

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 31 March 2010

Public Authority: The Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall
London
SW1A 2WH

Summary

The complainant requested copies of agendas, minutes and papers submitted to the Falklands "War Cabinet". The Cabinet Office confirmed that it held the information requested but argued that it was exempt under section 35(1)(a) and (b) of the Act. The Cabinet Office later also sought to rely on the exemptions at sections 26(1)(a) and (b), 27(1)(a), (c) and (d), 35(1)(c) and 42(1) of the Act.

The Commissioner found that some of the requested information was not in fact held, and that the Cabinet Office correctly withheld the remainder of the information in reliance on the exemptions at sections 26(1)(a), 26(1)(b), 27(1)(a), 27(1)(c), 27(1)(d), 35(1)(b), 35(1)(c) and 42(1) of the Act. Therefore the Commissioner requires no further steps to be taken.

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.

Background

2. The "War Cabinet" was the name given informally to OD(SA), the Defence and Overseas Policy Sub-Committee on the South Atlantic and Falkland Islands. This special ministerial sub-committee was established at the time of the Falklands conflict between the United Kingdom and Argentina in 1982. The terms of reference were to keep under review the political and ministerial developments relating to the South Atlantic and the Falkland Islands, and to report to the Defence and Overseas Policy Committee as necessary. Membership included the Prime Minister, Margaret Thatcher, and the Foreign and Defence Secretaries as well as the Paymaster General.
3. The War Cabinet met very frequently, and at the height of the conflict at least daily, between 6 April and 12 August 1982. In all 67 meetings were held and numerous notes, papers and memoranda on all aspects of the Falklands conflict were considered. The minutes and submitted papers which are the subject of the request record the day to day and hour by hour management of the military, diplomatic and political operations which the Falklands conflict entailed. The papers which informed the War Cabinet's decisions were prepared by senior civil servants, officials and legal advisers, who at times also attended War Cabinet meetings.

The Request

4. On 21 June 2005 the complainant requested the following information from the Cabinet Office under section 1 of the Act:

"My request relates to what was known as the 'war cabinet' which provided the day to day management of the Falklands war in 1982.

I would like to request complete copies of the minutes and agendas of this committee since it was set up in early April 1982 until it was wound up. I would also like to request complete copies of the papers which were submitted to each of the meetings of this committee.

I would also like to ask the Cabinet Office, on answering the above request, to comply with a further request under the Freedom of Information Act. The request is to provide a schedule of documents which are relevant to the above request."

5. On 20 July 2005, the Cabinet Office advised the complainant that it did hold information relevant to the request, but that it was exempt by virtue of section 35(1)(b) of the Act. This exempts information which relates to ministerial communications and includes proceedings of the Cabinet and its committees.
6. The complainant was dissatisfied with this response, and requested an internal review on 20 July 2005. The Cabinet Office responded on 14 September 2005. It advised that an internal review had been conducted, but it had upheld the decision to withhold the requested information in reliance on the section 35(1)(b) exemption. In relation to the complainant's request for a schedule of information held, the Cabinet Office advised that it did not hold such a schedule.

The Investigation

Scope of the case

7. On 16 September 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant claimed to the Commissioner that the Cabinet Office had incorrectly withheld the requested information from him.
8. The complainant argued to the Commissioner that the Cabinet Office had misjudged where the balance of the public interest lay. The complainant referred to the age of the requested information, and the fact that an official history of the Falklands campaign had recently been published¹. The complainant was of the view that disclosure of the requested information would "help to inform the public about a significant historical event".

Chronology

9. The Commissioner contacted the Cabinet Office on 23 February 2006 to advise it of the complaint. At this stage the Commissioner identified a similar case (i.e. a request for the same information) and decided that both should be investigated together. The Cabinet Office wrote to the Commissioner on 3 March 2006 to accept the Commissioner's proposal.
10. The Cabinet Office advised the Commissioner that, owing to the sensitivity of the withheld information, it would prefer a senior member of staff with appropriate security clearance to inspect it at the Cabinet

¹ Freedman, Professor, L, The Official History of the Falklands Campaign, Routledge, March 2005

Office. The Commissioner agreed to this proposal and staff from the Commissioner's office conducted a number of inspections of the relevant information. These inspections took place in April 2006, November 2007 and September 2008. Regrettably the investigation was delayed considerably owing to staff changes within the Commissioner's Office.

