

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 February 2008

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

Summary

The complainant requested Cabinet minutes and records relating to meetings it held from 7 to 17 March 2003 where the Attorney General's legal advice concerning military action against Iraq was considered and discussed. The Cabinet Office confirmed to the complainant that during the period in question, there were two meetings of the Cabinet. However, it withheld the information under sections 35(1)(a) and (b) of the Act ('Formulation of government policy' and 'Ministerial communications'). The Commissioner accepts that sections 35(1)(a) and (b) are engaged in this case. However, he concluded that (subject to certain specific redactions) the balance of the public interest under section 35 favours disclosure of the information in full.

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. On 27 December 2006 the complainant wrote to the Cabinet Office requesting the following:
 - Cabinet minutes and records relating to meetings it held from 7 to 17 March 2003 where the Attorney General's legal advice concerning military action against Iraq was considered and discussed.
 - Specifically, records, in paper and electronic data form, of Cabinet deliberations about Iraq's weapons of mass destruction and the so-called

“automaticity” trigger for military action in UN Resolution 1441, as specified in the Attorney General’s advice of 17 March 2003, in order to gauge the level of agreement and satisfaction within Cabinet toward the legality of such military action.

- From records of Cabinet meetings over this period, information appertaining to Cabinet knowledge of, and deliberations about, differing and conflicting legal opinions and assessments of the Iraqi situation from such sources as Downing Street, the Joint Intelligence Committee, Foreign Office legal officers and UK negotiators at the UN.
3. In his request, the complainant explained that he takes “automaticity” to mean “a perceived breach of UN Resolution 1441 legitimating military action through triggering previous resolution and thus not requiring a second and new UN resolution.”
 4. The Cabinet Office responded to the complainant on 25 January 2007. It confirmed that during the period in question, there were two meetings of the Cabinet, which took place on 13 March 2003 and 17 March 2003. However, the Cabinet Office informed the complainant that the sections of the minutes relevant to his request were being withheld under sections 35(1)(a) and (b) of the Act (Formulation of government policy and Ministerial communications).
 5. In its response, the Cabinet Office provided the following public interest factors both for and against for disclosure of the information in order to justify why, on balance, the public interest favours the withholding of the requested information (the following are direct quotations).
 - i. For disclosure
 - There is clearly a public interest in the government’s policy-making and decision-making processes being transparent and open to public scrutiny and accountability.
 - There is also a public interest in ensuring that the public are able to scrutinise the manner in which important decisions were taken.
 - The disclosure of such information would also contribute to improving the public’s knowledge of the way in which Cabinet operates in practice.
 - ii. Against disclosure
 - The vital importance of ensuring that Ministers and their officials continue to be able to debate issues relating to policy formulation freely and in confidence, while reaching a decision.
 - There is clearly a strong public interest in high quality decision making. The effective formulation of policy requires the maintenance of a private space within which policy options can be developed before they are presented to the public.
 - If Ministers and officials knew or thought that once a decision was reached, information pertaining to the process by which they reached that point was to be revealed, they might be less willing to engage in full and frank discussions of the issues. Their candour in these discussions could be affected by their assessment of whether the content of these discussions will be disclosed.

