

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 February 2015

**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 polling information collected in advance of the referendum on independence for Scotland in September 2014. The Cabinet Office refused to provide this information citing section 35(1)(a) as its basis for doing so (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 section 35(1)(a) as a basis for withholding the requested information.
3. No steps are required.

#### **Request and response**

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4. On 13 May 2014 the complainant requested information of the following description:
5. "I would like a copy of the report / opinion poll results that the Cabinet Office commissioned Ipsos Mori to undertake on "attitudes in Scotland towards Scottish independence" in Jan 2014.

For clarity this is identified in the Cabinet Office transparency data of expenditure over £25000 in January 2014 as: Cabinet Office, CABINET OFFICE, 21/01/2014, CONSULTANTS VAT RECOVERABLE, DEVOLUTION TEAM, IPSOS MORI LTD, 3000043736, 46550, Market research on attitudes in Scotland towards Scottish independence, TR48NE, Large, Programme".

6. On 6 June 2014, the Cabinet Office responded. It refused to provide the requested information. It cited the following exemption at section 35(1)(a) as its basis for doing so.
7. The complainant requested an internal review on 9 June 2014 and chased this on 9 July 2014. When he did not receive a reply he contacted the Commissioner on 23 July 2014. The Commissioner wrote to explain that, in exceptional circumstances, he accepted that a public authority may take 40 working days to complete an internal review. The complainant wrote to the Commissioner again on 5 August 2014 to advise that he had not received a response to his request for internal review.
8. The Commissioner wrote to the Cabinet Office on 13 August to advise the Cabinet Office that it was taking the case forward in the absence of an internal review. The Commissioner wrote to the Cabinet Office again on 18 August 2014 asking for its full and final arguments in support of its position with regard to section 35.
9. In the meantime, the Cabinet Office provided the outcome of its internal review on 5 September 2014. It upheld its original position.

### **Scope of the case**

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10. As noted above, the complainant had already contacted the Commissioner on 23 July 2014 and 5 August 2014 because the Cabinet Office had failed to undertake an internal review in a timely manner.
11. The Commissioner also explained to the complainant why it would be unlikely that he could complete his investigation into the Cabinet Office's use of section 35 before the Scottish Referendum due on 18 September 2014. He needed to ask the Cabinet Office for its submissions and for sight of the withheld information. Inevitably, there would be a short delay between the Commissioner asking for submissions and the Cabinet Office providing them - the Commissioner normally expects to receive a public authority's full and final arguments in support of its position (and a copy of the withheld information, if applicable) within 20 working days of his having asked for this.
12. The Commissioner also explained to the complainant that if there was further delay on the Cabinet Office's part in responding to the Commissioner's request for submissions and for access to the information, he could serve a formal information notice under section 51 of the Act which would require the Cabinet Office to provide him with the information he needed for his investigation. He explained that there is a right of appeal to such a notice which may add further delay. In short,

as time moved on, the Commissioner explained that the chances of completing his investigation into this matter prior to the referendum date of 18 September 2014 were becoming increasingly slim.

13. As noted above, the Cabinet Office provided the outcome of its internal review to the complainant on 5 September 2014. It provided its final arguments and copies of the withheld information to the Commissioner on 23 October 2014.
14. In light of the above, the Commissioner has therefore looked at whether the Cabinet Office is entitled to rely on section 35(1)(a) as a basis for withholding the requested information at the time of the request. It is important to stress that the outcome of the referendum is not relevant for the purposes of this investigation. The matter at issue is whether the Cabinet Office was entitled to rely on the exemption in question at the time of the request.

## **Reasons for decision**

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### **Section 35(1)(a) – formulation and development of government policy**

15. Section 35(1) provides 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,
16. Section 35 is a class based exemption, therefore if information falls within the description 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 the purpose described in the sub-section in question.
17. The Cabinet Office explained that the policy to which the information related was the government’s publicly stated policy of securing Scotland’s place in the United Kingdom. To this end, it hoped for a “No” vote in the referendum on independence for Scotland due to take place on 18 September 2014.

