

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 October 2012

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

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of a report prepared and sent to the Prime Minister by the Minister for Decentralisation and Cities. The report assessed the progress towards decentralisation in different government departments. The Cabinet Office withheld the report on the basis of section 35(1)(a) (formulation and development of government policy) and section 35(1)(b) (Ministerial communications) of FOIA. The Commissioner has concluded that the report is exempt from disclosure under section 35(1)(b) and that in the circumstances of the case the public interest favours maintaining the exemption.

#### Request and response

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2. On 9 November 2011, the complainant wrote to the Cabinet Office and requested information in the following terms:

*'At the prime minister's session with the Liaison Committee yesterday, Clive Betts MP referred to a report compiled for the prime minister by the minister for decentralisation assessing progress towards decentralisation in different government departments.*

*Please can you send me a copy of this report.'*

3. The Cabinet Office responded on 29 November 2011 and confirmed that it held the requested information but it considered it to be exempt from disclosure on the basis of sections 35(1)(a) and (b) of FOIA.

4. The complainant contacted the Cabinet Office on 30 November 2011 and asked for an internal review of this decision.
5. The Cabinet Office informed him of the outcome of the internal review on 17 January 2012; the review upheld the application of sections 35(1)(a) and (b).

### Scope of the case

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6. The complainant contacted the Commissioner on 25 January 2012 to complain about the way his request for information had been handled. In doing so he argued that the Cabinet Office's refusal had failed to reflect how release of the specific information could lead to a better understanding of the government's action and progress towards decentralisation and how it could promote public participation. He also stated that in his opinion the public interest arguments advanced by the Cabinet Office to favour maintaining the exemptions were formulaic and exaggerated.

### Reasons for decision

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7. Section 35 is a class based exemption, therefore if information falls within the scope of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
8. The relevant parts of section 35 of FOIA which the Cabinet Office has cited in this case state 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'*

9. In its submissions to the Commissioner the Cabinet Office explained that the public interests in respect of both exemptions were overlapping. That is to say, as the Ministerial communication in question concerns the formulation and development of the decentralisation agenda, the public interest arguments that favour maintaining section 35(1)(a) also favoured maintaining section 35(1)(b). However, in respect of section 35(1)(b) the Cabinet Office argued that additionally there was a very strong public interest in protecting the confidentiality of Ministerial

communications. The Commissioner has therefore focused his analysis on the application of section 35(1)(b).

10. It should be noted that the Cabinet Office's submissions to the Commissioner which explained why it believed that the exemptions are engaged, and why the public interest favoured maintaining the exemptions, included direct references to the withheld information itself. Therefore, in order to ensure that the decision notice does not include details of the withheld information itself the Commissioner's analysis of these submissions which is set out below is necessarily brief and omits a number of specific points made by the Cabinet Office.

### **Section 35(1)(b) – Ministerial communications**

11. As the wording of the complainant's request implies, the withheld information consists of a report sent to the Prime Minister by the Minister for Decentralisation and Cities. The Commissioner is therefore satisfied that the withheld information clearly falls within the scope of the exemption contained at section 35(1)(b) of FOIA.

### **Public interest test**

12. However section 35(1)(b) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of FOIA, that is whether 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 maintaining the exemption**

13. The Cabinet Office noted that the Coalition Agreement of May 2010 committed the government to a fundamental shift of power away from Westminster to the people; to promoting decentralisation and democratic engagement; and to ending the era of top-down government by giving new powers to local councils, communities, neighbourhoods and individuals. The Cabinet Office explained that, although at the time of the request in November 2011 the decentralisation agenda was clear, and some important legislation had been enacted, the development of detailed policies designed to meet the aims of the agenda remained at an early stage. The withheld information consists of an assessment of the progress of each government department towards decentralisation with the aim of furthering the implementation of the decentralisation agenda. The Cabinet Office confirmed that at the time of the request the policy of decentralisation was subject to consultation between the Minister for Decentralisation and Cities and his ministerial colleagues and that the withheld information was of key importance in those discussions. The Cabinet Office noted that it was therefore very clear

that the withheld information was part of live policy considerations by ministers at the time of the request and furthermore that these policy considerations were at a formative stage.

