

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 August 2011

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

Summary

The complainant requested correspondence sent from Baroness Warsi to the Deputy Prime Minister on the issue of electoral fraud, and information relating to this. The public authority refused the request, citing the exemptions provided by sections 35(1)(a) (information relating to the formulation or development of government policy) and 35(1)(b) (information relating to Ministerial communications). The Commissioner finds that the exemption provided by section 35(1)(b) was cited correctly and the public authority is not required to disclose this information. However, the Commissioner also finds that the public authority breached the procedural requirements of the Act in that it failed to respond to the request within 20 working days of receipt.

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 requested the following information on 4 October 2010:

"Please disclose under the FOI Act:

- Copies of all correspondence sent between Baroness Warsi and Deputy Prime Minister Nick Clegg relating to 'electoral fraud'.

- Copies of any other information held by the Cabinet Office relating to this exchange, e.g. internal discussion within the Cabinet Office."

3. The public authority responded substantively to the request on 22 November 2010, outside 20 working days from receipt. The requests were refused, with the exemptions provided by sections 35(1)(a) (information relating to the formulation or development of government policy) and 35(1)(b) (information relating to Ministerial communications) cited.
4. The complainant responded to this on 25 November 2010 and requested an internal review. The public authority responded with the outcome of the internal review on 25 January 2011. The conclusion of this was that the refusal of the requests was upheld.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner's office on 8 February 2011. The complainant indicated that she disagreed with the conclusion of the public authority on the balance of the public interest and that she did not believe that the public authority had adequately addressed the arguments she had advanced when requesting an internal review.

Chronology

6. The Commissioner's office contacted the public authority on 30 March 2011. The public authority was asked to respond within 20 working days supplying further reasoning for the citing of sections 35(1)(a) and (b) and a copy of the information withheld from the complainant.
7. Having received no response within 20 working days, the Commissioner's office contacted the public authority again on 4 May 2011. At this stage the public authority was asked to respond to the earlier letter as soon as possible and, in any event, within 10 working days.
8. An Information Notice in accordance with section 51 of the Act was served on the public authority on 2 June 2011. By that date no communication of any kind had been received by the Commissioner's office from the public authority in connection with this case.

9. Following receipt of the Information Notice, the public authority responded on 3 June 2011. This response provided further explanation for the citing of the exemptions and a copy of the withheld information.

Background

10. The request refers to correspondence between Minister without Portfolio Baroness Warsi and the Deputy Prime Minister. This request followed interview remarks made by Baroness Warsi concerning electoral fraud¹.

Analysis

Exemptions

Section 35

11. The public authority has cited sections 35(1)(a) and (b). The Commissioner has focussed here on section 35(1)(b), which provides an exemption for information which relates to Ministerial communications. Consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of the information falling within the class described in section 35(1)(b). Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed unless the public interest in the maintenance of the exemptions outweighs the public interest in disclosure.
12. Turning to whether the exemption is engaged, the approach of the Commissioner to the term 'relates to' as it is used in section 35(1) is that this can safely be interpreted broadly. This is in line with the approach taken by the Information Tribunal in the cases *DfES v the Information Commissioner & the Evening Standard* (EA/2006/0006) and *Scotland Office v the Information Commissioner* (EA/2007/0070). Amongst other reasoning, the Tribunal in those cases noted that this approach can safely be taken as section 35(1) is qualified by the public interest, so a finding that this exemption is engaged does not necessarily mean that the information will not be disclosed.
13. The information that the public authority has identified as that which falls within the scope of the requests is in two categories; first, a letter from Baroness Warsi to the Deputy Prime Minister dated 15 September 2010 and, secondly, exchanges between officials concerning the drafting

¹ <http://www.bbc.co.uk/news/uk-politics-11441382>

of this letter. The view of the Commissioner is that the letter is clearly within the class described in section 35(1)(b); not only does it relate to Ministerial communications, it is itself a Ministerial communication. The exemption provided by section 35(1)(b) is, therefore, engaged in relation to that document.

14. In relation to the second category of information, exchanges between officials concerning the drafting of the letter, the Commissioner also considers it clear that this information is within the class specified in section 35(1)(b). Whilst this information is not, unlike the first category of information, itself Ministerial communications, it closely relates to Ministerial communications. The exemption provided by section 35(1)(b) is, therefore, also engaged in relation to this information.