18. It explained how the withheld information fitted into the Scotland Analysis Programme<sup>1</sup> which formed a key part of developing that policy. It had commissioned Ipsos Mori to conduct market research to assess the effectiveness of its public communications in support of a "No" vote.

19. The complainant queried whether the Cabinet Office could rely on section 35 in relation to statistical information. Any statistical information in the withheld information, could not be exempt under section 35(1)(a) by virtue of section 35(2). Section 35(2), provides:

*Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded— .*

*for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or .*

*(b)for the purposes of subsection (1)(b), as relating to Ministerial communications.*

20. The Cabinet Office insisted that there was an ongoing policy to secure Scotland's place in the UK at the time of the request and that analysis of the MORI poll referred to in the request formed part of developing policy.

21. Following the approach set out in his guidance on section 35 (pages 40-41)<sup>2</sup> the Commissioner accepts that the requested information can be classed as statistical information. He accepts that it was likely that the information was used to provide an informed background to the 'United Kingdom, united future' document in June 2014.<sup>3</sup> However, the Commissioner accepts that there is enough evidence to support the Cabinet Office's argument that the information would be used to support future policy decisions in the run up to the referendum. The Commissioner therefore agrees that s.35(1)(a) can still apply to the requested information and s.35(2) is not relevant.

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<sup>1</sup> <https://www.gov.uk/government/collections/scotland-analysis>

<sup>2</sup> ICO guidance on section 35 FOIA

<https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

<sup>3</sup> "United Kingdom, united future: Conclusions of the Scotland analysis programme."

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/321369/2902216\\_ScotlandAnalysis\\_Conclusion\\_acc2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/321369/2902216_ScotlandAnalysis_Conclusion_acc2.pdf)

22. In light of the Cabinet Office's explanation and having read the withheld information, the Commissioner is satisfied that it falls within the class of information described in section 35(1)(a). As such, he is satisfied that section 35(1)(a) is engaged. He does not agree that section 35(2) is applicable in this case.

### **Public interest test**

23. By virtue of section 2(2), a public authority can only rely on section 35(1)(a) as a basis for withholding information if the public interest in maintaining that exemption outweighs the public interest in disclosure.

### **The complainant's arguments**

24. The complainant set out detailed arguments in support of his position when requesting an internal review. These can be summarised as follows:

- There is an overwhelming public interest in disclosure.
- Any policy to which the information relates will have been developed by the time of the request.
- The information described in the request would appear to be factual and therefore concerns about undermining advice-giving in the future do not apply.

### **The Cabinet Office's arguments**

25. The Cabinet Office acknowledged the public interest in transparency and the positive effect this can have on the public's engagement with government.

26. However, it made the following points in favour of maintaining the exemption:

- Any information disclosed would inevitably be widely published across the media leading to speculation about why particular questions were asked. Such speculation may be inaccurate or even unfair.
- Referring to what it called "the heated nature of the debate" it argued that the Cabinet Office "would be likely to be forced to divert already limited resources into rebutting such inaccurate or unfair speculation". The Cabinet Office had limited time and finite resources to achieve its policy aim which has huge constitutional significance. Time spent addressing such speculation would divert crucial resources away from this.

- Disclosure would have inhibited its ability to work freely with the polling organisation to ask the questions it felt it needed to ask at the time it needed to ask them. This inhibition would arise because it would be distracted from its main focus as a consequence of such speculation. It gave an example to illustrate this point which makes direct reference to the withheld information and which therefore cannot be reproduced on the face of this notice.
  - Its announcements on related topics were linked to the responses it was receiving to the survey. Disclosure of even a small part of the requested information would disclose prematurely its policy announcement strategy and undermine the safe space it needed to prepare that strategy. It illustrated this point with specific reference to the withheld information and specific reference to the detailed points set out in the request.
27. It argued that, on balance, the public interest in preserving the safe space in which it could formulate and develop a strategy that would, it hoped, ensure Scotland's continued place in the United Kingdom outweighed the public interest in disclosure. It stressed that it had been transparent about the costs involved in the polling work that it had commissioned.