Findings of Fact

11. The Commissioner has established that the withheld information in this case comprises numerous pieces of information which include the following:
 - Minutes of various meetings of the War Cabinet
 - Papers submitted to the War Cabinet
 - Entries in the Cabinet Secretary's notebook relating to the meetings of the War Cabinet
12. The Commissioner notes that there is already a substantial amount of information in the public domain relating to the Falklands War, and to the War Cabinet in particular. This includes memoirs, diaries and biographies relating to a number of politicians and officials. In addition the Commissioner notes the publication of the Official History in 2005.

Analysis

Substantive procedural matters

Section 1: information not held

13. Under section 1(1)(a) of the Act a public authority is required to confirm or deny whether it holds information of the description specified in the request.
14. The Commissioner notes that the complainant's request was for copies of all agendas, minutes and papers submitted to the War Cabinet. The Cabinet Office in its refusal notice of 22 July 2005 advised the complainant that it held "information in relation to this request". The Cabinet Office did not clarify exactly what information it held.
15. During the course of the Commissioner's investigation, the Cabinet Office informed the Commissioner that the War Cabinet was a sub-committee of the full Cabinet and agendas for sub-committee meetings

were not routinely produced. The Commissioner has questioned the relevant officials directly on this issue. In addition he has had sight of all the War Cabinet minutes and submitted papers and considered the contents of the Official History. As a result of these enquiries, he is satisfied that no agendas of the War Cabinet are held and it is unlikely, given the frequency and reactive nature of the meetings, that any were produced. Therefore the Commissioner has concluded that this information was not held by the Cabinet Office at the time of the request.

16. The Commissioner notes that the Cabinet Office's refusal notice of 20 July 2005 does not specifically confirm or deny whether agendas for the War Cabinet meetings were in fact held, nor was this issue addressed at internal review. This represents a breach of section 1(1)(a), the duty to confirm or deny whether information is held.

Exemptions claimed

Section 35(1)(b)

17. The exemption at section 35(1)(b) applies to information which relates to ministerial communications. Ministerial communications are defined at section 35(5) as including proceedings of the Cabinet, or of any committee of the Cabinet.
18. The scope of the exemption covers not only the formal minutes of Cabinet meetings, committees of the Cabinet and the Executive Committees, but also includes information relating to timing, agendas, memoranda and other tabled papers.
19. Section 35(1)(b) is a class based exemption, which means that there is no need to consider whether any prejudice might be caused by the disclosure of the requested information. To engage the exemption, the information in question must simply relate to that which falls within the definition of ministerial communications.
20. The Commissioner has had sight of the withheld information in this case and is satisfied that it does all constitute information which relates to ministerial communications. The Commissioner therefore finds that all the withheld information is exempt under section 35(1)(b).
21. The Commissioner has considered whether the papers submitted to the War Cabinet also relate to ministerial communications within the meaning of section 35(1)(b). This information comprises briefing materials and submitted papers prepared to inform War Cabinet deliberations and decisions. The Commissioner has had sight of these papers and notes that their primary purpose was to inform

Government decision making on military action following the invasion of the Falkland Islands. The Commissioner is satisfied that the papers also relate to ministerial communications.

Public interest test

22. Section 35(1)(b) is a qualified exemption and is therefore subject to the public interest test as set out at section 2(2) of the Act. The Commissioner must consider where the balance of the public interest lies, and must decide if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

23. The Cabinet Office identified a number of arguments in favour of disclosing the withheld information:
- Disclosure would demonstrate greater transparency in how Government operates
 - Disclosure would enable the public to assess the quality of debate between ministers and the quality of decision making
 - Disclosure would increase the public's capability to contribute knowledgeably to debate.
24. The Cabinet Office acknowledged the age of the information, and noted that "some time" had passed since the Cabinet meetings in question.
25. Finally, the Cabinet Office accepted that there was significant public interest in information relating to the Falklands campaign, which it had sought to recognise by commissioning the Official History.
26. The complainant also put forward a number of arguments in favour of disclosure. The complainant referred to the Official History, which in his view "reveals details of the deliberations of the war cabinet". The complainant also referred to the amount of information that was publicly available in various books and memoirs.
27. The complainant was of the view that, given the age of the requested information, sensitivities had faded and the public interest favoured disclosure.

