be based on incomplete background material because of the risk of future disclosure.
- The information was provided in confidence directly to the Prime Minister and to relevant Secretaries of State to inform policy development. There is a strong public interest in Ministers being able to receive free and frank advice to inform their policy decisions.
- Government must be able to commission advice on subjects of their choosing at the timing of their choosing without fear of information being disclosed – disclosure would inhibit the commissioning and provision of advice.
- Government needs free space to use imagination, to consider radical policy options and to undertake rigorous, candid assessment of its programmes and projects. Ministers need to be able to discuss the pros and cons of particular policy options in private before their final decisions come under public scrutiny.
- Disclosure of the information would lead to reluctance on the part of experts to be frank and candid in the future.
- Disclosure would reveal the nature of confidential policy recommendations.
- Criticism of existing governmental initiatives in response to the drugs problem could undermine the morale and commitment of staff involved in such initiatives, preventing their organisations from carrying out their functions effectively.
- Any recommendations for changes to the government's response to the drugs problem, for example organisational change, could lead to uncertainty,

upheaval and anguish. There would be a need for proper communication and preparation prior to any announcement.

- Revealing perceived weaknesses in the criminal justice system to criminals involved in drugs offences would undermine the effective operation of law enforcement. This is particularly the case concerning information about supply and possible reallocation of resources to other aspects of the government's drugs strategy. Ultimately this would benefit traffickers.
- Disclosure would undermine the convention of collective Ministerial responsibility, i.e. the free space to discuss options and to put forward individual opinions before adopting a collective position. This would have an inhibiting effect on Ministers.

Arguments for disclosure.

The Cabinet Office has provided the following public interest arguments in favour of the disclosure of the requested information:

- There is a general public interest in greater transparency in how Government operates.
- The drugs issue is one of national importance, there is a public interest in knowing what advice has been provided by the Prime Minister's Strategy Adviser.
- Release of some of the information would contribute to public understanding of drugs issues and associated policy discussions.
- There is a public interest in raising awareness of the drugs supply chain.

After the Complainant made his request for information, the first 53 pages of Phase 1 of the Report, apart from page 12, were leaked and posted on The Guardian's website. The Cabinet Office has since concluded that there is a public interest in the factual, analytical information that constitutes a significant part of Phase 1 of the Report being released, arguing that it is about a matter of national importance and that there is a public interest in advice provided by the Prime Minister's strategy adviser. However, this Decision Notice does not address the disclosure of the first 53 pages of Phase 1 of the Report because the Complainant did not ask the Commissioner to consider the release of this information.

The Commissioner's Assessment of the Public Interest.

The Commissioner has studied the requested information and has considered the various public interest arguments for and against disclosure.

The Cabinet Office has argued that releasing the requested information would inhibit the commissioning and provision of advice to Government, and that this

would not be in the public interest. The Cabinet Office has explained that this Report was commissioned with the intention of providing the Prime Minister and relevant Secretaries of State with hard-hitting, radical policy options which would be a contribution to the debate about drugs rather than official government policy. The Commissioner has not seen the information relating to the commissioning of this Report. However, it is presumably made clear to the authors of reports like this that 'blue sky thinking' is called for, and that they are being commissioned to provide this sort of advice. If this is the case, it is difficult to envisage how the release of the requested information would prevent such Reports being commissioned and produced in the future. Presumably it would be the prerogative of those commissioning such reports to reject them on the grounds that they do not have the radical, free-thinking content that was requested. The Commissioner is not satisfied, therefore, that releasing this part of the Report would inhibit the commissioning and provision of advice to government.

The Cabinet Office also argued that releasing the requested information would deny Government the private thinking space it needs to consider the pros and cons of particular policy options, and that this would not be in the public interest. As the Cabinet Office has explained, the Strategy Unit Drugs Report is not an account of official Government policy, rather it is a contribution to policy discussions across government that is designed to challenge and provoke discussion. It is clear that the various conclusions of the Report do not constitute actual or prospective government policy.

It has been widely reported that the use of illegal drugs is having a major impact on crime and public health. It is an issue that is high on the Government's agenda and is the subject of much public debate. Those with an interest in the drugs problem would presumably expect government to do its best to tackle the problem effectively. This may involve assessing the effectiveness of current policy, commissioning frank, hard-hitting policy advice and being open to the consideration of a range of policy options, including very radical ones. The Report does indeed contain some radical options for tackling the drugs problem. However, it is clear that the Report is only intended to provoke discussion - discussion that any government faced with a problem such as drugs should be expected to engage in. The Commissioner is not satisfied, therefore, that releasing this part of the Report would have denied Government the private thinking space it needs to consider the pros and cons of particular policy options.

