

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 30 September 2008

Public Authority: Ministry of Justice
Address: Selborne House
Victoria Street
London
SW1E 6QW

Summary

The complainant requested minutes of the meetings of the cross party group on House of Lords reform. This request was refused under section 35(1)(a) (formulation and development of government policy). The Commissioner is satisfied that the exemption is engaged, and has decided that – notwithstanding that the withheld information relates to a matter of such significance as House of Lords reform - in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has attached particular weight to the on-going and unresolved nature of policy formulation in relation to House of Lords reform, the risks of disruption to progress, the nature and status of the cross party group, the expectations of confidentiality which covered its discussions and the strong possibility that it may be re-convened.

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 made the following information request on 24 July 2007:

"I am seeking to see copies of the minutes of the meetings of the Government's cross party group on House of Lords reform"

3. The public authority responded to this on 22 August 2007. This response refused

the request, with the public authority citing the exemption provided by section 35(1)(a) (formulation or development of government policy).

4. The complainant responded to this on 30 August 2007 and asked that the public authority carry out an internal review of its handling of his request. The public authority responded with the outcome to the review on 18 October 2007. This upheld the initial refusal of the request under the exemption provided by section 35(1)(a).

The Investigation

Scope of the case

5. The complainant contacted the Commissioner on 25 March 2008 to complain about the refusal of his information request. The complainant stated that the cross party group on House of Lords reform (the cross party group) does not constitute part of government and thus could not be subject to the exemption provided by section 35(1)(a). The complainant also referred to newspaper articles on the subject of House of Lords (HoL) reform that he believed to have been based on information 'leaked' about the cross party group discussions.
6. During the case handling process, it was clarified to the complainant that only those minutes in existence at the time of his request would be within the scope of his request and of this case. The complainant clarified that his request was for the minutes of all meetings of the cross party group since its inception in March 2006. This notice relates to the record of the meetings of the cross party group dated as follows:

23 March 2006
12 October 2006
31 October 2006
8 November 2006
21 November 2006
7 December 2006
24 May 2007
25 June 2007
7. Several papers are referred to within the minutes as having been circulated in the meetings. Whilst it could be argued that these papers may constitute part of the meeting minutes, the Commissioner has not considered this aspect at this stage, concentrating first on whether the minutes themselves should be disclosed.

Chronology

8. The Commissioner contacted the public authority initially on 30 May 2008. In this letter the basis for the complaint was set out and the public authority was asked to respond explaining its stance. Specifically, the public authority was asked to respond to the following:

- Describe the background to the formation of the cross party group.
 - Who forms the membership of the cross party group?
 - To whom does the cross party group report?
 - What is the purpose of the cross party group?
 - What are the possible outcomes of the work of the cross party group, e.g. could it influence the detail of legislation on House of Lords reform?
9. The public authority was also asked to respond giving any further arguments that it wished in addition to those given in the refusal notice and the internal review response as to why the exemption was considered to be engaged and why the public interest was believed to favour the maintenance of the exemption. The issue of the newspaper articles apparently based on leaked details of the cross party group discussions was also raised. The public authority was asked to respond stating whether it was aware of any information about the cross party group discussions having been leaked and what relevance any previous disclosure may have on its arguments about maintenance of the exemption. Finally, the public authority was asked to provide to the Commissioner a copy of the information falling within the scope of the complainant's request.
10. The public authority responded to this on 18 July 2008. Its response to the bullet points above was as follows:

- Describe the background to the formation of the cross party group.

This group was formed by the then Lord Chancellor in March 2006 with the purpose of attempting to achieve cross party consensus on HoL reform. The work of this group contributed to the Government White Paper on HoL reform published in February 2007. The group was reconvened in March 2007 and held further meetings prior to the publication of the most recent HoL reform White Paper in July 2008.

- Who forms the membership of the cross party group?

Most recently the membership consisted of:

Labour: Jack Straw MP, Lord Hunt, Baroness Ashton

Conservative: Theresa May MP, Nick Herbert MP, Lord Strathclyde

Liberal Democrats: Simon Hughes MP, Lord McNally, Lord Tyler

Cross Benches: Baroness D'Souza

Lords Spiritual: the Bishop of Chelmsford

- To whom does the cross party group report?

