

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2013

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information concerning the undertaking given by the Cabinet Office to the ICO concerning the handling of information requests. The Cabinet Office refused to disclose some of the information requested and cited the exemptions provided by sections 22 (information intended for future publication) and 44 (statutory prohibitions) of the FOIA as its grounds for refusing the request.
2. The Commissioner's decision is that the Cabinet Office did not deal with the request correctly in that neither of the exemptions cited are engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant all information falling within the scope of part (b) of the complainant's request.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 18 December 2011 the complainant wrote to the Cabinet Office and requested information in the following terms:

"In June you signed an undertaking with the Information Commissioner agreeing that you would

'(1) provide the Commissioner with monthly updates about its request handling performance, accompanied by a list of any overdue requests. This will assist the Commissioner in monitoring the authority for a six month period [from 1st June to 30th November]'

and

'(2) take steps to ensure that the data it holds on compliance is accurate, up-to-date and readily accessible to those who may require it'

Please can I have a copy of:

***(a)** Each of the monthly updates you sent to the Commissioner under (1) above.*

***(b)** Any readily accessible data you currently hold on compliance, as per (2) above."*

6. The Cabinet Office responded on 18 January 2012. It refused to disclose the information requested on the ground that this was exempt under section 22 (information intended for future publication) of the FOIA.
7. The complainant responded on the same date and requested an internal review. After a lengthy delay, the Cabinet Office wrote to the complainant with the outcome of the internal review on 8 May 2012. At this stage it referred to the information that was previously withheld having now been disclosed, although it was later confirmed that some of the information continued to be withheld.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled initially on 22 February 2012. At this stage the complaint concerned the failure to complete the internal review promptly.
9. Later the complainant confirmed that the internal review had been completed, but that he was dissatisfied with the continued withholding of some of the information he had requested. It was at this stage that the complainant confirmed that the information specified in the second part of his request continued to be withheld.

10. In relation to the information that was disclosed, the complainant stated that he was dissatisfied that it had taken a period of several months since the date of the request to disclose only some of the information requested. He also stated that he did not accept that section 22 was cited correctly at the refusal notice stage.
11. During the Commissioner's investigation the Cabinet Office indicated that it believed that the exemption provided by section 44 (statutory prohibitions) of the FOIA was also engaged, hence this is covered in the analysis below.

Reasons for decision

Section 44

12. Section 44(1)(a) provides an exemption for information the disclosure of which is prohibited by law. The task for the Commissioner when considering this exemption is to reach a view as to whether the provision cited by the public authority does provide a statutory bar to disclosure.
13. The Cabinet Office has cited the Statistics and Registration Service Act 2007 as providing a statutory bar to disclosure in this case. When asked to specify the provision from that Act that barred disclosure of the information in question, the Cabinet Office referred to the "*Code of Practice for Official Statistics*". It supplied to the ICO a document that described situations in which disclosure of information under the FOIA may not be compatible with the Statistics and Registration Service Act.
14. This documents states that "*release of statistical data under the FoIA may therefore both undermine the ability of a department to comply with the Code of Practice and undermine the Code of Practice itself*" and refers to relevant parts of this code that touch on the issue of premature publication. It also goes on to give public interest arguments in favour of the release of only accurate statistics.
15. The Commissioner does not accept that this code of practice provides a statutory bar to disclosure. Section 44(1)(a) provides an exemption from disclosure where to do so would be in contravention of an enactment; it does not apply where disclosure may breach a directive given in a code of practice. The view of the Commissioner is that the factors set out in the code of practice may instead be relevant points to cite in favour of other exemptions, section 22 for example.
16. The Cabinet Office cited the Statistics and Registration Service Act 2007 as providing a statutory bar to disclosure. Whatever the standing of the

code of practice it subsequently referred to, failure to follow the directives given in it would not constitute a breach of the aforementioned Act. Neither does the code of practice itself provide a statutory bar to disclosure. The conclusion of the Commissioner is, therefore, that the exemption provided by section 44(1)(a) is not engaged.