- The convention of Cabinet collective responsibility allows for full considerations of policies and actions, as each Cabinet member knows that they are individually responsible for the decisions reached in Cabinet.
6. However, the Cabinet Office confirmed to the complainant that “some information about those Cabinet discussions is available in the public domain through the regular press briefings made by the Prime Minister’s Official Spokesman.” It also supplied the complainant with two annexes containing the following:
- Summaries of the aforementioned press briefings
 - The Attorney General’s view on the legality of military action in Iraq
7. On 27 January 2007, the complainant wrote to the Cabinet Office to request an internal review of its decision. In his request, the complainant put forward the following points:
- i. It must be open to dispute whether the specific instance of decision making about the imperative and legality of invading Iraq in March 2003 was an example of “high quality policy making” by Government.
 - ii. I would be interested to know the criteria used in the public interest test to arrive at this conclusion, because otherwise section 35 of the Act may become a blanket with which to shield poorly constructed and bad policy making, protecting ministers from public accountability.
 - iii. Application of an exemption in this way makes it impossible to know whether the “formulation of policy” was “effective” in the Cabinet meetings held on 13 and 17 March 2003.
 - iv. Only disclosure can satisfy the “strong public interest” that “high quality policy making” was in evidence in this case.
 - v. Given the immense public policy controversies generated by the Iraq invasion and occupation and the huge cost in lives resulting, are these public interests not “sufficiently powerful” in this case?
8. The Cabinet Office notified the complainant of the outcome of its internal review on 12 April 2007, in which it informed him of the following:
- i. In all the circumstances of the case, it remains the view that the balance of the public interest is in favour of maintaining the exemption under section 35 and there are no grounds for altering the decision taken.
 - ii. The decision not to disclose the information was made after very detailed consideration, which included consideration of the public interest arguments in favour of disclosure.
 - iii. A significant amount of information on this issue has already been made publicly available to help ensure that the public are able to scrutinise the manner in which this decision was taken:
 - on 17 March 2003 the Attorney General made a written statement to Parliament setting out his concluded view of the legal basis for the use of force against Iraq;

- as you have been made aware some information about the discussions at Cabinet on 13 and 17 March is available in the public domain through the press briefings made at that time by the Prime Minister's Official Spokesman;
 - the Attorney General's advice of 7 March 2003 on the legality of military action against Iraq was published on 28 April 2005;
 - and, on 25 May 2006 in response to an Enforcement Notice by the Information Commissioner the Cabinet Office and the Legal Secretariat to the Law Officers issued a statement, with which the Information Commissioner was satisfied, which gave information relating to the advice given on the legality of military action in Iraq in 2003.
- iv. However, there is also a strong public interest in ensuring that Ministers' discussions in Cabinet are full and frank and in protecting the confidentiality of those Cabinet discussions in order to maintain the convention of collective responsibility and allow free space around ministers to consider the most important policy topics without inhibition.
- v. To arrive at fully reasoned and agreed policy positions and plans for action discussion needs to be free and uninhibited. This may be compromised, to the detriment of good government, if Ministers are concerned that details of their considerations might be revealed.
- vi. The convention of collective Cabinet responsibility depends upon free, frank and confidential discussions to arrive at collective decisions. This is particularly the case when policy issues of the highest importance, such as the decision to take military action, are concerned.

The Investigation

Scope of the case

9. On 18 April 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- i. The list of public interest arguments given in the Cabinet Office's original response of 25 January 2007 have not been satisfactorily addressed by the rationale of the exemptions.
 - ii. An apparent contradiction exists between, on the one hand, the recognized public interest in "the government's policy-making and decision-making processes being transparent and open to public scrutiny and accountability", "ensuring that the public are able to scrutinize the manner in which important decisions were taken" and, on the other, denying this public access in the name of securing so-called "high quality policy making".