The Cabinet Office has also argued that criticism of existing governmental initiatives in response to the drugs problem could undermine the morale and commitment of staff involved in such initiatives, preventing their organisations from carrying out their functions effectively. There is no doubt that releasing information about the failure of an initiative could have an effect on the morale of staff involved in it. However, there is a strong public interest in the public knowing how successful current and past initiatives to deal with the drugs problem have been. It would be wrong for the public to be led to believe that initiatives against drugs are being successful if, in fact, this is not the case. Drugs have an effect on the lives of many people, directly or indirectly. It is in the public interest that the public has access to information that assesses the effectiveness of current anti-drugs initiatives. This facilitates public debate and allows Government and the public to look again at

current policies and perhaps opens the way for more effective ones to be adopted. It is in the public interest that there is public awareness of weaknesses in current policy, that the adoption of more effective policies, even very radical ones, be debated and that the public be aware that this debate is taking place.

The Cabinet Office has argued that releasing the requested information would undermine the convention of collective Ministerial responsibility. The Report was placed before the Prime Minister and relevant Secretaries of State for their consideration. The Complainant's request for information was only for access to the Report itself, not for records of Ministerial discussion of it. The Commissioner is not satisfied, therefore, that releasing this part of the Report would be likely to prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown.

The Cabinet Office has argued that revealing perceived weaknesses in the criminal justice system would undermine the effective operation of law enforcement, and that this would not be in the public interest. It is the case that the Report does contain information that questions the effectiveness of certain Governmental anti-drugs initiatives. However, it does not contain detailed information about policing methods or the methods used by drug producers, traffickers or others involved in the illegal drugs trade. The Commissioner is not satisfied that the release of the requested information could assist those involved in the illegal drugs trade or prejudice the efforts of law enforcement agencies.

The Report was commissioned in 2003. Following Ministerial discussion of it, official policy was adopted as set out in the November 2004 Home Office report entitled "Tackling Drugs, Changing Lives". The Complainant requested access to certain parts of the Report on 29 March 2005. This means that at the time the Complainant made his request the Report had served its purpose as a discussion document and official policy had already been adopted. In that sense, the Report constituted a historical document at the time the Complainant asked for access to the parts of it that had not already been released. The fact that debate of the Report had been completed and official policy adopted strengthens arguments in favour of disclosure and weakens arguments based on the detrimental effects that disclosure would have.

Given that all of the requested information is now in the public domain, the Commissioner does not intend to specify in detail which parts of the requested information should or should not have been communicated to the Complainant. However, the Commissioner's decision is all the requested information should have been communicated to the Complainant, apart from that falling within the s.23 exemption.

It is worth noting that had the requested information still been under active consideration with a view to formulating government policy at the time of the Complainant's request, the Commissioner may well have concluded that the requested information, or at least part of it, was exempt from disclosure by virtue of the exemptions at s.35 and 36 of the Act.

6. Action Required

The Commissioner has adopted a policy on ‘academic’ freedom of information cases. In short, this means that the Commissioner may decline to make a decision as to whether a request for information has been handled in compliance with the Act in cases where the information has already been made available. However, the public authority in this case has not communicated the non-exempt information to the applicant. The Commissioner must conclude, therefore, that despite the public availability of the entirety of the requested information, the public authority has failed to deal with the Complainant’s request for information in accordance with the requirements of Part 1 of the Act.

The entire content of the Strategy Unit drugs report is now publicly available. All of it appears on the Guardian Unlimited website. Phase 1 of the Report is available in its entirety on the Strategy Unit website. (The Strategy Unit is a management unit of the Cabinet Office.) However, the Cabinet Office has not published Phase 2 of the Report, nor has it communicated the requested information to the applicant. As the public authority in this case, it falls to the Cabinet Office, and not to any other organisation, to ensure that all non-exempt requested information is communicated to the Complainant. Therefore the public authority shall, within 30 days of service of this Decision Notice, communicate to the applicant the requested information contained in the Strategy Unit Drugs Report, except that which is exempt because it was supplied by, or relates to, a body dealing with security matters.

7. Right of Appeal

7.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the “Tribunal”). Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 31st day of May 2006

Signed

Ref: FS50082560

Graham Smith
Deputy Commissioner

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