

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 4 April 2007

Public Authority: Department for the Environment Food and Rural Affairs
Address: Nobel House
17 Smith Square
London
SW1P 3JR

Summary

The complainant requested a copy of the agendas for meetings of the Green Ministers Committee since its formation in 1997. Defra provided the complainant with a summary of the agendas from 8 June 1998 to 19 June 2001. Defra claimed the rest of the information was exempt from disclosure under section 35 of the Act. Having investigated, the Commissioner accepts that section 35 applies to the information requested. However he does not accept that the public interest in maintaining the exemption outweighs the public interest in disclosing the information and consequently finds that the exemption was improperly applied.

The Commissioner's Role

- 1 The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

- 2 The complainant has advised that on 17 January 2005 the following information was requested from the Department for the Environment Food and Rural Affairs ("Defra") in accordance with Section 1(1) of the Act:
- 3 *"Please would you provide us with copies of the agendas (not minutes) for meetings of the Green Ministers Committee (ENV-G) since its formation 1997"*.
- 4 On 14 February 2005, Defra responded to the complainant's request. In accordance with section 17 of the Act, Defra advised the complainant it was

withholding the agendas from 2001 onwards (the “later agendas”) under the exemption at section 35 of the Act, which relates to the formulation of Government policy. Defra advised that for the period 1997 – 2001, it was continuing its search but at that time, it had not been able to establish whether any such agendas were held. Defra advised that the search would continue and the complainant would be kept updated.

5. Defra had applied the public interest test to the later agendas and decided that whilst there was an interest in understanding the basis for government policies, there was a very strong interest in preserving the space for full and frank discussion of policy as that process leads to better quality decisions. Defra thought disclosure would inhibit that process and be harmful to collective cabinet responsibility. Defra also considered that the Environmental Information Regulations 2004 (the “EIR”) may apply and if the information was deemed to be environmental, then Regulation 12(4)(e) would provide an exception to disclosure.
6. The complainant requested that Defra carry out an internal review on the 17 February 2005.
7. On 11 March 2005, Defra advised that it had located agendas for the period 1997 – 2001 (the “earlier agendas”), but that it was also withholding that information for the same reasons set out in paragraphs 4 and 5 above.
8. On 27 April 2005, Defra advised the complainant of the outcome of its internal review. It advised that it upheld the decision previously reached for the reasons stated at that time.

The Investigation

Scope of the case

9. On 15 May 2005 the complainant contacted the Commissioner to complain about the way its request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - Whether the request should have been dealt with under the EIR; if so,
 - The application of regulation 12(4)(e) – the complainant felt that Defra had not interpreted the regulation in accordance with Directive 2003/4/EC
 - Whether the public interest test had been properly applied.

Chronology

10. In his investigation of the complaint, the Commissioner requested a copy of the agendas which Defra subsequently provided to him on 15 February 2006. The Commissioner also asked Defra to comment on the concerns raised by the complainant.

11. Defra advised the Commissioner that the Green Ministers Committee was established in May 1997. Initially, it was an informal committee set up to promote sustainable development across government and to integrate sustainable development into departmental policies. Following the General Election in June 2001, the Committee was created as a formal sub-committee of the Cabinet committee on the environment (ENV).
12. After the Commissioner had raised various points, Defra decided it could release some of the information. Consequently, on 17 November 2006, Defra sent a letter to the complainant enclosing a “summary of the information contained” in the earlier agendas for meetings dating from 8 June 1998 to 19 March 2001. It advised the complainant that the meetings of Green Ministers which took place between 1997 and the General Election of 2001 were reported on publicly once a year and the chair of Green Ministers regularly answered Parliamentary Questions on the matters discussed and the attendance at meetings of the group. Defra continued to maintain that section 35 is engaged, but was able to release this information as it advised that it had reconsidered the public interest test which was now in favour of disclosure.
13. On 21 November 2006, the complainant contacted the Commissioner to advise that it was not satisfied with the disclosure made. In particular, the complainant asked the Commissioner to investigate:
 - the paucity of the information disclosed and;
 - whether the redaction of the disclosed information was appropriate.
14. The Commissioner then sought Defra’s detailed views on:
 - the applicability of the EIR as opposed to the Act
 - confirmation that the only agendas in existence are as those previously disclosed to the Commissioner
 - why it had redacted the earlier agendas and whether that was appropriate and
 - its review of the public interest test in relation to the information it continued to withhold.