The public interest

15. Having concluded that section 35(1)(b) is engaged, it is necessary to go on to consider the balance of the public interest. In forming a conclusion on the balance of the public interest here, the Commissioner has taken into account the general public interest in the transparency of matters dealt with by the public authority. This is in addition to those factors that relate to the specific information in question, including the arguments advanced by the complainant and by the public authority.
16. Of no weight here, however, is the fact that the information is within the class specified in the exemption. This point was made by the Information Tribunal in the case *DfES v the Commissioner & the Evening Standard* (EA/2006/0006) in which it stated in relation to section 35(1):

"The weighing [of the public interest] exercise begins with both pans empty and therefore level." (paragraph 65)

17. Covering first those arguments that favour maintenance of the exemption, the public authority has advanced two main arguments that the Commissioner agrees identify important factors. These arguments are, first, that disclosure would be likely to inhibit participants in Ministerial communications in future and, secondly, that disclosure would be likely to harm the convention of collective Cabinet responsibility.
18. The argument advanced by the public authority concerning inhibition to participants in Ministerial communications is similar to the argument, advanced in many cases where section 35(1) is cited, that an erosion of confidentiality surrounding policy discussions would result in a 'chilling effect' to participants in future Ministerial communications. This chilling effect would result due to the participants in communications being concerned that the record of their contribution may later be disclosed and being reluctant to contribute in a free and frank manner as a result.

The Commissioner accepts the premise of this argument and its relevance here in that a reduction in willingness to participate in Ministerial communications in a free and frank way would be counter to the public interest.

19. On the issue of how likely such an outcome is in this case, in relation to the letter itself, including draft versions, the Commissioner's view is that the content could be reasonably regarded as free and frank. This represents correspondence from one Cabinet Minister to another and the content suggests that it was drafted in the expectation that it would remain confidential. The Commissioner accepts that there would be at least some likelihood of inhibition to Ministers participating in written communications with other Ministers as a result of the disclosure of this information.
20. As to the remainder of the information, this consists of exchanges between officials about the content of the letter. In relation to this information the question is, therefore, whether inhibition to officials conducting similar work in future would be a likely result of disclosure. As this information concerning the content of the letter does not include contributions from Ministers, the Commissioner's view is that it would not be reasonable to suggest that Ministers may be inhibited through disclosure of the letter. However, this information does include contributions from officials and these contributions are attributed to named individuals. As these contributions are attributable, the Commissioner accepts that there would be at least some likelihood of inhibition to officials when working on Ministerial communications through the disclosure of this information.
21. Turning to the second argument advanced by the public authority, that relating to collective Cabinet responsibility, this refers to the convention whereby every member of the Cabinet is responsible for, and publicly supportive of, all policies of the Government. The argument is that disclosing information that reveals the individual views of members of the Cabinet on specific policies would have the effect of eroding this convention. The Commissioner's view is that there is a public interest in the Government being able to present a united front, as this prevents valuable government time from being spent publicly debating and defending views that have only ever been individual views rather than Government positions, and commenting on the meaning and implications of a potentially divided Cabinet.
22. In relation to the information in question here, the Commissioner recognises that this argument does apply to the letter, in which the individual views of a Cabinet Minister are given. The second category of information includes draft versions of this letter and for this reason the

Commissioner also accepts that this argument is relevant to this information.

23. Whilst the Commissioner accepts that the argument relating to collective Cabinet responsibility is relevant in relation to this information, his view based on the content of this information is that any harm to this convention resulting from disclosure of this information is not likely to be severe. The information records the views of one Minister expressed to another. It does not, for example, record an exchange of correspondence or a verbal exchange in which a range of differing views are expressed. The weight that this argument carries is, therefore, reduced.
24. The complainant has argued that the convention of collective Cabinet responsibility had been undermined prior to the request through Baroness Warsi having commented publicly about her correspondence with the Deputy Prime Minister. The complainant likened this to a previous Information Tribunal case where it had been found that this convention had been undermined in relation to Cabinet minutes recording the resignation of Michael Heseltine. In that case the reasoning of the Tribunal was based on *"...multiple breaches of the convention by memoir or leak coupled with disclosures to the House of Commons..."* (*Cabinet Office v Information Commissioner* (EA/2010/0031)).
25. The Commissioner agrees that the public comment by the Minister is relevant. He does not, however, accept that this has undermined the convention of collective Cabinet responsibility in this case for the following reasons. The specific content of this letter was not disclosed and the existence of this letter has been commented on, as far as the Commissioner is aware, on just a single occasion. This situation is clearly substantially different from that considered by the Tribunal in the case referred to by the complainant. In that case multiple accounts of the events recorded in the information in question had been disclosed. In this case there is one example of the existence of the letter having been commented upon, and none of what is purported to be the actual content of this letter having been disclosed. The Commissioner's view is, therefore, that the convention of collective Cabinet responsibility has not been undermined in relation to this information as a result of Baroness Warsi having commented publicly on the existence of this letter.
26. The policy making process to which the information relates was ongoing at the time of the request and the public authority has argued that this increases the likelihood of harm and, therefore, the weight of the chilling effect and collective responsibility arguments. The public authority has explained that the information relates to Individual Electoral Registration