- iii. Exempting Cabinet deliberations and decisions from public scrutiny may certainly be in the interests of Cabinet ministers, but can only be seen as harmful to a democracy by merely permitting an official assertion of what happened without the means to verify it. If, for example, the Prime Minister's Official Spokesman asserts that "(Cabinet) ministers understood the enormity of the issues which were being discussed and the gravity of the situation" and that "there was very strong (Cabinet) support for the position which the Government had adopted and the efforts which had been undertaken to find a way forward" (PMOS Briefing 17 March 2003, Cabinet FoI response Appendix 1, 25 January 2007), why should the Cabinet Office feel compelled to refuse disclosure of information which can only verify to the public the truth of that statement?
- iv. Far from serving a "public interest" in "high quality policy making", does application of an exemption not rather create a public impression that something not entirely truthful has been uttered.
- v. How public disclosure would diminish "full and frank discussions" is not explained. Can it not be argued with equal validity that prior knowledge of public scrutiny would spur representative government to more and not less qualitative debate? Why should ministers who have deliberated in a "fully reasoned" way want to withhold from the public the fruit of that exercise?
- vi. Exemption from disclosure may be publicly construed as an admission of having something to hide or being economical with the truth.
- vii. The PMOS briefings given as an appendix showing information apparently going into the public domain raise more questions than they answer, inviting further disclosures from the actual Cabinet minutes. Three examples suffice:
 - a) the Deputy Prime Minister's statement after the Cabinet meeting of 17 March referring to Blair's pending Commons statement about military action, qualified by "if it was necessary", and support for British troops "should it be necessary" suggests that the Cabinet position on military invasion was not as "rock solid" as indicated.
 - b) the reference to Tony Blair's sofa style of government one to one meetings with Cabinet ministers before Cabinet meetings raises questions about how this potentially influenced "free and frank" discussions within Cabinet.
 - c) there has been no public disclosure of whether "regime change" was discussed in these key Cabinet meetings despite its subsequent emergence of this as a more powerful motive for the invasion than weapons of mass destruction.
- viii. In this instance, that exemption under Section 35(1) (a) and (b) projects "collective cabinet responsibility" as a conspiracy against the public right

to know, masking poor deliberation and decision making behind an impenetrable facade of official claims to the contrary, facilitated by the very refusal to disclose.

Chronology

10. On 17 July 2007 the Commissioner wrote to the Cabinet Office to ask for any further representations it wished to make on the matter, particularly with regard to the issue of collective Cabinet responsibility.
11. On 1 August 2007 the Commissioner wrote to the Cabinet Office to also request that he visit it to view the requested information.
12. On 19 September 2007 the Commissioner visited the Cabinet Office and viewed the withheld information in situ.
13. On 22 October 2007 the Cabinet Office sent the Commissioner a confidential submission setting out "the specific damage that would arise from the disclosure of this information."
14. On the same day, the Cabinet Office also provided the Commissioner with further representations, in line with his request of 17 July, the content of which it did not consider confidential.

Findings of fact

15. The Commissioner understands that Cabinet collective responsibility is a constitutional convention at Westminster that members of the Cabinet must publicly support all government decisions made in Cabinet, even if they do not privately agree with them. This support includes voting for the government in Parliament. This doctrine also applies to all members of the government.

Analysis

Exemption

Section 35(1)(a) - Formulation of government policy

Section 35(1)(b) - Ministerial communications

16. Section 35 is a class based exemption which means that, in this case, so long as the information 'relates' to the formulation of government policy or ministerial communications, the exemption is engaged. The Commissioner is satisfied that the information withheld from the complainant engages the exemption under section 35 of the Act and, in particular, subsections (1)(a) and (b). The Commissioner considers this to be the case for the following reasons:

- Cabinet is the ultimate arbiter of all Government policy. The records of the discussions at these Cabinet meetings relate to the process by which the Government's position and decision on military action in Iraq was formulated.
 - The minutes exclusively detail ministerial discussions and were recorded for the purpose of providing ministers (above all) with an accurate account of the meetings.
17. However, in order for the section 35 exemption to be maintained, in all the circumstances of the case, the public interest in maintaining the exemption must outweigh that in the disclosure of the information. The Commissioner therefore proceeded to analyse the public interest in respect of the information withheld from the complainant.

