

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 14 May 2008

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

### Summary

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The complainant requested a full list of all those who met with the Prime Minister at 10 Downing Street in June 2005. The Cabinet Office disclosed some information but withheld the information relating to internal meetings with ministerial colleagues under sections 35 and 36. The Commissioner has investigated the application of both exemptions and finds that they are not engaged in relation to the information requested. The Commissioner requires the public authority disclose the information withheld under section 35 and 36 within 35 calendar days of this notice.

### The Commissioner's Role

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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

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2. The complainant has advised that on 23 June 2005 he made the following request for information to Mr Blair:

*"I would be grateful if you could provide me with a list of all those you have met on official business at 10 Downing Street over the last year, giving the date of each meeting.*

*I would be grateful if the list you provide me with includes those attending official dinners at 10 Downing Street."*

3. The Cabinet Office responded on 26 July 2005 informing the complainant that compliance with his request in its present form would exceed the appropriate cost limit and asking him to refine his request.
4. The complainant responded on 23 August 2005 refining his request to:

*“a list of the Prime Minister’s official meetings held in Downing Street in June 2005”*
5. On 23 September 2005 the Cabinet Office responded enclosing a list of those meetings which it found it could disclose under the Act. The Cabinet Office withheld the remainder of the information held as it had found it was exempt under section 35(1) (a) and (b) of the Act, as the information relates to the formulation of government policy and ministerial communications. In addition the Cabinet Office sought to rely on section 36 (2) (b) (ii) as disclosure would inhibit the free and frank exchange of views or (c) otherwise prejudice the effective conduct of public affairs. In applying the public interest test the Cabinet Office concluded that the public interest lay in maintaining the exemption.
6. On 15 November 2005 the complainant requested an internal review of this decision.
7. The Cabinet Office responded on 2 May 2006 upholding the decision of not to disclose the remaining information to the complainant under sections 35 and 36.

## The Investigation

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### Scope of the case

8. On 19 May 2006 the complainant wrote to the Commissioner asking him to investigate the Cabinet Offices refusal to disclose the disputed information under section 35 and 36.
9. The Commissioner focused his investigation on establishing what information was held in relation to the complainants request and consideration of the application of the two exemptions.

### Chronology

10. The Commissioner wrote to the Cabinet Office on 20 June 2007 asking for a copy of the withheld information. The Commissioner also asked the Cabinet Office to explain how the information fell within the exemption at section 35 and for an expansion on the public interest arguments considered in relation to this exemption. Section 36 states that information can be exempt if in ‘the reasonable opinion of a qualified person’ disclosure would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation or otherwise prejudice the effective conduct of public affairs. The Commissioner asked the Cabinet Office to confirm who the qualified person was, when their opinion was

sought and given, the information taken into account by the qualified person and an expansion of the public interest arguments considered.

11. The Cabinet Office responded on 24 October 2007 explaining that it had now reviewed the request and considered that the information relating to meetings between the former Prime Minister and external representatives could now be released as the public interest now favoured disclosure. The Cabinet Office confirmed it had sent a copy of the information to the complainant.
12. On 25 October 2007 the Commissioner replied informing the Cabinet Office that he had noted that not all the requested information had been disclosed as the meetings between ministerial colleagues, officials and advisors continued to be withheld under section 35 and 36. The Commissioner asked the Cabinet Office to respond, within 10 working days, to the questions raised in the letter of 20 June 2007. To assist the Cabinet Office the Commissioner provided a copy of the questions raised in the letter.
13. The Cabinet Office responded on 3 December 2007 stating that it had disclosed to the complainant all the information that was identified as the time of the original request. The Cabinet Office explained that it had interpreted the request to be limited to meetings with external stakeholders as the request had made reference to an earlier decision by the Parliamentary Ombudsman.
14. The Commissioner wrote again on 5 December 2007. The Commissioner acknowledged that the original request had referenced the Ombudsman's decision. The Ombudsman's decision was in relation to an earlier information request made prior to the Freedom of Information Act coming into force. The request had been for a list of those attending Chequers. The Ombudsman found that information should be disclosed but restricted the list to those attending Chequers for official dinners. This was done as the Ombudsman found that it would take too much time trawling through diaries to achieve an accurate list of everyone who was met at Chequers. However, the Commissioner pointed out to the Cabinet Office that the complainant had made it clear that he did not believe this restriction would apply in relation to this request.

