

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2012

Public Authority: The Cabinet Office
Address: 1 Horse Guards Parade
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant requested information relating to proposals for changes to the fees and charging elements of the Freedom of Information Act. The Cabinet Office refused the request, citing the formulation of government policy exemption, section 35(1)(a).
2. The Commissioner's decision is that the Cabinet Office correctly applied section 35 to the withheld information. He requires no steps to be taken.

Request and response

3. The complainant wrote to the Cabinet Office on 6 April 2012 and requested information in the following terms:
"I would like to request any information held in documents, emails or other correspondence which outline proposals for changes to the fees and charging elements of the Freedom of Information Act 2000, and which show who has been involved in those discussions, both within the Cabinet Office and in other departments. I would also like to receive any assessment or consideration that has been made into the effect on the number of requests that these changes might involve".
4. The Cabinet Office responded on 11 April 2012. It told the complainant that it did not hold relevant information and advised him to contact the Ministry of Justice (MoJ) as that was the Government body dealing with such matters.
5. Following an internal review, the Cabinet Office wrote to the complainant on 8 May 2012, acknowledging that it had widened its

search as a result of the complainant's internal review request. It revised its original position, confirming that it holds two pieces of information within the scope of his request. However, it refused to provide these, citing section 35(1)(a) of FOIA (formulation of government policy) as its basis for withholding the information.

6. At the time of the request, the Justice Select Committee was conducting a post-legislative scrutiny of the FOIA. The Committee subsequently published its report on 26 July 2012.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In addition to his complaint about the Cabinet Office's refusal to provide him with the requested information, he complained about the quality of the original search carried out in relation to his request.
8. The Commissioner considers the scope of his investigation to be the Cabinet Office's citing of section 35(1)(a) of FOIA (formulation of government policy).

Reasons for decision

Section 35 formulation of government policy

9. Section 35(1) of FOIA states that:

"Information held by a government department or by the Welsh Assembly Government 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".*

10. Section 35(4) of FOIA states 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”.

11. Section 35 is a class-based exemption, meaning that it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
12. Concerning the withheld information, the Cabinet Office told the complainant:

“... I can confirm that the information held in these documents is exempt under section 35(1)(a) of the Freedom of Information Act. This exemption protects the formulation of policy and communications between Ministers. Disclosure would weaken Ministers’ ability to discuss controversial and sensitive topics free from premature public scrutiny”.

13. That response appears to refer to both section 35(1)(a) and section 35(1)(b). However, in correspondence with the Commissioner the Cabinet Office confirmed that it considers that all the information is exempt under section 35(1)(a). It also confirmed that it considers that the policy in question is policy on FOIA, specifically policy on charging fees.
14. The thinking behind the section 35 exemption is that it is intended to prevent harm to the internal deliberative process of policy-making. In the Commissioner’s view, although ‘policy’ is not a precise term, it can be about the development of options and priorities for ministers, who determine which options should be translated into political action and when. He also considers that the term ‘relates to’ can safely be interpreted broadly. This means it can include any information which is concerned with the formulation or development of the policy in question and not information specifically on the formulation of that policy.
15. Having viewed the withheld information, the Commissioner is satisfied that it falls within the category of ‘formulation or development of government policy’. Accordingly he finds that section 35(1)(a) is engaged and has gone on to consider the public interest arguments associated with that exemption.

Public interest arguments in favour of disclosure

16. In correspondence with the Cabinet office, the complainant stressed the “inevitably strong public interest” in openness and transparency:

“particularly in light of the Prime Minister’s assertion that the Coalition would be the most transparent government in history”.

17. With respect to the timing of his request, he stated:

"Given that the Justice Committee is currently holding open and transparent sessions into the operation of FOI, there is a huge public interest in revealing whether the Government is separately and secretly working on proposals for change without waiting for the Parliamentary Committee to report".

18. The Cabinet Office acknowledged the general public interest in openness of Government, telling the complainant:

"openness in government may increase public trust in and engagement with the government".

19. It also recognised that the decisions Ministers make may have a significant impact on the lives of citizens and that, accordingly, there is a public interest in their deliberations being transparent.

20. In correspondence with the Commissioner, the Cabinet Office acknowledged:

"that many citizens are interested in the future of the Freedom of Information Act and wish to understand, and are entitled to understand, the approach of the Coalition Government".

Public interest arguments in favour of maintaining the exemption

21. The Cabinet Office told the complainant that the arguments in favour of disclosure:

"have to be weighed against a strong public interest that policy-making and its implementation are of the highest quality and informed by a full consideration of all the options".

22. Arguing in favour of maintaining the exemption, the Cabinet Office also told the complainant:

"Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications".

23. The Cabinet Office expanded on its arguments in favour of maintaining the exemption during the course of the Commissioner's investigation. In correspondence with the Commissioner, the Cabinet Office explained the need for a 'safe space' to formulate policy, arguing that there is an important public interest in protecting information related to government policy discussions.