The cross party group does not report directly to anyone. The Justice Secretary has responsibility for HoL reform and the cross party group discussions have

formed part of this process.

- What is the purpose of the cross party group?

The cross party group was initially established with the intention of the three main parties reaching consensus on three key areas of HoL reform: powers, composition and transition. The group discussions initially contributed to the February 2007 HoL reform White Paper. The group was reconvened following this and held further discussions that contributed to the July 2008 HoL reform White Paper.

As well as contributing to the White Papers, the intention of the cross party group was that the three main parties would include similar pledges on HoL reform in their manifestos at the next general election.

- What are the possible outcomes of the work of the cross party group, e.g. could it influence the detail of legislation on House of Lords reform?

The public authority stated that the outcomes so far were that it had informed the free votes in the House of Commons in March 2007, which had given a clear direction for the future of HoL reform, and had enabled the development of consensus on key issues of HoL reform between the three main parties.

The public authority also stated that a possible future outcome of the work of the cross party group would be that the *"consensus developed in the talks be the platform for developing a wider consensus"*.

11. On the issue of apparent leaks of information, the public authority stated that no official disclosure had been made *"by Ministers or their officials"*. On the issue of what relevance these previous disclosures may have here, the public authority stated that the group had met since the newspaper articles and the content of the articles was *"not necessarily reflected in the group's final deliberations."*
12. In connection with the public interest, the public authority stated that its position was that disclosure would be detrimental to the process of the formulation and development of government policy. The public authority stated that it believed it is vital for the government to be able to discuss all policy options in a fully free and frank manner. The public authority believed that disclosure would be detrimental to this process as participants would be less than free and frank if they were concerned that their contributions would later be subject to disclosure. The public authority also believed that the publication of the July 2008 White Paper had satisfied the public interest as it had detailed the issues discussed by the cross party group and outlined where cross party consensus had not been achieved.
13. The Commissioner contacted the public authority again on 1 August 2008 for further details about its public interest arguments. It was noted that an argument likely to carry some weight in this case is that the withheld information relates to a matter of constitutional significance and that, given this subject matter, it was likely that a strong argument could be made that the public interest favours disclosure. The public authority was asked to respond addressing this issue.

14. The public authority responded to this on 15 August 2008. The public authority acknowledged that the information relates to an issue of constitutional significance and recognised that this would contribute to the weight attributed to the public interest arguments in favour of disclosure of this information. However, the public authority reiterated that it believed that the public interest had been served previously through the publication of the White Paper and also stated that the three main political parties had publicised their positions on HoL reform. The public authority stated that the positions of the members of the cross party group had changed during the discussions and that this was indicative of the need to keep the record of discussions of this kind confidential in order that the participants would feel able to alter their position. The public authority also reiterated its argument about disclosure having a detrimental effect on the level at which participants in discussions of this kind would contribute freely and frankly.
15. The Commissioner contacted the public authority again on 8 September 2008. At this stage the public authority was asked to respond to the following:
- What is the likelihood of the cross party group on House of Lords reform being reconvened?
 - Is the use of cross party groups similar to that convened to discuss House of Lords reform a commonly used method of policy formulation and development, or is it the case that the cross party group here is unusual or unique?
 - Were the members of the cross party group on House of Lords reform given any specific guarantee that the meeting minutes would remain confidential? If no, is there any other reason why the members of the group would hold an expectation of confidentiality?
 - Within the minutes that constitute the withheld information in this case, are there specific paragraphs which the MoJ feels particularly strongly should not be disclosed?
16. The public authority responded to this on 15 September 2008, stating that there was a “*strong possibility*” of the cross party group being reconvened as cross party consensus on several key issues of HoL reform has yet to be reached. On the issue of whether cross party groups are a commonly used method of policy formulation or development, the public authority confirmed that they are not and that this is an unusual method of policy making. The public authority stated that the Secretary of State had advised the members of the cross party group “*several times*” that the proceedings of the group would remain confidential and that the government did not intend to disclose the minutes of these meetings. The public authority did not wish to advance any arguments relating to specific paragraphs.

Analysis

Exemption

Section 35(1)(a)

17. Consideration of this exemption is a two stage process. Firstly, in order for the

exemption to be engaged, the information in question must relate to the formulation or development of government policy. Secondly, this exemption is qualified by reference to the public interest. If the public interest does not favour maintenance of the exemption, the information should be disclosed.