*"However, presumably this would not apply in the case of 10 Downing Street. It seems quite clear to me that on the basis of the Ombudsman's findings I am entitled to receive the full list requested above."*

15. The Commissioner also pointed out the Cabinet Office's own earlier response to the complainant on 24 October 2007 which stated:

*"He also holds regular internal meetings with his ministerial colleagues and his official advisors. These meetings continue to be withheld under section 35 of the Freedom of Information Act."*

16. On 28 February 2008 the Cabinet Office finally responded. In the letter the Cabinet Office stated that despite the wording of its previous replies no further information had been withheld from the complainant because it had not conducted a search to determine what information it held in relation to internal

meetings. However, the Cabinet Office did state that it had now conducted its search and located the information. The information is being withheld under section 35(1) (a) (the names of officials listed), (b) (the timings of Cabinet Committees and subcommittees) and section 36(2) (b) (i) and (ii) and (c) (the remaining withheld information). The Cabinet Office provided further explanation regarding the application of the exemptions.

## Findings of fact

17. The information being withheld is a list of meetings held in June 2005 between the Prime Minister, his ministerial colleagues, officials and advisors.

## Analysis

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### Exemption: Section 35 'Formulation and development of government policy'

18. Section 35 (1) states that information is exempt if it relates to (a) the formulation or development of government policy or (b) Ministerial communications. Section 35(5) defines ministerial communications as any communications between Ministers of the Crown, between Northern Ireland Ministers or between Assembly Secretaries and includes proceedings of the Cabinet or of any committee of the Cabinet.
19. The Cabinet Office argue that Section 35(1) (a) is engaged in relation to the names of officials where the officials are identified with a particular policy area. As an example the Cabinet Office explain that if the Prime Minister has held several meetings with a particular minister during a time when a certain policy area was being finalised or put through Parliament, that might well indicate that the minister had had concerns about the Government's position on that policy thereby undermining the convention of collective responsibility. The Cabinet Office also argue that section 35(1) (b) is engaged as it believes the exemption applies to the timings of meetings and subcommittees.
20. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that government policy is about the development of options and priorities for Ministers. It is unlikely to be about purely operational or administrative matters which involve the application rather than the formulation of policy. At the very least, 'formulation or development' suggests something dynamic – that is, something must be under consideration within government in relation to the policy.
21. The Cabinet Office have applied section 35(1) (a) in relation to the names of officials where those are identified with a particular policy area. However, the

request is for a list of officials the Prime Minister met in June 2005 at Downing Street. Even if you can establish which policy area the individual with whom the Prime Minister met with was linked to it is unlikely that this reveals any information would actually relate to the formulation or development of any policy. The Cabinet Office have argued that as you can identify some of the officials with a particular policy remit you can determine what was being discussed. The Commissioner rejects this argument. Whilst it may be possible to determine what topic was under discussion it would not reveal any of the content of what was discussed, which options were being considered or what was recommended. The Commissioner also does not accept that if the Prime Minister meets repeatedly with a minister during the time in which a policy is being debated, that this automatically reveals that the minister must have been discussing concerns about this policy with the Prime Minister. Any speculation that this had occurred, would be just that, speculation; it is equally possible that the minister came to discuss completely unrelated matters.

22. In relation to the application of section 35(1) (b), the Cabinet Office applied this exemption to the timing of meetings of Cabinet Committees and sub committees. The exemption provided by section 35(1) (b) reads:

“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

The Commissioner interprets the term ‘relates to’ broadly. Although this has the potential to capture a lot of information, the fact that the exemption is qualified means that the public interest test applies. The information withheld under section 35(1) (b) is a list of Cabinet meetings and committee meetings along with the week in which they occurred. As ‘relates to’ is very broad it can include a diary entry or other record that a meeting took place between the Prime Minister and a minister and would also cover cabinet and committee meetings.

23. The Commissioner finds that the exemption at section 35(1) (a) is not engaged as applied to the names of officials. However, the exemption at section 35(1) (b) is engaged as applied to the references to Cabinet Committees and sub-committees.