and that at the time of the request work was underway on legislation to bring this about.

27. As to what this means for the weight of the arguments advanced by the public authority, the Commissioner accepts that the weight of these arguments is increased as a result of the policy to which they relate having been ongoing at the time of the request. In relation to the chilling effect argument, the Commissioner accepts that the likelihood of this is made greater as a result of the information relating to a policy making process that was ongoing at the time of the request. This is because the Ministers and officials who are identified within this information may be required to comment further on this policy and may regard the previous disclosure of information relating to this matter as evidence that their further contributions may also be disclosed.
28. In relation to the convention of collective Cabinet responsibility argument, the Commissioner believes that the severity of the impact of a breach of this convention would be likely to be greater where the disclosure relates to a current policy making process. This is because it might affect the outcome of this policy making process, which would not happen where the policy in question had already been finalised and enshrined in legislation.
29. Overall, therefore, the Commissioner accepts that the relevant policy making process having been ongoing at the time of the complainant's request increases the weight of the public interest arguments advanced by the public authority. He finds that the chilling effect and Cabinet responsibility arguments carry significant weight in favour of maintenance of the exemption. However, he also comments below on how the policy making process having been ongoing at the time of the request can also be an argument in favour of disclosure.
30. Turning to those factors that favour disclosure of the information, the complainant has argued that the subject matter of the information in question indicates a strong public interest in disclosure. The information relates to the issue of electoral fraud, which the complainant argued was of such significance that this indicated a strong public interest in disclosure. The complainant quoted the following from the Information Tribunal case *Martin George Rosenbaum v Information Commissioner* (EA/2008/0035) in support of this argument:

“Democracy is dependent on the process being entirely legitimate and seen to be such – and that this can be achieved by maximum openness”. (paragraph 41)

31. The Commissioner agrees with the complainant that the issues covered in the withheld information are of importance. He also agrees that the

Tribunal quote above is relevant in that there is a strong public interest in openness in relation to information that impacts upon the health of democracy. The Commissioner considers that disclosure of the information in question would serve the public interest in that it would shed light on how the Government has reacted to allegations of electoral fraud. The Commissioner regards the subject matter and the specific content of the information to be public interest factors in favour of disclosure of significant weight.

32. As noted above, the fact that the policy making process to which this information relates was ongoing at the time of the request can be cited as an argument in favour of disclosure of the information. The Commissioner's view is that disclosure would increase public understanding of and participation in a live and ongoing policy development process. This adds to the weight of the public interest in favour of disclosure.
33. The Commissioner has recognised significant public interest in favour of disclosure owing to the subject matter and content of the information in question, particularly given that the policy development process to which this information relates was ongoing. However, the fact that this process was ongoing also adds to the weight of the arguments against disclosure relating to the harm to the process of Ministerial communications and the convention of collective Cabinet responsibility. In these circumstances, the public interest in avoiding the harm predicted by the public authority must be afforded very significant weight. Due to the weight of the public interest in avoiding this harm, the conclusion of the Commissioner is that the public interest in maintenance of the exemption provided by section 35(1)(b) outweighs the public interest in disclosure.

Procedural Requirements

Sections 10 and 17

34. In failing to confirm that it held information, or respond to the request, within 20 working days of receipt, the public authority did not comply with the requirements of sections 10(1) and 17(1).

The Decision

35. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption provided by section 35(1)(b) correctly. However, the Commissioner also finds that the public authority breached sections 10(1) and 17(1) in that it failed to confirm that it held information, and

supply a valid refusal notice, within 20 working days of receipt of the request.

Other matters

36. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to respond with the outcome of the review within twenty working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

37. 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

38. 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.
39. 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 16th day of August 2011

Signed

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

Legal Annex

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17(1) provides that -

“A public authority which, in relation to any request for information, 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 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.”