

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 November 2012

Public Authority: The Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information relating to the Papal visit in 2010. The Cabinet Office provided some information but withheld the remainder on the basis that it was exempt from disclosure by virtue of section 27 (international relations) and section 35 (formulation of government policy).
2. The Commissioner's decision is that the Cabinet Office correctly applied sections 27 and 35 to the withheld information. He requires no steps to be taken.

Request and response

3. The complainant wrote to the Cabinet Office on 1 November 2011, requesting information in relation to Pope Benedict XVI's visit to Britain in September 2010:

"The following information is requested including electronic documents such as emails, faxes and digital voicemails:

1. *All policy documents pertaining to the Cabinet Office's strategy to deal with perceived legal threats to the Pope before, during and after his September 2010 visit to UK*
2. *Information pertaining to actions taken in regards to the above policy and strategy.*
3. *All information specifically dealing with the Raelian Movement and the above mentioned lawsuit including collateral contact with the media, courts and Vatican".*

4. The Cabinet Office responded on 21 December 2011. It denied holding some of the requested information – information in relation to part (3) of the request - but confirmed that the remainder was held. However, it refused to provide that information citing the exemptions at sections 27, 35 and 42 of FOIA - international relations, formulation of government policy and legal professional privilege.
5. The Cabinet Office upheld that position in its internal review correspondence of 31 January 2012.

Scope of the case

6. The complainant wrote to the Commissioner on 5 April 2012 to complain about the handling of his request for information. In agreement with the complainant, the scope of his complaint is in relation to how the Cabinet Office handled parts (1) and (2) of his request.
7. During the course of the Commissioner's investigation, the Cabinet Office provided the complainant with a copy of some of the information within the scope of the request. Following that disclosure, the complainant contacted the Commissioner to confirm that he would like to pursue his complaint.
8. In correspondence with the Commissioner, the Cabinet Office advised that it was no longer relying on section 42 (legal professional privilege).
9. The Commissioner therefore considers the scope of his investigation to be the Cabinet Office's citing of sections 27 and 35 in respect of the remaining withheld information.

Reasons for decision

Section 27 international relations

10. The Commissioner has first considered the Cabinet Office's citing of section 27 (international relations). During the course of the Commissioner's investigation, the Cabinet Office confirmed that it is relying on section 27(1)(a), (c), and (d) and, additionally, section 27(2) of FOIA.
11. Section 27(1) of FOIA focuses on the effects of the disclosure of information and provides for information to be exempt under section 27(1) if its disclosure 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 other 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.
12. Information is exempt by virtue of subsection (2) of section 27 if it is confidential information obtained from a state other than the UK or from an international organisation or international court.
13. In other words, section 27(1) focuses on the effects of the disclosure of the information, while section 27(2) relates to the circumstances under which it was obtained and the conditions placed on it by its supplier, and does not relate primarily to the subject of the information or the harm that may result from its disclosure. In the Commissioner's view, such information is confidential for as long as the state, organisation or court expects it to be so held.
14. The Cabinet Office argued that the UK has full diplomatic relations with the Vatican and that the Pope is considered a full Head of State under UK law, including for the purposes of section 27 of FOIA. Accordingly, and in response to the comments the complainant made when he requested an internal review, the Cabinet Office stressed that its reliance on section 27:
- "is therefore not based in any way on the Pope's role as Head of the Catholic church, but on the likely prejudice to the UK's foreign relations including, but not limited to, those with the Vatican".*
15. In correspondence with the Commissioner, the Cabinet Office expanded on its arguments that damage would flow from disclosure.
16. Having viewed the withheld information at issue in this case, and considered the arguments put forward by the Cabinet Office, the Commissioner is satisfied either that UK interests abroad, or the international relations of the UK, would be likely to be prejudiced through disclosure or that such information is confidential information within the meaning of section 27(2).
17. He therefore finds the exemption engaged in relation to the information withheld under section 27. As section 27 is a qualified exemption, the Commissioner has next considered the public interest.

The public interest test

18. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to

disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

Public interest arguments in favour of disclosing the requested information

19. When requesting an internal review, the complainant told the Cabinet Office that he disagreed with its view that disclosure *"might prejudice foreign relations with the Vatican"*.

20. Arguing in favour of disclosure, he told the Cabinet Office:

"The Pope's visit is in the past, no future visit is immediately scheduled, and therefore foreign affairs concerns have receded in favour of the public's right to know what transpired".

21. The Cabinet Office recognised the general public interest in openness in public affairs:

"in order to ensure that the public are able to scrutinise the manner in which public authorities reach important decisions".

22. Describing the Pope's visit as *"an historic occasion"* in which there was a high level of public interest, the Cabinet Office recognised the benefit in understanding how the Government prepared for this visit.

Public interest arguments in favour of maintaining the exemption

23. In the Cabinet Office's view, disclosure of the information in this case would be likely to prejudice the United Kingdom's relations with the Vatican and inhibit frankness and openness in future diplomatic exchanges with the Vatican and other states.

24. Arguing in favour of maintaining the exemption, the Cabinet Office told the complainant that it considered that other states would be likely to be less willing to share sensitive information with the United Kingdom in future if the information in this case was disclosed. It also argued that States:

"may also be less willing to arrange reciprocal state visits with the United Kingdom if information relating to these visits were released prematurely, thus damaging the United Kingdom's ability to conduct normal diplomatic relations and further our national interest".

25. In correspondence with the Commissioner, the Cabinet Office expanded on its arguments, providing the Commissioner with further submissions

in support of its view that there is a very strong public interest in maintaining good relations with international partners in general and with the Holy See in particular.