Formulation or development of government policy?

18. This exemption is available only to those public authorities that have functions relating to the formulation or development of government policy. As the public authority in this case is a central government department, it is clear that it does have functions in this area and that this exemption is, therefore, available to it.
19. As noted above, this exemption applies to information that 'relates to' the formulation or development of government policy. The approach of the Commissioner to the term 'relates to' as it used in the Act is that it should be interpreted broadly. Rather than a minute dissection of the information in question, the exemption will be engaged where the information can overall be accurately characterised as relating to formulation or development of government policy.
20. The process of HoL reform is at the White Paper stage. Had this process been further advanced and the withheld information recorded discussions about, for example, giving effect to finalised legislation, this may have been indicative that the withheld information related to the implementation of an existing policy. However in this case the process is at the White Paper stage, which indicates that policy in this area was being formulated at the time of the request.
21. The complainant has argued that this exemption cannot be engaged here as the cross party group does not form part of government. The Commissioner's approach here has not been to consider in detail the status of the cross party group, rather it has been to consider whether the work of this group can be accurately characterised as contributing to the formulation of government policy.
22. The Commissioner has considered three main factors in reaching his conclusion on this issue. Firstly, the membership of the group. As noted previously, this includes representatives of the three main parties, as well as cross bench peers and the Lords Spiritual. Whilst this group does not consist entirely of members of the government, representatives of the government are amongst the membership.
23. Secondly, the topic of discussion within the group. HoL reform is an area where the government was in the process of formulating policy at the time that the information in question was recorded, as demonstrated through the White Papers of February 2007 and July 2008.
24. Thirdly, the outcome of the cross party group discussions. The public authority has described how the discussions contributed to the process of drafting the White Papers of February 2007 and July 2008. Whilst the non government members of the cross party group contributed to the White Papers through their membership of the group, the White Papers are a product of the government, rather than having been produced jointly by the three main parties. Moreover it is almost certain that any legislation to reform the House of Lords would be introduced by the

government.

25. The Commissioner's conclusion is that the information in question does relate to the formulation of government policy on HoL reform and that the exemption is, therefore, engaged. Whilst the Commissioner agrees with the complainant that the cross party group does not, in itself, form a part of government, the government was represented within the membership of the group. Furthermore, the discussions of the group related to an area where the government was in the process of formulating policy and contributed to the White Papers, which set out the progress in the government's policy formulation in this area. This exemption does not only relate to information internal to the government, where the government has formulated policy through discussion with third parties, as in this case, this exemption may be applicable to the record of these discussions.

The public interest

26. Section 2(2)(b) of the Act requires the Commissioner now to consider whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information." In the case *DfES v the Commissioner and the Evening Standard (EA/2006/0006)* the Information Tribunal set out 11 guiding principles for considering the public interest in relation to section 35(1)(a). The majority of these considerations are based on the presumption that information considered subject to 35(1)(a) will largely be made up of, or at least will include, contributions from officials within the civil service. That is not the case in relation to the information in question here, which consists of the record of meetings between politicians. Of the 11 principles set out by the Information Tribunal, only those of relevance to the information in question here have been considered.

The information itself

27. In the *DfES* case, the Information Tribunal stated the following:

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case"

28. In this case, the information details discussions about the reform of the HoL and the various options for how to give effect to the proposed changes. It details the outcome of this process and considers how the reformed second chamber might work following the completion of the process of reform. The content of the information shows that it goes beyond solely relating to the broad area of HoL reform to covering the various options that were considered and giving some explanation as to why the options eventually set out in the White Papers were chosen in preference to others.
29. The information in this case relates to a matter of constitutional significance. As the public authority itself has acknowledged, the subject matter of this information indicates that there is likely to be a legitimate public interest in its disclosure. As

well as the overall subject matter of the information, there is some public interest in the detail (to the level of “who said what?”) to enable the public to have a better understanding of the competing arguments and considerations, the depth of analysis and the positions of the different participants.