### **Public Interest Test**

24. As the Commissioner has found that section 35(1) (b) is engaged, where applied, he therefore must go onto consider the public interest test. The Commissioner must therefore decide if the public interest in maintaining the exemption is outweighed by the public interest in disclosure of the requested information.
25. The Cabinet Office recognise that there is a public interest in disclosing information about the Prime Minister’s meetings and the Cabinet Committee system, in order to facilitate understanding of how government formulates policy

and takes decisions, to inform public debate and to increase public confidence that decisions are properly made.

26. However, the Cabinet Office found that the disclosure of the information held would not add significantly to public understanding in this area. The Cabinet Office stated that the recorded information does not, in many instances, indicate the subject matter of the meeting or the role of the attendees, which might assist in increasing understanding of the policy making process. In any event, the Cabinet Office concluded that the requirements of openness and transparency must be balanced against the proper and effective functioning of government.
27. The Commissioner agrees with the Cabinet Office that the information does not; in most instances reveal the policy area under discussion. However, the Commissioner does not agree that this lessens the public interest in disclosure of the information. The Commissioner believes that where disclosure of information would cause no significant harm, the public interest is likely to favour disclosure of the information.
28. The Cabinet Office also argue that there is a strong public interest in ensuring that the Prime Minister's time is used effectively and efficiently and that his diary is managed in a way which enables this to happen. The Prime Minister must be in a position to meet with his officials, advisers and ministerial colleagues without concern that the timing of each and every meeting will be subject to premature disclosure and public scrutiny. Disclosure of his meetings including when they had taken place and who attended would considerably inhibit this process. The Commissioner appreciates the importance of this but he does not agree that disclosure of the requested information would inhibit the Prime Minister's ability to meet with advisors etc. As the Cabinet Office have acknowledged, the information does not in most instances indicate the subject matter under discussion or the role of any attendees where listed. Even where it may be possible to speculate on the subject matter or the role of attendees, it would remain speculation, and would not reveal the content of any discussion.
29. The Cabinet Office pointed out that if disclosure of the meetings reveals that particular individuals met with the Prime Minister on a regular basis it could be inferred that those individual have access to the Prime Minister and they may well be targeted and subject to unwarranted approaches by lobbyists. This would not be in the interests of good government or in the public interest. The Commissioner recognises this concern but notes that the information requested relates to a four week period making it unlikely that disclosure could reveal any patterns in meetings.
30. Further the Cabinet Office argue that in relation to Cabinet Committee meetings there is a strong public interest, recognised by the exemption at section 35(1)(b), in protecting the way in which ministers communicate with each other and conduct the business of government through Cabinet and the Cabinet Committee system. Underpinning this is the constitutional convention of collective Cabinet responsibility, the principle that once a decision is made all members of Cabinet will present a united front. The Cabinet Office state that the protection of this convention and the proceedings of Cabinet is important to preserve the free



space around ministers and to enable them to consider the most important and sensitive policy issues without inhibition. The Cabinet Office argue that it is strongly in the public interest that meetings can take place in private way from public scrutiny and that ministers are confident that their discussions can remain confidential and will not be subject to premature disclosure. This extends to the subject matter under discussion. It is for this reason that the timing and frequency of meetings of Cabinet Committees are not routinely disclosed.

31. The Cabinet Office add that disclosure that a meeting took place on a particular date would in many cases reveal the content of the policy discussion. Further in relation to the names of officials, there is a strong interest in protecting the neutrality of the civil service. If a civil servant becomes publicly associated with a particular area of policy, ministers might be less willing to accept that such advice is neutral or impartial and could undermine the convention of ministerial responsibility.
32. The Commissioner rejects the argument that there is a strong public interest inherent in the existence of the exemption at section 35(1) (b). In *DfES v the Commissioner & the Evening Standard (EA/2006/0006)* DfES argued that in creating class based exemptions Parliament had accepted that “any disclosure of information within this class caused some damage...to the public interest”. This was rejected by the Tribunal which found that there was no inherent damage caused by disclosing information covered by such a class based exemption.