Analysis

15. In reaching a decision in respect of this case the Commissioner has consider both the views expressed and information provided by the parties to the complaint.
16. The Commissioner notes that the complainant believes the information is environmental information but that Defra does not. As the information does not extend beyond agendas identifying issues to be discussed in meetings, it is the Commissioner’s view that the information is not environmental and the request and complaint should therefore be dealt with under the Act. Whilst some of the issues listed on the agendas may concern the environment, the agendas themselves do not constitute environmental information as defined in Regulation

- 2 of the EIR. They relate to items for discussions or orders of business for given meetings rather than being environmental information as defined under Regulation 2(1). In particular, the Commissioner does not consider that they are “measures....[or] activities affecting or likely to affect the elements or factors” set out in that Regulation.
17. Defra has advised the Commissioner that the agendas disclosed to him on 15 February 2006 are the totality of information which it holds pertinent to the request. The Commissioner accepts that he has received a copy of all relevant information falling within the scope of the complainant’s request and will refer to this information as the “earlier and later” agendas.
 18. Defra has advised the Commissioner that public authorities are only required to release information, not documents. Consequently, it believes that to provide a summary is adequate. The Commissioner does not accept this view. The Act provides a right of access to recorded information held by a public authority. This will normally be fulfilled through access to existing documents or electronic media, though in some cases the information can, or should, be disclosed through other means. The Commissioner’s approach is consistent with paragraph 6 of the Explanatory Notes to the Act which states that the Act provides access to documents, or copies of documents as well as to information.
 19. Although section 11 of the Act permits a requester to express a preference for a summary or digest, an “imposed” summary is unlikely to provide access to information which is not exempt from disclosure. By its very nature, a summary is not the totality of the information held. Consequently, for information to be withheld, the public authority must demonstrate and justify the use of an exemption as a basis for withholding this information otherwise all of the information in the document must be disclosed.

Exemption

Section 35

20. Section 35 is a class based exemption which potentially exempts information relating to the formulation of government policy, Ministerial communications, the provision of advice by any of the Law Officers or any request for the provision of such advice or the operation of any Ministerial private office. Section 35 of the Act is set out in full in the Legal Annex to this decision notice.
21. To engage the exemption, it is not necessary to demonstrate that prejudice would occur if the information was disclosed; the information must simply fall within the class of information set out above. However, the exemption is qualified which means that for the exemption to provide a basis for withholding the information requested in all the circumstances of the case, the public authority (in this case Defra), must demonstrate that the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
22. Defra has claimed that section 35(1)(b) of the Act is engaged; that subsection exempts information relating to Ministerial communications. Such

communications are defined in section 35(5) as including “in particular, proceedings of...any committee of the cabinet”. Defra has advised the Commissioner that membership of all the committees within the scope of the request was at ministerial level. As the information is agendas for Ministerial meetings (albeit informal meetings prior to June 2001), the Commissioner accepts the exemption is engaged.

Public Interest Test

23. Having decided that the exemption is engaged, the Commissioner must then consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.
24. The Commissioner has reviewed the information redacted from the earlier agendas. He has also reviewed the later agendas, dating from 19 March 2001 to the date of the request on 17 January 2005. In applying the public interest test, the Commissioner has considered several issues which are summarised below.

Thinking Space

25. The Commissioner recognises that frank and honest debate, whether in cabinet committee or otherwise, is necessary for high quality policy formulation and that there is a public interest, in certain circumstances, in maintaining private space for discussion away from public scrutiny to formulate government policy. He notes that the Act will, therefore protect the formulation and development of government policy by maintaining privacy when it is sufficiently in the public interest to do so.
26. Defra argues that the convention of collective cabinet responsibility should be preserved and it explicitly encompasses the work of cabinet committees. Defra advises that collective responsibility is an important and longstanding constitutional principle which means that decisions of the Government are taken by the Government as a whole, and that each member of the Government is party to the decision and committed to it. Defra considers that for the convention to work effectively, it is essential that it is applied consistently. Whilst the information itself appears comparatively uncontroversial, Defra urged the Commissioner to note that agendas can contain highly sensitive information by revealing either directly or indirectly the amount of consideration a specific issue has received, the pattern of discussions over a certain period of time, those issues which may not have been discussed by a committee at all, the ministers involved in discussions and disagreements between ministers on certain issues. If committee papers were only withheld in cases where there have been disagreements, then it would soon become clear when there have been disagreements. Further, it would become possible to build up a picture of the issues that the Government was discussing.
27. The Commissioner fully recognises the constitutional significance of collective cabinet responsibility. This is an unwritten convention which undoubtedly survives the enactment of the Act. Equally, however, the new requirements – which Parliament has made legally binding - call for some adjustment of thinking within government and elsewhere about the interpretation and application of the

underlying principle. For example, the strength of the convention lies primarily in the political commitment of all Ministers to a government decision once it has been made. It is less powerful in relation to any personal or departmental differences of view or emphasis which arise during the decision-making process. The convention should not be used to create or reinforce any fiction that Ministers have always been of a single collective opinion. The public do not expect such an approach and indeed would probably be dismayed by the absence of rigorous debate before complex decisions are taken. A central rationale for freedom of information legislation is to expose decision-making processes to greater transparency unless there is good reason for confidentiality. Such greater transparency - which may indeed sometimes reveal differences of view or emphasis – need not inhibit frankness and candour.