Public interest arguments in favour of maintaining the exemption

28. The Cabinet Office argued to the Commissioner that the exemption at section 35(1)(b) was designed to protect the way in which government ministers communicate with each other, and to protect the Cabinet and

Cabinet Committee system. The Cabinet Office drew the Commissioner's attention to the convention of collective responsibility, particularly in the context of the need to protect the confidentiality of ministerial discussions for a substantial period of time.

29. The Cabinet Office advised the Commissioner of the general principle of collective responsibility as 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."

The Code goes on to state that "the internal process through which a decision has been made, or the level of committee by which it was taken should not be disclosed".

30. The Cabinet Office argued that disclosure of the requested information would have an adverse impact on collective responsibility, and undermine Ministers' confidence in the convention. This in turn would make it more difficult for Ministers and their officials to engage in full, frank and uninhibited discussion of policy options.
31. The Cabinet Office also noted that the requested information would be subject to transfer to The National Archives for possible publication in 2013 under the "30 year rule", and argued that it would be inappropriate to disclose the information before this time. The Cabinet Office explained to the Commissioner its view that the thirty year rule meant that information was protected for a substantial period of time which reflected "the time span of the active career of ministers and senior civil servants". Premature disclosure of the requested information would harm the ability of ministers and senior officials to participate in full and uninhibited discussions, which were essential for good government.
32. The Cabinet Office also explained to the Commissioner that "The Official Histories Programme recognises the need for authoritative accounts of important national events but where early release of the relevant documentation, such as Cabinet and Cabinet Committee papers, would not serve the public interest". Therefore the Cabinet Office considered that it already taken steps to meet the public interest as far as possible.

Balancing the public interest

33. The Commissioner has considered carefully the public interest factors identified both in favour of disclosing the information, and in favour of maintaining the exemption at section 35(1)(b). The Commissioner accepts that section 35(1)(b) is designed to protect the ways in which government ministers communicate with each other, and in particular, the conduct of government business through the Cabinet and Cabinet Committee system.
34. The Commissioner considers that the Cabinet Office's analysis largely rests on generic arguments in relation to the public interest favouring maintaining the exemption and in relation to the convention itself. The Commissioner has had regard to the Information Tribunal's comments in *FoE v Information Commissioner and the Export Credit Guarantee Department (EA/2006/0073)*. In relation to the public interest test the Tribunal remarked:
- "There is and can be no immutable rule in terms of reliance upon the collective ministerial responsibility and/or the individual accountability of ministers to Parliament. The Tribunal refutes any suggestion that such notions, either singly or together represent some form of trump card in favour of maintaining the particular exemption".*
35. In this case the Commissioner is mindful of the historical significance of the Falklands War and the impact of the decisions made by the War Cabinet on government policy in a time of major conflict. The Commissioner considers that the need for accountability is very great indeed when government makes decisions about a declaration of war and the pursuit of a military campaign. The significance of the decision to go to war with Argentina is recognised by the proliferation of the accounts and commentaries on the Falklands conflict.
36. The Commissioner has carefully considered the contents of the Official History, which makes frequent reference to the minutes. He notes that in many instances the information contained in the minutes is publicly available as a result of that publication. The War Cabinet has been described by Freedman as "the critical instrument of crisis management²". In light of its unique role at a time of major conflict, the Commissioner considers that there is a public interest in informing historians and other commentators of the intricate workings of that particular Cabinet sub-committee.
37. The Commissioner recognises the constitutional significance of the convention of collective responsibility particularly in relation to matters of such national sensitivity and international significance as the

² Vol 11 Page 21

Falklands conflict. The Commissioner acknowledges the potential for the convention to be undermined by the routine early disclosure of minutes of Cabinet meetings. In an earlier Decision Notice relating to the minutes of Cabinet meetings at which the legality of the (then) potential war with Iraq was considered (FS50165372) the Commissioner emphasised the importance of the subject matter of the deliberations as a persuasive factor in favour of disclosure. The Commissioner's decision in that case was upheld by the Tribunal (EA/2008/0024 & 0029). The majority view of the Tribunal recognised (paragraph 79) that "there is undoubtedly a strong argument in favour of maintaining the section 35(1)(b) exemption in respect of Cabinet discussions". In that case, however, the Tribunal stressed (paragraph 80) that it was "the coincidence of all the identified factors being applied to the particular information in question that generates the impetus for disclosure".