Public interest test

18. In its letter to the Commissioner of 22 October 2007 (the contents of which it did not consider confidential) the Cabinet Office provided the following public interest arguments as to why the Cabinet minutes should not be released. Those which were additional to the reasoning previously provided to the complainant were as follows (and are directly reproduced here):
- i. The very existence of the exemption at section 35 in the Act is designed to protect the way in which ministers communicate with each other and conduct the business of government through Cabinet and the Cabinet Committee system.
 - ii. At the very heart of that system is the constitutional convention of collective Cabinet responsibility. The maintenance of that convention is fundamental to the continued effectiveness of cabinet government. There are very strong public interest arguments in withholding discussions within Cabinet in order to maintain the convention of collective responsibility and to preserve free space around ministers to enable them to consider the most important and sensitive policy issues without inhibition. To release the details of discussions between ministers in Cabinet would undermine this and would manifestly not be in the public interest.
 - iii. Cabinet and Cabinet Committees are the only groups formally empowered to take binding decisions on behalf of government. The convention of collective Cabinet responsibility allows for the fullest consideration of policies and actions because all Cabinet members know that they are individually responsible for the decisions reached in Cabinet.
 - iv. If Ministers do not feel able to discuss openly at Cabinet the most important and sensitive policy issues, such as the legal advice in military action in Iraq, for fear that subsequent discussions might be subsequently disclosed, then Government decision making at the highest level and collective Cabinet responsibility would be seriously undermined.

- v. It is in the public interest....that once a decision has been reached all members of the Cabinet will present a united front. It is also the case that in order to safeguard collective Cabinet responsibility the principle must be applied consistently. If only information revealing agreement between ministers was released it would soon become apparent that where information had been withheld there must have been disagreement and the principle of collective Cabinet responsibility would then have been breached.
 - vi. It is not in the best interests of policy formulation, and consequently in the public interest, that every stage of the policy making process and every aspect of ministerial discussion should be exposed to public scrutiny.
 - vii. Section 1.2 of the Ministerial Code puts a minister's duty to uphold the principle of collective responsibility as the first in the list of principles of ministerial conduct.
 - viii. In this case, the specific harm which would be caused by disclosure arises from the subject of the Cabinet discussion, the decision to take military action against Iraq. (The Cabinet Office's view of the specific damage that would arise from disclosure of this information was provided to the Commissioner in confidence.)
19. As section 35 is a qualified exemption, a blanket approach cannot be taken to justify the withholding of all information to which the exemption is engaged. Rather, the analysis of the public interest must focus on the circumstances and context of the information in each case.
 20. The Commissioner notes that the Cabinet Office's analysis largely rests on generic arguments in relation to the public interest favouring the withholding of information under section 35 and, specifically, in relation to the convention of collective Cabinet responsibility. However, as section 35 is a qualified exemption, collective cabinet responsibility cannot be used to prevent the withholding of Cabinet minutes in all circumstances where disclosure would impinge on this convention. Rather, it may only be used as a factor (albeit a significant one) in the overall public interest under section 35. As such, the Cabinet Office should have focused on the damage to collective Cabinet responsibility that would be caused by the release of these particular Cabinet minutes and the way in which, in this case, it would outweigh the public interest in disclosure.
 21. In contrast to the factors put forward by the Cabinet Office to support the public interest in withholding the information, in respect of the exemption under section 35, the Commissioner considers several public interest factors to favour disclosure. Though intermixed, they can be summarised in the following terms:
 - The gravity and controversial nature of the subject matter
 - Accountability for government decisions
 - Transparency of decision making
 - Public participation in government decisions

22. The Commissioner considers that a decision on whether to take military action against another country is so important, that accountability for such decision making is paramount. Though not strictly relevant, acceptance by the current Prime Minister that decisions to go to war should ultimately be referred to Parliament reinforce arguments flowing from the gravity of subject matter.
23. In this case, in respect of the public debate and controversy surrounding the decision to take military action in Iraq, the process by which the government reached its decision adds to the public interest in maximum transparency. This is reflected by, among other matters, the controversy surrounding the Attorney General's legal advice on the legality of military action and the ministerial resignations which took place at that time.
24. It is also the case that there is a widespread view that the justification for the decision on military action in Iraq is either not fully understood or that the public were not given the full or genuine reasons for that decision. In coupling this context with his analysis of the information itself, the Commissioner believes that its release would assist in addressing uncertainties and controversies in this respect. This would serve the public interest in relation to each of the factors he has summarised in favour of disclosing the information.
25. From his detailed analysis of the specific information withheld, the Commissioner further considers that:
 - i. The information referred to by the Cabinet Office which has been placed in the public domain does not, in light of the contents of the withheld information, sufficiently enable the public to "scrutinise the manner in which this decision was taken".
 - ii. To more fully understand this particular decision of the Cabinet, the Commissioner believes that disclosure of these minutes is necessary. Release of the minutes would therefore serve the public interest in respect of transparency and public understanding of the relevant issues in this case. This would enable the public to be made aware of what was officially recorded about any evidence and argument the Cabinet considered and then the process the Cabinet followed in making a decision.
 - iii. Disclosure of these minutes would also enhance and enable greater understanding of the information already in the public domain.
26. The Commissioner fully recognises the weight of the Cabinet Office's arguments about the importance of Cabinet's ability to freely consider the most important and sensitive policy issues without inhibition and for not damaging the convention of Cabinet collective responsibility. However, in this case, the Commissioner believes that such arguments for the withholding of the information are outweighed by the public interest in its disclosure. He believes this to be the case for the following reasons:

- i. Release of these two specific and unusual sets of Cabinet minutes would not in itself undermine the convention of Cabinet collective responsibility. (This was the main thrust of the Cabinet Office's argument against release.)
 - ii. In respect of effects on Cabinet collective responsibility, disclosure of the minutes will not set a dangerous precedent in respect of other Cabinet minutes. This is because the Commissioner accepts that the protection of the convention of Cabinet collective responsibility is, in general terms, a strong factor favouring the withholding of Cabinet minutes.
 - iii. In this case the Commissioner considers the public interest in transparency, accountability, public debate and understanding of decisions made to be more important considerations than that in the importance of being able to discuss policy issues without inhibition.
 - iv. Each decision must be based on the circumstances of each case, regardless of the status of the information to which the exemption was applied. The Act does not allow for Cabinet minutes to automatically be withheld as a class of information. The logic of the Cabinet Office's argument would turn section 35 into an absolute exemption where Cabinet minutes are involved. The Commissioner does not consider the Cabinet Office's arguments against disclosure to sufficiently focus on the contents of the specific Cabinet minutes in this case.
27. Under the cover of this Notice, the Commissioner is providing the Cabinet Office with a confidential annex elaborating on his analysis and conclusion, setting out his *specific* reasons as to:
- why the information contained with the minutes led to his assessment of the positive consequences in respect of the public interest that would follow from their disclosure; and
 - why the convention of Cabinet collective responsibility would not be harmed by the release of the minutes.
28. Taking all the above factors into consideration, the Commissioner has concluded that although section 35 is engaged, in all the circumstances of this case the public interest in maintaining that exemption does not outweigh the public interest in disclosing all the requested information except that which should be redacted in accordance with the next paragraph.

Redacted information

29. The confidential submission mentioned in paragraph 13 above sets out specific damage which, it was claimed, would arise from disclosure of the requested minutes. That submission in particular focuses on a number of specific references in the Cabinet minutes which, it was claimed, would have a detrimental effect on international relations. The commissioner notes that no reliance has been placed on upon section 27 of the Act ('International Relations' exemption), but he nevertheless accepts that the points made can be treated as additional public

interest arguments in support of maintaining the exemptions under section 35(1)(a) and (b). He does not consider that these points are sufficiently strong, in public interest terms, to tip the balance against disclosure of the requested minutes as a whole. However, the Commissioner has concluded that there are a number of very specific references in the minutes in respect of which the public interest in maintaining the exemptions does outweigh the public interest in disclosure. In other words, the balance is tipped for these specific references. These references, which are identified in the confidential annex to this Decision Notice, can and should be redacted from the minutes to be disclosed.

The Decision

30. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

31. The Commissioner requires the public authority to take the following step to ensure compliance with the Act:

Disclose to the complainant the two sets of Cabinet minutes held in relation to the request, subject to the redactions specified in the confidential annex to this Decision Notice.

32. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

33. 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

34. 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@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

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 19th day of February 2008

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Formulation of Government Policy

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 or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides 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-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.”

Section 35(3) provides that –

“The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).”

Section 35(4) provides that –

“In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular 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.”

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;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."