

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2013

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

Decision (including any steps ordered)

1. The complainant has requested a copy of minutes from Cabinet meetings and Cabinet sub-committee meetings which relate to riots which took place in the Handsworth district of Birmingham in September 1985. He specified meetings held between 3 September 1985 and 30 September 1985. The Cabinet Office argued that it was not obliged to confirm or deny whether it holds such minutes based on the exclusion at section 35(3) (Formulation/Development of government policy). It upheld this position at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on the exclusion at section 35(3).
3. No steps are required.

Request and response

4. On 18 May 2012 the complainant requested information of the following description:

"On 9 September 1985 rioting broke out in the Handsworth area of Birmingham and lasted until 11 September 1985. I request from the Cabinet Office the content of any minutes from Cabinet meetings and cabinet sub-committee meetings that relate to these riots. For the purposes of this request I would seek any such minutes which relate to meetings which occurred between 9 September 1985 and 30 September 1985."
5. On 30 May 2012 the Cabinet Office responded. It refused to confirm or deny that it held the requested information. It cited section 35(3) as

its basis for doing so and explained that the information, if held, would constitute ministerial communications by virtue of section 35(1)(b) of the FOIA.

6. The complainant requested an internal review on 30 May 2012. The Cabinet Office sent him the outcome of its internal review on 6 August 2012. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 4 August 2012 to complain about the way his request for information had been handled. He first complained about the length of time taken to complete an internal review.
8. The complainant received the Cabinet Office's letter setting out the outcome of its internal review on 7 August 2012. He wrote to the Commissioner on the same day to complain about the Cabinet Office's use of section 35(3).
9. This Notice addresses whether or not the Cabinet Office is entitled to rely on section 35(3) as a basis for refusing to confirm or deny whether it holds information within the scope of the complainant's request.
10. There was considerable delay on the part of the Cabinet Office in conducting an internal review of its handling of this request. This is addressed in the Other Matters section of this Notice.

Background

11. In September 1985, riots broke out in the Handsworth district of Birmingham and lasted from 9 September – 11 September.¹ Two people died and over a hundred people were injured. There was also considerable damage to local property.²

¹

http://www.bbc.co.uk/birmingham/content/articles/2005/09/05/handsworth_riots_20years_feature.shtml

² <http://www.birminghammail.co.uk/news/local-news/from-the-archives-police-parking-ticket-sowed-157800>

Reasons for decision

12. The right of access to information under section 1(1) of the FOIA is in two parts. Upon receipt of a request, a public authority has a duty to
 - a) confirm or deny whether it holds the information described in an FOIA request; and
 - b) provide that information.
13. Both duties are subject to exemptions. Some of the exemptions are subject to a balance of public interest test under section 2 of the FOIA. This means that even where the exemption is engaged, a public authority can only rely on it if, in all the circumstances of the case, the public interest in doing so outweighs the public interest complying with either of the duties described in section 1(1). This case turns on whether the Cabinet Office is excluded from its duty to comply with its section 1(1)(a) obligation because it can rely on an exemption from this duty.
14. The relevant exemptions in this case are set out below.
15. Section 35(3) of FOIA states that:-

"The duty to confirm or deny does not arise in relation to information to which is (or if held by the public authority would be) exempt information by virtue of subsection (1)."
16. Section 35(1) of FOIA states that:-

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to:-

...

(b) Ministerial Communications,

..."
17. Section 35 is a class-based, qualified exemption. Its provisions are therefore engaged in relation to information of a particular description (or class) set out in section 35(1). However, the exemption is qualified by a balance of public interest test.
18. The Cabinet Office can only rely on section 35(3) as a basis for refusing to confirm or deny whether it holds the requested information if:
 - a) the information described in the request would, if held, constitute ministerial communications; and

b) the public interest in refusing to provide confirmation or denial as to whether the requested information is held outweighs the public interest in providing such confirmation or denial.

Section 35(1)(b)

19. The first question to address is: would the information, if held, constitute ministerial communications (as described in section 35(1)(b))?
20. The request seeks access to "*the content of any minutes from Cabinet meetings and cabinet sub-committee meetings that relate to these riots*". The Commissioner is satisfied that the information described in the request would, if held, constitute ministerial communications. Section 35(5) defines ministerial communications as including "*any communications between Ministers of the Crown ... and includes, in particular proceedings of the Cabinet or of any committee of the Cabinet*".
21. This means that the Cabinet Office can refuse to confirm or deny whether it holds such information under section 35(3) but only where the public interest in doing so outweighs the public interest in providing such confirmation or denial.