24. Arguing that the process of government policy formulation with respect to FOIA *"is clearly still live"*, the Cabinet Office told the Commissioner:

"The disclosure of preliminary views at an early stage of policy development would intrude upon the right of Government to consider the details of policy formulation. Disclosure would result in public comment that would make it more difficult for Ministers to consider the merits of every option before deciding what could be ruled out. Restricting the range of options that public opinion permits Ministers to entertain would make it more difficult to discuss any policy option fully. In these circumstances, the public interest in protecting the privileged space for Ministers and their advisers to consider policy overrides the general public interest in transparency".

25. When considering the safe space argument in relation to the public interest test, the Commissioner will look at the age of the requested information and whether the formulation and development of the policy in question was still underway at the time of the request.
26. In his view, safe space arguments are only relevant, with regard to maintaining the exemption, if, at the time of the request, policy formulation and development was ongoing. This is because such arguments focus on the need for a private space to develop live policy.
27. Having viewed the withheld information, the Commissioner accepts that it relates directly to the formulation and development of policy: in this case, policy making in relation to FOIA. He also accepts that the process was ongoing at the time of the request. He is therefore satisfied that the argument that a safe space was needed to protect the policy making process is a relevant one.
28. Having viewed the withheld information, the Commissioner considers that some of the information is factual under section 35(4). The Commissioner considers that that information also relates to an ongoing policy process: he therefore considers that the safe space argument is relevant to that information.

Balance of the public interest arguments

29. 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.
30. The exemption at section 35(1) of FOIA is intended to prevent harm to the internal deliberative process of policy making. In the Commissioner's view, the weight given to arguments in favour of disclosure will depend

largely on the need for greater transparency in relation to the subject matter and the extent to which disclosure of the information in question will meet that need.

31. Assessing the balancing of the public interest in this case, the Commissioner considers it relevant that he has determined that some of the information is factual under section 35(4). Subsection 35(4) provides an explicit indication that there is a 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. It is therefore important to consider what weight must also be given to this factor.
32. The Commissioner supports the disclosure of data that has been used in the policy process. However he recognises that, sometimes, revealing factual information whilst a process is ongoing can impact on the policy process as intentions can be revealed by the type or nature of the factual information.
33. The Commissioner considers that the public interest in the specific information at issue in this case is relatively low and the complainant's arguments in favour of disclosure do not carry significantly strong weight in light of the content of the information. However, he acknowledges the general public interest in FOI reform and public interest in the full picture of the policy work in this area, regardless of the content.
34. In reaching a conclusion in this matter, the Commissioner has taken account of the content and context of the withheld information, and, against that background, has considered whether its release would contribute to the general public interest in openness and transparency. In his view, the weight given to arguments in favour of disclosure will depend largely on the need for greater transparency in relation to the subject matter and the extent to which disclosure of the information in question will meet that need. He has also taken into account the importance attached to disclosing factual information.
35. The Commissioner has already concluded that the policy process was still live at the time of the request and that the requested information relates to that policy making. In light of this, having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in protecting the safe space at that time was of sufficient significance for him to conclude that maintaining the exemption outweighs the public interest in disclosure.
36. Accordingly he has determined that the Cabinet Office was entitled to withhold the requested information under section 35(1)(a).

Other matters

The nature of the search

37. With respect to the Cabinet Office's original response that it did not hold information within the scope of the request, the complainant brought to the Commissioner's attention that, while he wanted to see relevant proposals developed in the Cabinet Office, the Cabinet Office initially only looked in the area which liaises with the MoJ. He told the Commissioner:

"I just want to emphasise that I don't believe that the Cabinet Office's explanation of their initial search is plausible. The explicit scope of my request asks for information about discussions "within the Cabinet Office" and to confirm that any plans are being developed by them rather than the MoJ".

38. In its response to the Commissioner, the Cabinet Office provided the Commissioner with a detailed explanation of the way it undertook the original search. It described it as:

"a reasonable approach and in line with our usual practice".

39. The Cabinet Office also explained that, following the complainant's request for an internal review, the second search it carried out for information within the scope of the request was wider than the search it originally conducted.

40. With respect to the adequacy of the search, the complainant also told the Commissioner:

"I wanted to see proposals for FOI fees changes developed in the Cabinet Office and described on Newsnight, whereas they only looked in the area which liaises with the Ministry of Justice".

41. With respect to that point, the Cabinet Office argued that the complainant had not made any reference to Newsnight in his request.

42. The Commissioner considers that the circumstances of this case highlight the benefits of having an internal review procedure in place. He recognises that an internal review provides the opportunity for a public authority to reconsider its handling of the request when, as in this case, an applicant complains about the authority's response to his or her request.

Right of appeal

43. 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

44. 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.
45. 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

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