“...inclusion within such a class of information simply indicates the need and right of the public authority to examine the question of the balance of public interests when a request...is received.... The weighing [of the public interest] exercise begins with both pans empty and therefore level.....If, after the weighing exercise is complete, the scales are still level the public authority must disclose....Such an equilibrium may not be a purely theoretical result: there may be many cases where the apparent interests in disclosure and maintaining the exemption are equally slight.”

33. The Commissioner also does not agree with the Cabinet Office’s assertions that disclosure would undermine the convention of collective responsibility. The disclosure of a list of meetings in no way shows the topics under discussion with ministers even where it may be possible to determine or speculate on the subject matter under discussion. The general principle of collective responsibility is outlined in the ‘Ministerial Code’:

*“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.”*

34. The Commissioner does not believe that disclosure in any way indicates the internal discussions taking place within Cabinet and so cannot be said to be undermining the convention.

35. The Commissioner also does not accept that the meetings list can link civil servants to any particular area of policy. Where individuals are named there is no indication of any subject matter under discussion and even if it were possible to speculate he does not agree that this would affect the impartiality or neutrality of the civil service. As acknowledged by the Cabinet Office it is not possible from the list to determine individuals roles or be privy to the content of the discussions i.e. the stance taken by individuals in any discussion taking place. He also notes that the list only relates to a four week period and any patterns would be difficult to determine from such a brief time frame.
36. The Commissioner does not find that there is any significant harm to the public interest in disclosure of the information. He believes disclosure would increase public understanding of the way in which the Prime Minister and his office work and of the role of Cabinet. For these reasons the Commissioner finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information withheld under section 35(1) (b).

**Exemption: Section 36 'Prejudice to the effective conduct of public affairs'**

37. Section 36(2) provides that information is exempt if disclosure under the Act :(b) would or would be likely to inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of view for the purposes of deliberations; and (c) would otherwise prejudice, or would be likely otherwise to prejudice the effective conduct of public affairs.
38. Information can only be exempt by virtue of section 36 if 'in the reasonable opinion of a qualified person' disclosure would, or would be likely to lead to the above adverse consequences. In order to establish that the exemption has been correctly applied the Commissioner must:
- Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given;
  - Consider whether the opinion was objectively reasonable and reasonably arrived at.
39. The Cabinet Office originally sought to rely on section 36 to withhold the list of official meetings the Prime Minister had in June 2005 at Downing Street. During the course of the investigation the Cabinet Office disclosed this list to the complainant explaining that it was withholding the details of meetings with ministerial colleagues, officials and advisors under section 35. This was on 24 October 2007. The Cabinet Office explained to the Commissioner that it had interpreted the request as being limited to this information; however, following discussions with the Commissioner it accepted that the request was also for all meetings including those with ministerial colleagues etc. In light of this the Cabinet Office conducted a search for this information and wrote to the Commissioner on 28 February 2008 explaining that this had been located and was being withheld under section 35 and 36. The Cabinet Office explained that



sections 35(1) (a) and (b) applied to certain meetings listed in the withheld information and the remaining information was being withheld under section 36.

40. Because of this the Cabinet Office has only provided the Commissioner with details of the qualified person in relation to its revised interpretation of the request. The Commissioner has therefore established that the qualified person was The Rt Hon Ed Miliband MP, Minister for the Cabinet office. His opinion was sought and given on 28 January 2008.
41. The Cabinet Office stated that the Minister was of the opinion that the release of the requested information would, or would be likely to prejudice the free and frank provision of advice, or otherwise prejudice the effective conduct of public affairs because:
  - The Prime Minister needs to be able to meet his advisers and his ministerial colleagues without concern that the timing and frequency of each and every meeting will be subject to public scrutiny;
  - It might be possible to infer that topic of discussions from knowledge of its timing and that premature disclosure of this information would have a negative impact upon the ability of the Prime Minister to engage in free and frank discussions with individuals of his choosing.
42. The Information Tribunal has decided (*Guardian & Brook v The Information Commissioner & the BBC*) (EA/2006/0011 and EA/2006/0013) that a qualified person's opinion under section 36 is reasonable if it is both '*reasonable in substance and reasonably arrived at*'. It elaborated that the opinion must therefore be 'objectively reasonable' and based on good faith and the proper exercise of judgement, and not simply '*an opinion within a range of reasonable opinions*'. However, it also accepted that '*there may (depending on the facts) be room for conflicting opinions both of which are reasonable*'. In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that material which may exist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.
43. The Cabinet Office has provided no information to explain what information was put to the Minister in order for him to reach his decision; they have simply stated what his decision was. The Commissioner therefore does not know that the Minister considered when reaching his decision or whether he had sight of the withheld information when making it.
44. The Commissioner has viewed the information and is not persuaded that, in the circumstances of this case, that the opinion of the qualified person is a reasonable one, as he does not consider that disclosure of the information would, or would be likely to: inhibit free and frank advice or the free and frank exchange of views; or otherwise prejudice the effective conduct of public affairs.
45. In reaching this decision the Commissioner has considered the Tribunal Decision EA/2005/005 '*John Connor Press Associates vs The Information Commissioner*'. The Tribunal confirmed that 'the chance of prejudice being suffered must be more