Balance of public interest test

22. The Commissioner has considered the arguments of both the complainant and the public authority as follows.

The complainant's arguments

23. The complainant focussed on the age of the information. He noted that, at the time of his request, nearly 27 years had passed since the riots took place. He noted the government's intention to reduce the so-called "30 year rule" so that eventually official papers would be passed to The National Archives after 20 years rather than 30 years. He argued that, given the passage of time, it was difficult to see how providing confirmation or denial as to the existence of information of this age would be detrimental to good governance. He also said:

"In all likelihood the documents, if they exist, would be made public in a few years' time. It is hard to see that the public interest will change so significantly over such a short period of time in relation to matters that are historical in nature."

24. He also supplied the Commissioner with links to a contemporaneous newspaper article in which ministers were reported to have made public comments about the riots. The article also reports the level of government at which the riots were apparently discussed.³

The Cabinet Office's arguments

25. The Cabinet Office focussed on the importance of protecting the safe space in which ministers could decide the level at which a matter should properly be discussed. It referred to the constitutional importance of maintaining the convention of Cabinet Collective responsibility. It explained that it was incumbent upon ministers to maintain this convention as part of the Ministerial Code.⁴ It referred specifically to Part 2, Section 2.1 and Part 2, Section 2.3. This states:

"The internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed. Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned. On occasion, it may be desirable to emphasise the importance of a decision by stating specifically that it is the decision of Her Majesty's Government. This, however, is the exception rather than the rule."

26. It dismissed the idea that ministers or their advisers would shrink from their duty to take decisions based on all relevant information and full consideration of all the options were confirmation or denial to be provided. However, it said that confirmation or denial would create a precedent such that *"if Ministers and their advisers have constantly to 'look over their shoulders' for how the public would react to the level at which a decision was taken, there would be a pressure for decisions to be taken at a higher level than required placing an unnecessary burden on the most senior levels of decision making"*. It argued that providing confirmation or denial would be corrosive to parliamentary democracy because it would be holding ministers to account for the level at which a matter was discussed rather than for the decision taken. It argued that this was contrary to good governance and not in the public interest.

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<http://news.google.com/newspapers?nid=2507&dat=19850913&id=3cBAAAAAIBAJ&sjid=26UMAAAAIBAJ&pg=2317,2874996>

⁴ <http://www.cabinetoffice.gov.uk/sites/default/files/resources/ministerial-code-may-2010.pdf>

27. It acknowledged the public interest in openness and recognised a particular public interest in increasing understanding of how the government of the time handled incidents of major public disorder.
28. It did not agree that the passage of time weakened the argument for maintaining the exclusion in this case. It noted that government policy on the handling of major public order incidents continues to be sensitive.

The Commissioner's conclusions

29. The matter at issue here is to consider the balance of public interest in providing confirmation or denial about whether the requested information is held not in disclosing the requested information. Is the Cabinet Office entitled, on the balance of public interest, to refuse to confirm or deny whether it holds the requested minutes? The Cabinet Office has argued that it is entitled to refuse to confirm or deny whether it holds the requested minutes because the public interest favours such refusal.
30. The Commissioner recognises that there is a compelling public interest in understanding more about the government's policy making and decision making process during a time of civil unrest in the UK's second city in the 1980s.
31. These events took place over 20 years ago. The Commissioner recognises that the passage of time weakens somewhat the public interest in maintaining the exclusion. According to The National Archives website, papers relating to the 1985 riots fall within the category of information likely to be transferred to that body under the 30 year rule, as it is progressively reduced to a 20 year rule. Information within the scope of this request, if held, would therefore be considered for transfer as part of that exercise within the next two years, although the Commissioner recognises that in certain circumstances papers may not be transferred.⁵
32. The Commissioner also notes that a considerable amount of information concerning the riots which took place four years earlier in Handsworth and Toxteth (an area of Liverpool) in 1981 was transferred to The National Archives in 2011. This slightly older information prompted considerable public debate about the policies that were discussed at the