38. The Commissioner also acknowledges the age of the information as a factor favouring disclosure in this case. The Commissioner is mindful of the public interest in maintaining the confidentiality of government records which is the premise upon which the 30 year rule was based. In this particular case the Commissioner notes that the information was 23 years old at the time of the request.
39. However the Commissioner recognises that, under the established 30 year rule, minutes of Cabinet meetings are not made public until a full 30 years after the date of the meeting. Although this rule is currently under review and a recommendation has been made that the period for routinely keeping government information secret should be reduced, it was in effect at the time of the request and currently remains in effect, albeit that it does not and can not preclude statutory disclosure under the Act.
40. The Commissioner rejects the blanket approach taken by the Cabinet Office, which is to the effect that disclosure of Cabinet minutes, regardless of content, is not in the public interest as it would undermine the convention of collective responsibility. Whilst the convention and its maintenance is one of the public interest factors to be considered, and it is a convention that the Commissioner places much weight upon, it is only one element of the public interest test. It is important but not in itself conclusive. Indeed, had Parliament intended it to be conclusive, it could have legislated to that effect by creating an absolute exemption, rather than one which is subject to the public interest test..
41. The Commissioner considers that the public interest arguments in relation to the exemption at section 35(1)(b) are finely balanced in this case, particularly given the age of the information and the amount of

material already in the public domain. Nevertheless in all the circumstances, the Commissioner considers that the public interest in maintaining the exemption at section 35(1)(b) outweighed, at the time of the request, the public interest in disclosure. The Commissioner therefore finds that the Cabinet Office acted correctly in withholding information in reliance on this exemption.

Other exemptions claimed

42. As explained above, the Commissioner is satisfied that all of the requested information has been correctly withheld under the exemption at section 35(1)(b) of the Act. However, given the strong public interest the Commissioner has identified in the Falklands War Cabinet, the Commissioner considers it appropriate to record his views briefly in relation to the other exemptions claimed by the Cabinet Office.

Section 35(1)(c) and section 42(1)

43. Section 35(1)(c) exempts information held by a government department which relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. The Law Officers are the Attorney General and the Solicitor General. Section 42(1) exempts information in respect of which a claim to legal professional privilege could be maintained in legal proceedings. As the Commissioner is satisfied that both provide similar exemptions, he has considered them together.
44. The Cabinet Office claimed to the Commissioner that some of the requested information fell within the scope of the exemptions under sections 35(1)(c) and 42(1) as it related to communications with legal advisers, including information relating to the advice of the Law Officers. Having inspected the withheld information, the Commissioner is satisfied that both exemptions are engaged.

Public interest test

45. Both exemptions are qualified, and the Cabinet Office argued to the Commissioner that the public interest in maintaining these exemptions outweighed that in disclosing the withheld information. The Cabinet Office explained to the Commissioner that in its view there was a strong public interest in the ability of government to seek and discuss legal advice on policy decisions without fear of premature disclosure. The Cabinet Office explained that such fear would inhibit the frankness and candour of that advice.

46. The Commissioner has considered the strong public interest in maintaining the long-standing convention that neither the advice of the Law Officers, nor the fact that their advice has been sought, is disclosed outside government. The Commissioner is mindful of the fact that the advice of the Law Officers was sought by the War Cabinet is a matter of public record, but that the some of content of that advice is not. The Commissioner accepts that there is a strong public interest in protecting the confidentiality of advice given by the Law Officers.
47. The Commissioner is of the view that there is a significant public interest in openness and transparency in this case given the importance of the advice and the impact of the declaration of war on Argentina. The Commissioner also accepts the legitimate public interest in informing the public debate on the issue of the Falklands conflict in its historical context.
48. However, the Commissioner notes the public interest in favour of maintaining the confidentiality of communications between lawyers and their clients. The doctrine of legal professional privilege is one of the fundamental building blocks of the English legal system. This factor is particularly strong when government legal advisers are asked for advice on such serious matters as the declaration of war. There is a need to protect the confidentiality of such discussions: without this protection, it is argued that ministers would be inhibited from seeking legal advice.
49. The Commissioner has also had regard to the decision he made in relation to the Legal Secretariat to the Law Officers, which was concluded by way of an Enforcement Notice³ issued in May 2006. This complaint was about a request for the legal advice on the legality of military intervention in Iraq in 2003. In ordering disclosure of this legal advice, the Commissioner noted that the military action was “a matter of intense public controversy”, and referred to the perceived uncertainty as to the nature of the legal advice in the context of public statements issued by the Government. The Commissioner commented that there was
- “a public interest in establishing the extent to which published statements are consistent with fuller advice that had been given”.
50. The Commissioner considers that the legal advice which is the subject of this Decision Notice has not been subject to such controversy. The relevant events took place many years ago. Although the Commissioner recognises that the issues remain highly sensitive, he

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/notices/full_transcript_of_enforcement_notice_220506.pdf

does not consider that the public interest factors in favour of disclosing the legal advice are of the same nature as in the Iraq case. Therefore the Commissioner is not inclined to attach so much weight to the fact that the advice related to military action as a factor in favour of disclosing the information in this particular case.