30. The significance of the impact of policy making in this area also influences the nature and extent of the public interest arguments. HoL reform is a long-standing matter of public and political controversy. It raises fundamental questions about the governance of the nation and the conduct of politics. Ultimately it affects the entire population.
31. A public interest in disclosure also extends to the detailed options under consideration, such as the extent to which members of a reformed second chamber would be wholly or partly elected, with a consequential extension in voting rights. The Commissioner believes that issues of particular interest are how the membership of the reformed chamber will be defined, what the powers of the reformed chamber will be and how these will compare to the powers of the House of Commons. These issues are all covered within the withheld information and the public understanding and debate about these issues would be likely to be enhanced through disclosure. There has also been comment about the apparently slow rate of progress in the process of HoL reform. The content of the withheld information provides some insight into this process and may add to public understanding as to why this has taken time.
32. Accordingly, the Commissioner recognises that - at both general and specific levels - the subject matter and content of this information is a public interest factor in favour of disclosure that carries some considerable weight.
33. However, the same arguments also point in the opposite direction. The subject matter of this information, and its gravity and sensitivity, also supports public interest arguments in favour of maintenance of the exemption. Given that the policy formulation in question here relates to an issue of constitutional significance, it is arguable that the government (with input from others) should be given sufficient space away from public scrutiny to carry out the policy making process effectively. This includes protecting the government's ability to gather free and frank input from cross party groups such as this one to inform its decisions. There is a public interest in ensuring that options are fully debated and that people are not deterred from providing full and frank suggestions and input to ensure that the best options are put forward. These aspects are developed further below.

The status of the information is not relevant

34. The information here records discussions between senior members of the government and the opposition parties about an issue of constitutional significance. The Information Tribunal made clear, however, that the seniority of those who have contributed to the information in question is not in itself a valid – or conclusive - argument in favour of maintenance of the exemption and this is not a factor given weight here. The composition of the group and its role – as opposed to the seniority of its members - is, however, a factor which is addressed below.

Timing of the request / is policy formulation complete?

35. At the time of the request the process of policy formulation was ongoing. Whilst the request post-dated the White Paper of February 2007, it pre-dated the White Paper of July 2008. The fact that the policy making process was ongoing at the time of the request provides some argument in favour of disclosure. If it is accepted that there is a public interest in disclosure to inform public debate about an area of policy, it follows that this public interest would be well served whilst the policy making process remains live.
36. However, the timing factor is also double-edged. The argument that it is in the public interest for the government to have a private space in which to formulate policy carries additional weight where the policy formulation, as here, was ongoing at the time of the request. The public interest may not be served by premature disclosure of material of such political sensitivity – certainly before conclusions have been reached and government has decided its own policy. Put simply, in the absence of other considerations, the strength of the public interest in maintaining the section 35(1)(a) exemption increases where information relates to a “live” issue.

Information in the public domain

37. HoL reform has been the subject of wide public and political debate and substantial media coverage. The specific information in question has not been disclosed into the public domain and the media coverage is not relevant in that sense. However, the media coverage is of significance here to the extent that it may demonstrate whether the public interest would be served through disclosure and, if so, how.
38. Media coverage of HoL reform has tended to be serious in tone, rather than sensationalist, and has sought to inform its audience of the facts in this area. Whilst what is of interest to the public and what is in the public interest are not the same, the media coverage here can be interpreted as reflective of a legitimate public interest in the facts of HoL reform. Media coverage of the disputed information would contribute to understanding how the public interest would be served through disclosure. It would improve public knowledge of the background to HoL reform, and more generally promote the universal public interest in transparency.
39. On the other hand, the Commissioner does recognise some force in the argument put forward by the Public Authority that this public interest had been largely served by the publication of the first White Paper. Some of the content of the withheld information is reflected in the content of the February 2007 White Paper. The July 2008 White Paper had not been published at the time of the request. Although its contents cannot therefore be taken into account here, the prospect that such a White Paper might be published to record progress and set out the issues as seen by key players goes some way to serve the public interest in disclosure.