26. The Cabinet Office brought to the Commissioner's attention that much information about His Holiness's visit is already available in the public domain. Arguing strongly that it is not in the public interest to prejudice relations between the UK and other states and international partners, the Cabinet Office considered that further disclosure would prejudice relations with all States on the basis that they are likely to take disclosure of the information at issue in this case into account in future exchanges with the United Kingdom.

Balance of the public interest arguments

27. In considering the opposing public interest arguments in this case, the Commissioner must decide whether it serves the interests of the public better to withhold or to disclose the requested information. In deciding where the balance lies, the Commissioner has taken into account the presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest.
28. The Commissioner recognises the public interest in maintaining good international relations: he accepts that it is strongly in the public interest that the UK enjoys effective relations with foreign States. The public interest would obviously be harmed if these relationships were negatively impacted, through either information ceasing to be provided or the nature of discussions becoming less candid. He considers this to be especially true given the likely harm if disclosure makes international relations more difficult.
29. In considering the public interest factors in this case, the Commissioner has taken into account not only the immediate impact on relations with the Holy See, but also the potential adverse effect with many other States across the world if the UK was seen to be disclosing information considered to have been shared/imparted in confidence.
30. Having balanced the opposing public interests in this case with respect to the information withheld by virtue of section 27, the Commissioner has concluded that the Cabinet Office correctly applied the exemption and was therefore entitled to withhold the information.

Section 35 Formulation of government policy

31. The Commissioner has next considered the Cabinet Office's citing of section 35 in relation to the small amount of information it withheld by virtue of that exemption.

32. During the Commissioner's investigation, the Cabinet Office confirmed that it is relying on section 35(1)(a) and (b) for refusing to disclose the requested information. In other words, it is claiming that the information is held by a government department and relates to the formulation or development of government policy and ministerial communications.
33. Ministerial communications are defined at section 35(5) as including proceedings of the Cabinet, or of any committee of the Cabinet. Having viewed the withheld information, the Commissioner is satisfied that it falls within both subsections 35(1)(a) (the formulation or development of government policy) and (b) (Ministerial communications). He acknowledges that the withheld information relates to the formulation or development of government policy at the time by virtue of its subject matter, namely the UK Government's policy on the Pope's visit to Britain.
34. Accordingly, he finds the exemption engaged in relation to both subsections being claimed and therefore he has gone on to consider the public interest arguments.

The public interest test

35. Section 2(2)(b) provides that a public authority is not under a duty to disclose information if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it. This means that if the public interest is equally balanced, the information must be disclosed.

Public interest arguments in favour of disclosing the requested information

36. The Cabinet Office recognises the general public interest in disclosure of information, and in the public being able to assess the quality of advice being given to Ministers and their subsequent decision making:

"particularly in relation to high profile issues such as the Pope's visit".

37. Similarly it recognises that transparency may contribute to greater public understanding of, and participation in, public affairs. In this respect it referred to the public interest in understanding the government's contribution to planning for the visits of foreign heads of state.

Public interest arguments in favour of maintaining the exemption

38. Arguing strongly in favour of maintaining the exemption, the Cabinet Office told the complainant:

"Ministers must be able to discuss policy freely and frankly... Ministers and officials also need to be able to conduct rigorous and candid risk assessments of policies... In relation to information of this sort, it is important for Ministers and officials to be able to robustly assess options for dealing with potential legal challenges and take appropriate action accordingly, without fear that their considerations would be made public prematurely".

39. With reference to the complainant's observation that, at the time of his request, the Pope's visit was in the past, the Cabinet Office responded that it was only just over two years since the visit and the policy discussions that preceded it. Releasing the information at issue in this case *"so shortly after these policy discussions took place"* would, in the view of the Cabinet Office, reduce the quality of Ministerial decision making overall.
40. Although restricted in what he is able to say without disclosing the nature of the withheld information, the Commissioner acknowledges that, during the course of his investigation, the Cabinet Office expanded on its arguments in favour of maintaining the exemption.

Balance of the public interest arguments

41. As the Cabinet Office is citing multiple limbs of the exemption, the Commissioner must consider separately, in the case of each limb of the exemption, whether the public interest in disclosing the information under consideration equals or outweighs the public interest in maintaining the exemption.
42. As he considers section 35(1)(b) to be the more relevant, the Commissioner has first considered the public interest in respect of that limb of the exemption. In doing so, he notes that, in this case, the public interest arguments put forward by the Cabinet Office in relation to section 35(1)(a) are broadly similar to those cited in relation to section 35(1)(b).
43. The Commissioner recognises that there is a public interest in openness and accountability, and in increasing public understanding in the way that government works. In the particular circumstances of this case, the withheld information relates to Ministerial communications about government policy in relation to a Papal visit, a visit that the Commissioner understands was controversial for a number of interest groups.
44. In reaching a decision in this case, the Commissioner has taken into account the extent to which relevant information is already in the public domain: he considers the focus of his decision should be on what purpose disclosure would serve and what the information at issue in this case would add to the information that is already available.

45. The Commissioner also considers that the age of the information requested is a relevant factor to the extent that the passage of time may impact upon the strength of the public interest arguments: in many cases it can be seen that its sensitivity decreases over time. In this case, however, at the time of the request, less than three years had passed since the relevant Ministerial discussions took place.
46. Taking all the above into account, the Commissioner has concluded that, in the circumstances of this case, the public interest in maintaining section 35(1)(b) in relation to the withheld information outweighs the public interest in disclosure. Therefore the information in question should be withheld.
47. The Cabinet Office is citing section 35(1)(a) in relation to the same information for which it is citing section 35(1)(b). As he has found that the information was correctly withheld by virtue of section 35(1)(b), the Commissioner has not gone on to consider the public interest arguments in relation to section 35(1)(a).

Right of appeal

48. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

49. 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.
50. 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
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