

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 February 2011

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

Summary

The complainant requested copies of minutes from meetings held by Permanent Secretaries where the Civil Service Compensation Scheme (CSCS) was discussed. The Cabinet Office responded providing a link to the published minutes on the Civil Service website. The complainant requested an internal review as the information he was directed to did not fulfil his request for unredacted minutes. After carrying out an internal review, the Cabinet Office cited sections 35(1)(a) and 42(1) as grounds for withholding the information. The Commissioner requires the Cabinet Office to disclose the information in full to the complainant as it has failed to provide him with either a copy of the withheld information or adequate arguments as to why the exemptions applied.

The Commissioner's Role

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

The Request

2. On 3 October 2009 the complainant requested the following information:

"...Under the freedom of information act, I'm requesting un-redacted copies of the minutes of the meetings between the Permanent Secretaries, where the compensation scheme was discussed..."

3. On 2 November 2009 the Cabinet Office responded stating that *"the Permanent Secretaries Management Group discussed reforms to the CSCS [Civil Service Compensation Scheme] at their meetings on 23 January 2008, 23 April 2008 and 6 May 2009"*, and providing a link to the minutes published on the Civil Service website.
4. On 14 November 2009 the complainant requested an internal review of the Cabinet Office's decision. He stated that the Cabinet Office had *"directed me to the Civil Service website where I found little more than summaries of the meetings"*.
5. On 28 July 2010, following intervention from the Information Commissioner, the Cabinet office provided details of the internal review to the complainant. The Cabinet Office withheld the information stating that the exemptions contained within sections 35(1)(a) and 42(1) were engaged.

The Investigation

Scope of the case

6. On 8 March 2010 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 fact that, to date, he had not received a response from the Cabinet Office regarding his request for an internal review. Following the Commissioner's intervention and receipt of the internal review outcome the complainant confirmed he did not accept the Cabinet Office's findings.

Chronology

7. On 17 May 2010 the Commissioner wrote to the Cabinet Office recommending that it complete the internal review within 20 working days.
8. On 22 June 2010 the Commissioner wrote to the Cabinet Office to inform it that he would issue an Information Notice in order to progress his investigation if he did not receive a response to matters he had previously raised within 10 working days.
9. On 20 July 2010 the Commissioner issued an Information Notice containing questions for the Cabinet Office as part of his investigation to ascertain whether more detailed minutes of the meetings were held.

10. On 28 July 2010 the Cabinet Office provided the result of the internal review to the complainant and forwarded a copy to the Commissioner. The Cabinet Office stated that the requested information engaged section 35(1)(a) and section 42(1) of the Act. It provided details of the public interest test it had carried out which found in favour of maintaining the exemption.
11. On 2 August 2010 the Commissioner wrote to the complainant to enquire whether he accepted the Cabinet Office's refusal to disclose the information on the grounds cited. The complainant responded on 7 August 2010 to confirm that he did not accept the Cabinet Office's position.
12. On 29 September 2010 the Commissioner wrote to the Cabinet Office and asked it to provide further reasons why it had considered sections 35(1)(a) and 42(1) to be engaged by the requested information. He also, again, asked for a copy of the information to be made available to him and that the Cabinet Office clearly identify which of the exemptions related to which part of the withheld information. The Commissioner also asked the Cabinet Office to provide any further arguments as to why the public interest in maintaining the exemptions outweighed the public interest in disclosure.
13. On 9 November 2010 the Commissioner chased a response from the Cabinet Office.

Analysis

Substantive Procedural Matters

Exemptions

14. The Cabinet Office cited the following sections of the Act as grounds for withholding the requested information.
 - Section 35(1)(a) – concerning information relating to the formulation or development of government policy.
 - Section 42(1) – concerning information in respect of which a claim to legal professional privilege could be maintained in legal proceedings.

In order for the Commissioner to ascertain whether withheld information engages any exemptions cited by a public authority, he usually asks for a copy of the information to be provided to him. He may also request further detailed arguments from the public authority

as to how the exemptions apply. Where exemptions are qualified he uses the public interest test to weigh up whether the balance is in favour of maintaining the exemption.

15. The Commissioner carried out his investigation into this case in the way described above. The Cabinet Office was given ample time to respond to his lines of enquiry and many opportunities to argue its position and to provide evidence to the Commissioner in support of its handling of the request. The arguments which had previously been provided by the Cabinet Office in its internal review result were generic and in the Commissioner's view did not provide sufficient evidence of how the Cabinet Office considered the exemptions to apply. Therefore, the Commissioner sought further, detailed arguments in support of the exemptions which related directly to the requested information. This has not been provided by the Cabinet Office nor has the withheld information.
16. Without a copy of the withheld information and further arguments in support of the exemptions and the public interest test, the Commissioner has nothing on which to base a balanced assessment of whether the exemptions are engaged.

The Decision

17. The Commissioner's decision is that the Cabinet Office has not provided him with sufficient evidence to show that the requested information engages the exemptions cited.

Steps Required

18. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - full disclosure of the requested information to the complainant.
19. The public authority must take the steps required by this notice within 35 calendar days of the date of this Notice.

Failure to comply

20. 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.

Other matters

21. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 150 working days for an internal review to be completed, despite the publication of his guidance on the matter.
22. During the course of his investigation, the Commissioner has encountered considerable delay on account of the Cabinet Office's reluctance to meet the timescales for response set out in his letters. Furthermore, the Commissioner has been met with resistance in his attempts to understand the Cabinet Office's reasons for handling the request as it did and for invoking particular exemptions. The delays and resistance were such that the Commissioner was forced to issue an Information Notice in order to obtain details relevant to his investigation.
23. Accordingly the Commissioner does not consider the Cabinet Office's approach to this case to be particularly co-operative, or within the spirit of the Act. The Commissioner expects that, in future, the Cabinet Office will respond to his enquiries within the timescales set in his correspondence

Right of Appeal

24. 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

25. 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.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 15th day of February 2011

Signed

**Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

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."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Section 1(3) provides that –

"Where a public authority –

- (a) reasonably requires further information in order to identify and locate the information requested, and
- (b) has informed the applicant of that requirement,

the authority is not obliged to comply with subsection (1) unless it is supplied with that further information."

Section 1(4) provides that –

"The information –

- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
- (b) which is to be communicated under subsection (1)(b),

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

Section 1(5) provides that –

“A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).”

Section 1(6) provides that –

“In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

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-

- (c) the formulation or development of government policy,
- (d) Ministerial communications,
- (e) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (f) 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-

- (g) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (h) 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-

- (i) between Ministers of the Crown,
- (j) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (k) 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."

Legal Professional Privilege

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.”

Section 42(2) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) in respect of which such a claim could be maintained in legal proceedings.”