### **The Commissioner's decision**

28. A key factor in the Commissioner's decision is the timing of the request. The referendum had not yet been carried out and there was a keen and detailed debate about the future of Scotland's place in the United Kingdom ongoing at the time of the request. Also, the request was made very shortly after the research was completed and it is reasonable to assume that the information was still being actively used and considered. The Commissioner also accepts that the polling was part of wider research programme to support government policy on the referendum and that further research, linked to the polling, was planned after the complainant had made his request.
29. It is also important to recognise that some but not all polling information was being placed into the public domain during the campaign; many of the key players would be choosing not to reveal polling. The Commissioner is therefore mindful that the government's policy development could be impacted by an uneven playing field.
30. The Commissioner also acknowledges that section 35(4) is relevant to considering the public interest:

*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.*

31. The Scottish electorate and the wider UK public were entitled to expect clarity of argument from both sides of the debate to assist them in making their crucial decision. Both sides had their own strategies for preparing and advancing their arguments and the polling information requested in this case formed part of the UK government's strategy.
32. The Commissioner recognises a strong public interest in providing the Scottish electorate with the polling information that the government was using to inform its strategy for promoting Scotland's continued presence in the United Kingdom. He accepts as well that this public interest was particularly weighty during the run-up to the referendum – the time the request was made.
33. The UK electorate as a whole also has a right to understand more about what informed the UK government's strategy in the run up to the referendum (and beyond). Policies in respect of further devolution for Scotland, where it remains in the UK, inevitably impact on the rest of the UK. There is an ongoing debate about the further devolution of law-making and revenue-raising powers to the English Regions and to other parts of the Union (Wales and Northern Ireland). There is also ongoing debate about the so-called West Lothian question – the fairness of Scottish MPs in Westminster being allowed to vote on matters which only affect English constituencies. Arguably disclosure may shed some light on the government's approach to devolution across the UK in general terms as it developed in advance of the referendum. Where disclosure would serve this interest, weight could be added to the public interest in disclosure.
34. Where Scotland decided to vote in favour of independence, that decision would also impact on the rest of the UK both economically and socially. There is a public interest in knowing more about the polling that informed the evolution of the government's thinking should that eventuality arise. This would add weight to the argument for disclosure where disclosure would serve this public interest factor.
35. The circumstances surrounding the request were unique. There was a strong public interest in maximum transparency to assist the Scottish electorate in making the important decision about Scotland's future.



36. The Commissioner also recognises that the poll was paid for by the public purse. Arguably this also adds weight to the public interest in disclosure – allowing the public to see the results of what it has paid for.
37. However, the Commissioner also recognises that there was a compelling public interest in allowing the government the safe space it needed to consider the results of the polling exercise and prepare its messages in order to advance its position. Premature release of the information could create a distraction to the work carried out in that safe space. The government would need to spend time reacting to commentary on what the results meant. It would also be less able to tailor its questions in order to consider the impact of its communications, recent or proposed. This, it had explained to the Commissioner, was the purpose of commissioning the polling in the first place. Public money would therefore not be well-spent if disclosure resulted in a distraction from the original purpose of the exercise.
38. The Commissioner thinks that fettering the UK government's ability to prepare and consider the impact of its communications during the run-up to the referendum would not have been in the public interest. It was entitled to advance its policy aim of ensuring Scotland remained in the United Kingdom in the same way that supporters of independence, driven by the Scottish government, were entitled to advance theirs.
39. In light of the above, the Commissioner has concluded that the public interest favoured maintaining the exemption. In reaching this view, he has given particular weight to the timing of the request. He recognises that there was a strong public interest in making available to the Scottish electorate and wider UK public as much information as possible about how government policy developed in advance of the referendum. However, he thinks that there was a more compelling public interest in protecting the safe space in which the UK government could develop its policies relating to the referendum. The importance of maintaining this safe space was particularly acute in the run-up to the referendum. Disclosure in this case would have undermined that safe space to a considerable degree which would be contrary to the public interest.

## **Other Matters**

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40. Whilst there is no explicit timescale laid down by the Act 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.



41. The Commissioner is concerned that in this case, it took 64 working days for an internal review to be completed. While there were clearly exceptional circumstances prevailing here, in the Commissioner's view, 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, or 40 working days at most in exceptional circumstances.

## Right of appeal

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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: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
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