⁵ <http://www.nationalarchives.gov.uk/about/20-year-rule.htm> (see information for 1985)

- time.^{6 7} Arguably, this adds weight to the public interest in knowing more about the level at which the government of 1985 discussed events which also occurred in Handsworth only four years later.
33. Confirmation or denial as to whether the matter was discussed at Cabinet or at a Cabinet sub-committee, in 1985 would also, to some extent, further ongoing public debate about social policy in the wake of widespread civil disorder that broke out in major cities in the UK in August 2011.
 34. However, the Commissioner thinks that considerable weight must be given to the public interest in conforming with the requirements of the Ministerial Code as described above. There is clearly a well-established convention whereby the level at which matters are discussed remains confidential unless the government decides to disclose that detail.
 35. The Cabinet Office has given particular emphasis to the importance of preserving a safe space in which ministers can discuss matters of policy. Specifically, it has argued that it is for the government of the day to decide the level at which a policy matter should be discussed and decided upon, for example, at full Cabinet, at a Cabinet sub-committee or within a minister's department.
 36. The Commissioner recognises that it may regularly arise that the government voluntarily discloses that a matter has been discussed at Cabinet level or at a sub-committee of the Cabinet.⁸ Arguably, this gives a more positive impression about the government's commitment to tackle a pressing problem of national importance. However, in accordance with the Ministerial Code, it remains a decision of the government to determine whether or not it discloses the level at which a matter has been discussed.
 37. The Commissioner accepts that the argument for refusing to confirm or deny the level at which matters of national importance were discussed

⁶ <http://www.telegraph.co.uk/news/politics/margaret-thatcher/8973896/1981-files-Fears-that-Royal-Wedding-would-be-spoiled-by-riots-strikes-and-economic-misery.html>

⁷ <http://www.bbc.co.uk/news/uk-england-merseyside-16355281>

⁸ <http://www.number10.gov.uk/news/pm-statement-on-violence-in-england/>; <http://www.bbc.co.uk/news/uk-politics-21102140>; <http://www.bbc.co.uk/news/science-environment-20182806>

over 20 years ago becomes less compelling, particularly where a contemporaneous report (as supplied by the complainant) appears to indicate that a senior minister was prepared to make public the level at which the riots were discussed. The report advises that Douglas Hurd (the minister in question) had been "*backed by the Cabinet*" and that the Cabinet "*met yesterday [September 12 1985] to underwrite [Mr Hurd's] tough line on the Handsworth Riots*". However, despite the seniority and experience of the journalist who prepared the report, the Commissioner does not think that the report constitutes unequivocal evidence that confirmation or denial as to the existence of requested information has already been given.

38. While recognising that the public interest in maintaining this exclusion does wane considerably with the passage of time, the Commissioner thinks that, in this case, there is a stronger public interest in maintaining the exclusion. In reaching this conclusion he has had particular regard to the public interest in protecting the safe space in which the government of the day determines the most appropriate forum for decision making. He has given particular weight to the provisions of the Ministerial Code described above. He recognises that there is a strong public interest in understanding the approach taken by the government of the day in relation to the disturbing events that took place in Handsworth only four years after earlier rioting in the area. This has resonance for the present day given the troubling events of August 2011 when there was extensive rioting, looting and criminal damage to property across major cities of the UK including Birmingham. However, he has concluded that on balance, and by a narrow margin, the Cabinet Office is entitled to refuse to confirm or deny whether it holds the requested information.

Other matters

Internal review

39. Whilst there is no explicit timescale laid down by the FOIA for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner believes that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
40. The Cabinet Office argued in mitigation that it conducted an office move during this period and that this, coupled with a high volume of requests at the time, gave rise to a delay in this case. The Commissioner accepts

that short delays may arise during an office move but the excessive delay that occurred in this case is not in accordance with good practice.

41. The Commissioner is concerned that in this case, it took 47 working days for an internal review to be completed. The Commissioner does not believe that any exceptional circumstances existed to justify that delay, and he therefore wishes to register his view that the Cabinet Office fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the Cabinet Office of the expected standards in this regard and recommends that it aims to complete its future reviews within the Commissioner's standard timescale of 20 working days.

Right of appeal

42. 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

43. 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.
44. 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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