51. The Commissioner is aware of the age of the legal advice in this instance but notes that it has not as yet become an historical record within the meaning of section 62(1) of the Act, it being less than thirty years old. The Commissioner is mindful of the principles set out by the Information Tribunal at paragraph 53 of *Pugh v The Information Commissioner*⁴ as follows:

“a. There is an assumption built into FOIA that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to the activities of public authorities.

b. The passage of time since the creation of the information may have an important bearing on the age of the information. As a general rule the public interest in maintaining the exemption diminishes over time.

c. In considering the public interest factors in favour of maintaining the exemption, the focus should be upon the public interest expressed explicitly or implicitly in the particular exemption provision at issue.

d. The public interest factors are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process”.

52. The Commissioner recognises the strength of the convention which has historically protected the advice of the Law Officers. The Commissioner has also given due consideration to the impact on international relations identified by the Cabinet Office in the event that this advice is disclosed.
53. The Commissioner considers that in this case the balance of the public interest lies in favour of maintaining the exemptions at sections 35(1)(c) and 42(1). Therefore the Commissioner finds that these exemptions have been correctly applied by the Cabinet Office in this case.

⁴ Appeal No EA/2007/0055

Sections 26 and 27

54. Section 26 exempts information where disclosure would prejudice the defence of the British Islands or of any colony. Section 27 provides an exemption where disclosure would or would be likely to prejudice international relations. Many of the arguments put forward by the Cabinet Office apply to both exemptions, so again the Commissioner has considered them together.
55. The Cabinet Office argued to the Commissioner that disclosure of the requested information would undermine relations between the UK and Argentina, and might undermine relations between the UK and other States. The Cabinet Office indicated that, while some parts of the information were particularly sensitive, the exemptions applied to all of the requested information. In its view release of any of the information on this subject was and remains highly sensitive as previous releases of information had proved 'unhelpful' for UK relations with Argentina.
56. The Cabinet Office claimed to the Commissioner that, in light of the continuing disputed status of the Falkland Islands, and the strength of feeling this issue continues to raise in Argentina, all of the information could be withheld under section 27. The Cabinet Office claimed in addition that relations with nations other than Argentina could also be prejudiced if the information were disclosed.
57. The Cabinet Office also argued that some of the withheld information related to the UK's military capabilities, disclosure of which would not be in the public interest. Furthermore, the Cabinet Office expressed the view that in principle section 26 was engaged in respect of 'virtually' all of the requested information because of the undesirable consequences of a diplomatic confrontation with Argentina, and the possibility that a dispute could widen.
58. The Cabinet Office advised the Commissioner that previous releases of related information had caused difficulties in international relations, and it was also argued that this damage could in turn prejudice the defence of the British Islands. The Commissioner cannot disclose in this Decision Notice extensive detail of his discussions with the Cabinet Office in relation to the exemptions at section 26 and 27. To do so would disclose exempt information. However, on the basis of the arguments put forward by the Cabinet Office, the Commissioner accepts that the exemptions are engaged.

Public interest test

59. As sections 26 and 27 provide qualified exemptions, the Cabinet Office provided the Commissioner with detailed submissions in relation to the

public interest considerations it had identified. The Cabinet Office was of the view that there were a number of strong arguments in favour of maintaining the exemptions, and that these arguments outweighed those in favour of disclosure.

60. Again, the Commissioner is limited in the detail he can record without disclosing exempt information. The Commissioner recognises the strength of the public interest in maintaining harmonious international relations and the defence of the British Islands. He accepts that in relation to the information withheld under sections 26 and 27, the public interest in maintaining the exemptions is so strong as to outweigh those in favour of disclosing the information.