Section 22

17. Section 22(1) provides that information is exempt from disclosure if it was held at the time of the request with the intention that it would be published at some future date. It is not vital to this exemption that the date of publication be determined, but there must have been at the time of the request a clear and settled intention to disclose and it must be, in any event, reasonable in all the circumstances to withhold the information from disclosure until the time of the publication.
18. Some of the information falling within the scope of the request had been disclosed by the time of the completion of the internal review (the Cabinet Office later clarified that all information falling within the scope of part (a) of the request had been disclosed), indicating that clearly it was appropriate to cite section 22 in relation to it. For the remainder of the information, the Commissioner's task is to consider whether this was held with an intention to disclose at the time that the request was made and whether it was reasonable to delay access to this information until the time of that publication. This exemption is also qualified by the public interest, meaning that the information should be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
19. The Cabinet Office has been unclear and inconsistent in its responses as to when and by whom the information falling within the scope of request (b), which it has stated continues to be withheld, would be published. In the refusal notice, the reasoning given for the citing of section 22 was that the information in question was to be disclosed by the ICO. In the internal review response no explanation was given for the continued withholding of some of the information; indeed, no reference at all was made at this stage to any information continuing to be withheld.
20. In correspondence with the ICO the Cabinet Office amended its stance and stated that the information in question was to be published by the MoJ. In a letter to the ICO dated 30 July 2012, the Cabinet Office stated that the information would be published three to four months after the end of the quarter to which the information related. The request was made on 18 December 2011. According to the timetable given by the Cabinet Office, the latest this information should have been disclosed

would have been at the end of April 2012, four months after the end of the quarter in which the request was made.

21. In this letter explaining the citing of section 44, the Cabinet Office confirmed that information from the date of the request had been published in April 2012: "*Had we released information which formed part of MoJ's statistics for Quarter 4 – before they were published at the end of April 2012 – we would have breached [the Statistics and Registration Service Act 2007]*". Clearly, however, the timetable of disclosure by the end of April 2012 had not been adhered to in relation to information which was still being withheld at the time of the letter of 30 July 2012.
22. In an attempt to resolve this contradiction, the ICO afforded to the Cabinet Office a further opportunity to explain. In a letter received by the ICO on 3 September 2012, the Cabinet Office stated "*no information that fell within the scope of part (b) of the request has been disclosed*".
23. The reasoning given for the citing of this exemption was that this information would be disclosed by the MoJ three to four months after the end of the quarter in which it was recorded. However, this date for publication had passed by the time of the aforementioned correspondence in which the Cabinet Office advised that this information had not been disclosed.
24. The overall impression gained from these responses is that the Cabinet Office does not have a clear plan for the publication of the information that it continues to withhold. Whilst, as noted above, it is not vital to the citing of this exemption for there to be a set publication date, it is necessary to convincingly show a clear intention to publish.
25. The Cabinet Office may argue that the discrepancies identified above could have been resolved had it been afforded a further opportunity to explain. In response to this the Commissioner would stress that he will generally give a public authority one chance to explain its reasoning. In this case the Cabinet Office was given three opportunities. The Commissioner's decision not to revert to it for further explanation was also influenced by the consistent failure of the Cabinet Office to respond to correspondence from his office promptly. In this case it was necessary to issue an information notice under section 51 of the FOIA, and other delays were experienced.
26. On the basis of the lack of a coherent and convincing explanation from the Cabinet Office as to the intention to disclose the information falling within the scope of request (b), the conclusion of the Commissioner is that the exemption provided by section 22 of the FOIA is not engaged. As this conclusion has been reached at this stage it has not been

necessary to go on to consider the balance of the public interest. The Cabinet Office is required at paragraph 3 above to disclose the information falling within the scope of part (b) of the request.

Other matters

27. The published guidance of the ICO on internal reviews¹ states that a public authority should complete reviews within 20 working days, or 40 working days in exceptional circumstances. In this case there were no exceptional circumstances, yet it took close to four months for the internal review to be completed. The Commissioner agrees with the complainant that this is an excessive delay and the Cabinet Office should ensure that it carries out internal reviews promptly in future.

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/internal%20reviewsv1.pdf

Right of appeal

28. 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

29. 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.
30. 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

**Gerrard Tracey
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