14. The Cabinet Office argued that it was strongly in the public interest to protect all aspects of communications between ministers. It noted that the issues went beyond the public interest in preserving the sovereignty of the policy development process in which ministerial advisers, subject experts and representatives of affected interests may also play a part. The Cabinet Office explained that there was a clear public interest in ministers having a clear space, away from public inspection, in which to debate, discuss and refine proposals and options as they arise from the wider policy making process. By providing ministers with such a space they are able to decide what to discuss, and how to discuss it, and this allows them to direct the wider policy making process.
15. The Cabinet Office further argued that disclosure of information still under active ministerial consideration would distort the conduct of ministers' deliberations and influence the conduct of the ministerial deliberations in the future. This is because if ministers and their advisers had to constantly consider what the public's reaction would be to their discussions, then there would be unwarranted concern over the presentation of the policy rather than its content. In the longer term, this would have a tendency to restrict considerations to options that could be presented as reasonable by the standards of the time, and exclude from consideration other options which might prove unacceptable to interest groups. However, discussions of what some could consider objectionable proposals, even when there is no prospect of them being taken up, can serve to clarify issues. Nevertheless, disclosure of ongoing policy discussions could distract ministers (and indeed the public) from the consideration of real and viable policy options by having to defend their consideration of options which had been discarded. This would be corrosive of parliamentary democracy since it would hold ministers to account for all stages of policy discussion rather than their decisions. In summary, it was simply not in the best interests of policy formulation, and therefore not in the public interest, that every contribution to policy formulation should be examined by the public before ministers own thoughts had matured with the benefit of discussion with their colleagues.

### **Public interest arguments in favour of disclosing the withheld information**

16. The Cabinet Office acknowledged that there was a general public interest in openness in government and that transparency may contribute to a greater public understanding of, and participation in, public affairs. It also accepted that there is a strong public interest in

understanding how the government develops policy in pursuit of a wider agenda. Furthermore the Cabinet Office acknowledged that there is also a public interest in understanding the development of policy on decentralisation which aims to have far reaching effects on citizens and their civic life.

17. As noted above, the complainant argued that the specific information he requested could lead to a better understanding of the government action and progress towards decentralisation and how it could promote public participation.

### **Balance of the public interest arguments**

18. In considering the Cabinet Office's submissions the Commissioner has taken into account the comments of a key Information Tribunal decision involving the application of section 35(1)(a).<sup>1</sup> In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself. Although focused on section 35(1)(a) rather than section 35(1)(b), the Commissioner believes that these principles are equally applicable in respect of both exemptions.
19. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption:
20. With regard to the Cabinet Office's arguments regarding the need for a 'safe space', the Commissioner believes that such arguments are only relevant if at the time of the request the decision making was ongoing. This is because such arguments are focused on the need for a private space in which to develop **live** policy. In the circumstances of this case the Commissioner is satisfied that at the time of the complainant's request ministers' discussions about the decentralisation agenda, in particular the content of the report which has been requested, were clearly ongoing. Indeed this is confirmed in a letter dated 6 December 2011 sent by the Prime Minister to the Liaison Select Committee in which he explained that he had asked the Minister for Decentralisation and Cities to circulate the report to the relevant members of Cabinet so

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<sup>1</sup> *DFES v Information Commissioner and Evening Standard* (EA/2006/0006)

that they could consider it and add examples of the work their departments had done<sup>2</sup>.

21. In line with the comments of the Tribunal decision referenced above at paragraph 18, the Commissioner believes that significant and notable weight should be given to the safe space arguments in cases such as this where the policy making process is live and the requested information relates directly to that policy making. As the Tribunal noted, in such scenarios the public interest is very unlikely to favour disclosure unless, for example, it would expose some level of wrongdoing. Furthermore, and for the reasons identified by the Cabinet Office, in the Commissioner's opinion it is clearly in the public interest that ministers are able to discuss policy options regarding the decentralisation agenda in a robust and uninhibited manner.
22. In the Commissioner's view a number of factors specific to this case mean that significant weight should be attributed to these arguments: Firstly, the Commissioner notes that the information in question contains a candid assessment of departments' progress towards decentralisation. Secondly the report itself – not just wider aspects of decentralisation policy - was actively under discussion by ministers at the time of the request. Thirdly, the Commissioner accepts that the policy making process, and thus ministers' discussions about it, were at the early stages of formulation. The Commissioner is therefore firmly of the view that disclosure of the withheld information at the time of the request would have had a detrimental impact on the safe space within which ministers were discussing this policy.
23. With regard to attributing weight to the public interest factors in favour of disclosure, in the Commissioner's opinion disclosure of the withheld information would go a significant way to informing the public about the progress made by various departments in decentralising power. Given the nature of the withheld information the Commissioner believes that it could be effectively used by the public to make more informed contributions to the policy making process regarding decentralisation. Therefore, in the Commissioner's view the public interest arguments in favour of disclosure also attract considerable weight.
24. However, on balance the Commissioner has concluded that the public interest favours maintaining the exemption. There is undoubtedly significant value in the public playing an active part in the policy making process regarding the government's decentralisation agenda. However,

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<sup>2</sup> <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmliaisn/608/608we01.htm>

disclosure of the withheld information before ministers have had the opportunity to discuss its content and agree the government's next steps in implementing the decentralisation agenda, would in the Commissioner's opinion, significantly risk impinging on the confidential space needed for effective ministerial decision making in relation to the decentralisation agenda, and arguably would result only in the public being provided with an incomplete and inconclusive view of the government's future plans regarding decentralisation.

## Right of appeal

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25. 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,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

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

**Signed** .....

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