28. In this case, however, the Commissioner does not believe that disclosure of the requested information would create any real risk. He does not accept that the ability of ministers to speak with frankness and candour would be adversely affected by disclosure. Releasing agendas will not disclose the views of any particular individual nor any disagreements between individuals or departments. Further, disclosure would not reveal the nature of any decision which may or may not have been taken. It is also the Commissioner's view that where individuals are mentioned by name, in view of their seniority, there is no reason why the public should not be aware of their presence.
29. The Commissioner notes that the requested information potentially dates from 1997 to 17 January 2005 being the date of the request.
30. It is the Commissioner's view that any policy decisions arising out of the items for discussion noted on the agendas are likely to have been taken. Even if they had not, the position will have considerably moved along. With the passage of time, the requirement for private thinking space may diminish and the desirability and need for collective responsibility may lessen when balanced against the desirability of transparency and accountability. Therefore, the Commissioner does not believe that this is a persuasive argument for withholding the information.

Transparency and accountability

31. The Commissioner recognises that there is an inherent public interest in public authorities being transparent in the decisions they take in order to promote accountability. If the background information to the decision making process are made public, there is a strong argument that this increased transparency will improve the quality of future decisions and enable the public to assess whether public authorities are acting appropriately. In particular disclosure of the agendas will enable the public to assess which matters have been discussed by the government and when and this will reveal to some extent how the government is tackling environmental issues.
32. In addition, disclosure of the requested information may improve confidence in the manner decisions are taken and this would reassure the public that all relevant information has been taken into account when determining the particular course of action to be taken.

33. The Commissioner notes that in this case, the withheld information provides a basic background to what was to be discussed. The Commissioner's view is that disclosing the information would not compromise the principle of collective responsibility in any significant way and in that there is an overriding public interest in disclosure to the extent that it will encourage greater transparency and accountability.

Public debate

34. The Commissioner notes that it is in the public interest to disclose information where this would help further the understanding of and participation in the public debate of issues of the day. There is an interest in increasing the public's understanding of how public authorities' decisions affect them and, where appropriate, in allowing the public to challenge these decisions. The Commissioner considers that for the public to participate in a debate, then for beneficial input to occur, the options being considered should be known. The Commissioner notes that whilst the information itself is not environmental, some of the issues which are to be discussed in the meetings will be of an environmental nature. There is a considerable degree of public interest in relation to any potentially environmental issues and consequently there is a strong public interest in providing information to the public about issues being considered.
35. The Commissioner accepts there is a necessity to strike a balance between disclosing sufficient information to allow informed debate and protecting the space within which Ministers are advised and formulate policy. However, having balanced these issues, the Commissioner finds that in these circumstances, encouraging informed public debate by disclosing the information creates a greater public interest than withholding the information to provide the Government with thinking space. The Commissioner bases this view on the brevity of the information (being agendas of meetings only, not the meetings minutes) and the passage of time.

Record keeping

36. The Commissioner accepts that there is a public interest in accurate record keeping. Inadequate recording which may lead to poor decision making is to be avoided. However, he does not accept that disclosure in these circumstances would lead to inadequate recording of agendas. Government has an obligation to carry out its functions effectively and each member of the public service has a duty to carry out their duties in accordance with Civil Service Code.

Summary

37. It is the Commissioner's decision that after carrying out a balancing exercise of the public interest arguments, both the earlier and later agendas should be released into the public domain in full.

38. The Commissioner considers that this will
- promote openness to enable the public to access more information about the way in which government has reached decisions,
 - improve trust and confidence in government and
 - enable citizens to understand and participate in debates on issues of public importance from a more informed standpoint.
39. The Commissioner does not believe that it is likely there will be a detrimental impact on record keeping or future policy making, and does not accept that collective cabinet responsibility will be damaged by releasing the information which does not disclose the views or disagreements of any minister. Consequently, the Commissioner considers that the public interest lies in promoting transparency and openness and encouraging public debate.
40. The Commissioner's view is that in all the circumstances of this particular case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

The Decision

41. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with section 1(1) of the Act in so far as it incorrectly applied section 35 of the Act.

Steps Required

42. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Defra shall communicate to the complainant both the "earlier and later" agendas of the Green Ministers committee meetings as previously withheld and should ensure that these are full and unredacted versions of the agendas.
43. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

44. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

45. Either party has the right to appeal against this Decision Notice to the Information 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

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

Dated the 4th day of April 2007

Signed

**Richard Thomas
Information Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 35(1) provides 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,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(5) provides that –

“In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, 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;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;