than a hypothetical possibility; there must have been a real and significant risk' (para 15). This was further expanded in the Tribunal Decision *Hogan vs The Information Commissioner EA/2005/0026* and *Bexley vs The Information Commissioner EA/2006/0060*.

46. In these cases the Tribunal considered what was meant by would, or would be likely to prejudice and when a prejudice exemption might apply. The Tribunal found that 'prejudice must be real, actual and of substance', it went on to explain that there are two alternative ways in which disclosure can be said to prejudice and that one of these must be shown. Where prejudice 'would be likely to occur' the likelihood need not be more probable than not, though it should be real and significant; where prejudice 'would' occur, the likelihood should be greater – more probable than not.
47. The Commissioner has considered the content of the information and notes that there are only five instances where the title of the appointment makes any reference to the topic under discussion. Where there is reference to a specific topic under discussion it is a single word reference; and in relation to some topics mentioned it would be expected that the Prime Minister would be meeting with people to discuss such topics regularly at the time. Even where the topic under discussion might come as a surprise it is difficult to see how knowing that the Prime Minister has met to discuss a specific subject divulges anything of the content of that meeting or have any of the adverse effects put forward by the Cabinet Office.
48. The Cabinet Office have argued that disclosure would prejudice the free and frank provision of advice and the effective conduct of public affairs because the Prime Minister needs to be able to meet with his advisers and ministerial colleagues without the timing and frequency being open to public scrutiny; and because disclosure prematurely would have a negative impact on his ability to engage in free and frank discussions. Whilst the Commissioner appreciates the importance of this, he does not agree that disclosure, even if it results in the aforementioned scrutiny, would impinge on the Prime Minister's ability to continue to meet with and discuss frankly with whom and on which matters he wishes. The list of names, even when linked to a certain policy area, do not give any indication of the content of any discussion and an inference made could be inaccurate.
49. The Commissioner also notes that the information in question only relates to a four week period and whilst the regularity of some meetings would be revealed by disclosure, it would be difficult to establish any sort of pattern to the meetings or draw conclusions which might lead to the kind of prejudice referred to in section 36.
50. The Commissioner recognises that there may be room for conflicting opinions both of which are reasonable but in the circumstances of this case he does not consider that the qualified person's opinion was reasonable.
51. For these reasons the Commissioner finds that section 36 is not engaged as he does not accept that the opinion of the qualified person is a reasonable one. He has therefore not gone on to consider the public interest test

## The Decision

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52. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:
- (i) In relation to the information provided on 24 October 2007, the Home Office breached sections 10 by failing to comply with the requirements of section 1(1) (b) within the time limit provided by section 10.
  - (ii) The original refusal notice issued on 24 September 2005 only related to stakeholder meeting and did not provide the complainant with a refusal notice for internal meeting information. The Home Office have therefore breached section 17(1) for failing to issues a refusal notice, section 1(1) (a) in failing to confirm for deny that information is held, and section 1(1) (b) for failing to disclose the requested information.

## Steps Required

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53. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- i. Disclosure the information being withheld under section 35 and 36.
54. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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- 55 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

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56. 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](mailto: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 14<sup>th</sup> day of May 2008**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

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