The requests for the lists and schedules

61. The Commissioner notes that the complainant in this case also requested a schedule of information relevant to the request. The complainant specified that the schedule should include a brief description of each relevant document including the nature of the document, the date of the document, and whether the document was being released or not.
62. The Cabinet Office's position is that it does not hold a schedule of the withheld information, and the compiling of such a schedule would equate to creating new information, something which the Cabinet Office is not required to do under the Act.
63. The Commissioner's position is that where a request is made for a schedule or list of documents, even if no schedule has been compiled, if the information which would be in the schedule is held, the request can and should be complied with unless the contents of the schedule, once compiled, would also be exempt. (The Commissioner originally outlined this view in decision notice FS50070854 involving a request to the Foreign and Commonwealth Office).
64. However, in the Commissioner's opinion, the information that would form the schedule in this case would itself be exempt. Any information contained in a schedule listing the documents falling within the scope of section 35(1)(b) would be exempt because the information comprising such a schedule would be drawn directly from the withheld documents, and the Commissioner accepts that the information in these documents falls within the scope of the exemption provided by section 35(1)(b).
65. Having examined the withheld information the Commissioner is satisfied that its nature is such that in many instances any description of a withheld document, such as would be required for a

comprehensive schedule, would disclose information which would attract other specific exemptions even if did not constitute information relating to ministerial communications. In particular the exemptions under sections 26 and 27 would, in the Commissioner's opinion, be engaged in respect of some of the information, for the same reasons given in paragraphs 54 to 58 above.

66. The Commissioner does not consider that there is any significant public interest in the disclosure of a schedule of the withheld information in this case. The Commissioner is therefore satisfied that the balance of the public interest requires the maintenance of the exemptions engaged. Therefore the Commissioner does not require the Cabinet Office to produce and disclose such a schedule.

Procedural requirements

Section 17: refusal notice

67. Under section 17(1)(b) of the Act, a public authority wishing to withhold information in response to a request is required to issue a "refusal notice". This notice must specify which exemptions are being relied upon and the reasons for this, if not otherwise apparent. The Cabinet Office wrote to the complainant on 22 July 2005 confirming that it held the requested information, but that it was exempt by virtue of the sections 35(1)(a) and (b) of the Act. However, during the course of the investigation the Cabinet Office withdrew reliance on section 35(1)(a) and sought to rely on a number of additional exemptions in relation to the requested information. In particular, it advised the Commissioner that some of the requested information was covered by sections 35(1)(c), 42(1), 26(1)(a) and (b) and 27(1)(a) of the Act.
68. As the Cabinet Office failed to specify these exemptions either in its refusal notice or at internal review, the Commissioner considers that it breached section 17(1)(b) of the Act. In its refusal notice, the Cabinet Office outlined its public interest considerations in a very general manner to the complainant and did not identify how the exemptions applied to the specific information requested. Therefore the Commissioner finds that the Cabinet Office also breached section 17(3) of the Act, which requires a public authority to state the reasons for claiming that, in all the circumstances of the particular case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The Decision

69. The Commissioner's decision is that the Cabinet Office dealt with the following elements of the request in accordance with the requirements of the Act:
- The Cabinet Office correctly withheld the requested information in reliance on the exemption under sections 26(1)(a), 26(1)(b), 27(1)(a), 27(1)(c), 27(1)(d), 35(1)(b), 35(1)(c) and 42(1) of the Act.
70. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- Section 17(1), (2) and (3) in that the Cabinet Office failed to provide an adequate refusal notice to the complainant.
 - Section 1(1)(a) in that the Cabinet Office failed to advise the complainant that it did not hold some of the requested information.

Steps Required

71. The Commissioner requires no steps to be taken.

Right of Appeal

72. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 31st of March 2010

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

Any person making a request for information to a public authority is entitled –

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

2. **Section 2(2)** provides that –

In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

3. **Section 17(1)** provides that:

A public authority which ... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.

Section 17(3) provides that -

A public authority which ... is to any extent relying:

- on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or

- on a claim that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

must either in the notice under section 17(1) or in a separate notice within such

time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, on a claim that in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

4. **Section 26(1)** provides that –

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the defence of the British Islands or of any colony, or
- (b) the capability, effectiveness or security of any relevant forces."

5. **Section 27(1)** provides that –

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.

6. **Section 35(1)** provides that –

Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,

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

Section 35(5) provides that –

In this section-

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

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

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

7. **Section 36(1)** provides that –

This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or

- (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

8. **Section 42(1)** provides that –

Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.