Wider factors

40. The central argument of the public authority is that the policy making process would be likely to be prejudiced through disclosure as the frankness and candour of the participants in this process would be compromised as a result of the knowledge that the record of their contributions may later be subject to disclosure through the Act. The Commissioner has considered the likelihood, severity, extent and frequency of prejudice both to any future policy making process in the area of HoL reform and, taking the argument of the public authority as referring to a wider 'chilling effect', to the process of policy making in general.
41. Addressing the likelihood of such prejudice occurring firstly, it is notable that the contents of the withheld information are directly attributable to individual members of the cross party group. This strengthens the argument that the frankness and candour of participants in the policy making process is more likely to be compromised than in a case where, for example, the contributions are attributable to a group rather than to individuals. The Commissioner considers that a loss of candour and frankness is at least more likely in a situation where the disclosure of individually attributable comments is a possibility than in a situation where this possibility does not exist.
42. Turning to the extent, severity and frequency of such prejudice, it is notable that the progress in the area of HoL reform since the general election of 1997 has been relatively slow. Were any momentum that has now been developed through this process to be compromised as a result of disclosure, this would represent severe prejudice. The government was elected with a manifesto commitment to HoL reform; were this process to be prejudiced through disclosure this would be counter to the public interest and avoiding such prejudice is a valid argument in favour of maintenance of the exemption.
43. As noted above, the Commissioner has also considered what prejudice may result to the wider process of policy formulation. The arguments of the public authority focus on the need to maintain a private space away from the possibility of disclosure in which the government can carry out the policy making process. This private space helps to facilitate considerations of all policy options frankly and with candour, including those options perceived as unpopular and unlikely to lead to political advantage.
44. It is in the public interest for the government to be capable of carrying out a thorough policy making process. Were this 'chilling effect' to the wider policy making process to come about, the prejudice likely to result through this would be extensive, severe and frequent. The Commissioner believes that the participants in the policy making process, both politicians and civil servants, would do their best to explore all options thoroughly, even where they are aware that the record of their contribution to this process may be subject to disclosure. Nevertheless, the Commissioner recognises, in the context of this case, the 'chilling effect' factor as a valid argument that maintenance of the exemption is in the public interest.
45. As recorded above section 2(2)(b) of the Act requires consideration of "all the circumstances of the case". This is an unusual set of circumstances, especially the

cross-party nature of the group which was established by the government and accepted by the other parties involved. The Commissioner considers that it is desirable – and very much in the public interest – for such mechanisms to be used to explore the scope for resolving constitutional and similar controversies. The fact that cross party groups are not a commonly used method of policy formulation or development and that the use of such groups in the policy making process is unusual, means that care must be taken not to deter their future establishment by government, or participation by opposition parties. Such a risk is increased where (as here) the group had been advised (“several times”) that their proceedings would remain confidential and that the government did not intend to disclose the minutes of these meetings.

46. Finally, the Commissioner is especially influenced by the public authority’s statement that there is “a strong possibility” of the cross party group being reconvened. This means that premature, unexpected (and possibly unwelcome) disclosure of what has been said before may jeopardise both any re-convening and the progress of any further cross-party discussions. There is also at least some likelihood of prejudice through a loss of frankness and candour in the contributions of the members of the cross party group were this to be reconvened if they were conscious of the possibility that the record of their contributions may later be disclosed. All these are public interest factors favouring non-disclosure.

Conclusion

47. The task here is essentially to balance the competing public interests which are valid on both sides of the argument. There is a strong argument that disclosure of the withheld information is in the public interest in order to add to public knowledge and debate about the issue of HoL reform. This argument is based both on the overall significance and impact of HoL reform and on the likelihood that the detail of the content would add to public knowledge and inform public debate about this subject.
48. Against that, the Commissioner takes very seriously the public interest arguments for non-disclosure, as set out above, in terms of the likely prejudice to specific and general aspects of policy making. Policy formulation in relation to House of Lords reform is on-going and unresolved and was certainly “live” at the time of the request. Disruption to the momentum gained in the progress of such reform would constitute a severe prejudice and the arguments about the loss of frankness and candour in the policy making process, in relation to both the specific area of HoL reform and more widely, are powerful. The Commissioner also attaches particular weight to the nature and role of the cross party group, the expectations of confidentiality covering its discussions and the strong possibility that it will be re-convened.

The Decision

49. The Commissioner is satisfied that the section 35(1)(a) exemption is engaged in relation to the withheld information. The Commissioner has carefully weighed all the relevant arguments as set out in this Notice and has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
50. Accordingly, the Commissioner does not require the public authority to take any steps to ensure compliance with the Act.

Right of Appeal

51. 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

52. 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 30th day of September 2008

Signed

**Richard Thomas
Information Commissioner**

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

Legal Annex

Section 35

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.”