

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 December 2015

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

#### Decision (including any steps ordered)

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1. The complainant has requested information held by the Cabinet Office relating to the removal/consideration of removal of the 'Check Off' facility within the Home Office. The Cabinet Office withheld all the information under sections 35(1)(a)(formulation or development of government policy) and (b) (Ministerial communications) of FOIA. In addition, the Cabinet Office withheld some of the information under section 42(1)(legal professional privilege).
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on sections 35(1)(a) and (b) to withhold all the requested information. No steps are required.

#### Request and response

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3. On 18 September 2014, the complainant wrote to the Cabinet Office and requested information in the following terms:  
*'Please provide all information held by the Cabinet Office pertaining to the removal/consideration of removal of the Deduction of Contributions at Source (Check Off) for trade union subscriptions for FDA, Prospect, PCS Union and Immigration Services Union for employees in the Home Office. This should include all correspondence between the Cabinet Office and the Home Office'.*
4. The Cabinet Office responded on 13 October 2014. It stated that it held the information requested but that the information was exempt from disclosure under sections 35(1)(a) and (b) of FOIA.

5. Following an internal review the Cabinet Office wrote to the complainant on 1 December 2014. The review upheld the application of the exemptions for the reasons provided in the previous refusal notice.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 6 February 2015 to complain about the Cabinet Office response to his request. The complainant questioned the application of the public interest test both on the basis of the timing of the request and in respect of the Cabinet Office's involvement in a matter which the complainant asserted was a decision (i.e. the ending of Check Off)<sup>1</sup> for the Home Office rather than the Cabinet Office.
7. During the course of his investigation, and after making searching enquiries with the Cabinet Office, the Commissioner established that the withheld information comprised three letters, the status of which the Commissioner discusses below. In submissions to the Commissioner the Cabinet Office applied section 42(1) to some of the information contained in one of the letters. The Commissioner's investigation concerned whether the Cabinet Office was entitled to withhold the requested information under the exemptions cited.
8. The Commissioner has inspected the withheld information.

## **Reasons for decision**

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### **Section 35(1)(a): Formulation or development of government policy**

9. Section 35(1)(a) of the FOIA provides that information held by a government department or by the National Assembly for Wales, is exempt information if it relates to the formulation or development of government policy. Section 35 is a class-based exemption and section 35(1)(a) will therefore automatically be engaged if the information in question relates to either the formulation or the development of government policy. Section 35 is also a qualified exemption, which means it is subject to a public interest test.

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<sup>1</sup> The system used by most government departments (until recently) to deduct trade union subscriptions from employees' salaries and pay these to the unions of which they are members

10. In submissions to the Commissioner, the Cabinet Office confirmed that the decision to cease the Check Off system within the Home Office took effect on 12 January 2015. The Commissioner notes that the three letters comprising the withheld information in this case all pre-date 12 January 2015 by some months.
11. One of the letters was sent by the then Minister for the Cabinet Office, Paymaster General, Francis Maude MP (via private secretary) to the Home Secretary, Theresa May MP. The same letter was sent by Mr Maude to a number of other central government departments. The second letter was subsequently sent by the Home Secretary (via private secretary) to Mr Maude and the third letter was personally sent by the Home Secretary to Mr Maude. (The Commissioner has made further observations in a confidential annex to this notice which is being provided to the Cabinet Office only due to the information it reveals about the content of some of this material.)
12. The purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it provides a safe space to consider policy options in private. The Information Tribunal has found that the term 'relates to' can be interpreted broadly and can encompass the immediate background to policy discussions [DfES v Information Commissioner & the Evening Standard (EA/2006/0006)]. In order for the exemption to apply, the information does not itself have to be created as part of the formulation or development of policy but it must relate to it.
13. 'Government policy' is not defined in the FOIA but it is well established that it may be made in a number of different ways and take a variety of different forms. In submissions to the Commissioner, the Cabinet Office explained that the Minister for the Cabinet Office, *'has Ministerial responsibility for civil service issues, including efficiency, and as such his role includes developing policies to review the arrangements that are in place in individual departments'*. Noting that there is no standard form of government policy and that it can take a variety of forms, the Cabinet Office stated that, *'this is an example of one of those forms. In order to ensure that public money is spent effectively, Ministers are asking departments to review their arrangements through less formal channels'*.
14. In his complaint to the Commissioner the complainant correctly noted that, *'the removal of Check Off was not a Cabinet Office decision but a Home Office one since the matter was devolved to departments'*. This was recognised and accepted by the Cabinet Office which confirmed in submissions to the Commissioner that the **decision** as to whether to end the Check Off system *'is a matter that is delegated to individual*

*government departments and not a matter for central government policy'.*

15. The Cabinet Office explained that, *'the policy that was being formulated instead concerned how the Cabinet Office can review the "check-off" system and respond to issues that had arisen in relation to it'.* The Cabinet Office stated that the policy development in this case was *'a piece of government policy which is suggesting how government believes departments should interact with trade union members'.* The Cabinet Office stated that the Minister for the Cabinet Office has responsibility for civil service matters, *'and in his (Mr Maude's) view, trade unions should have a direct subscription relationship with their members rather than via the government departments in which their members work'.* It was on this basis that Mr Maude had asked departments to review their existing arrangements, what the Cabinet Office described as, *'policy development by persuasion'.* Furthermore, the Cabinet Office advised the Commissioner that at the time of the request this policy development was in its early stages and the policy formulation was taking place at a departmental level rather than, for example, in a Cabinet Committee.
16. The Commissioner notes that the focus of the complainant's request concerns consideration given by the Home Office to ending the Check Off system within that department and any related correspondence with the Cabinet Office. It is clear and not disputed that the decision whether or not to cease the Check Off system within the Home Office is one for that department alone (the same applies for all other central government departments). The Cabinet Office has made clear that that policy (whether the Home Office should end Check Off) is not the policy to which it has applied the section 35(1)(a) exemption in this case. Rather, the policy in question is that of how the Cabinet Office can review the Check Off system across all government departments and respond to unspecified 'issues' which had arisen in relation to it.
17. Having considered the withheld information, the Commissioner is satisfied that all the withheld information relates to this reviewing policy on the part of the Cabinet Office and that the information relates to the formulation of this departmental wide policy. However, the Commissioner is also satisfied that some of the withheld information (specifically the two letters between the then Minister for the Cabinet Office and the Home Secretary) also relates to the Home Office's policy decision of ending the Check Off system within the department since it is evident that that discrete policy was related to the departmental wide 'persuasion' policy of the Cabinet Office in reviewing the Check Off system. The Commissioner considers it is important to make this clear since the specific focus of the complainant's request was upon the Check

Off decision within the Home Office and any information held by the Cabinet Office pertaining to that decision.

18. In light of the above the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged in relation to all the withheld information within scope of this request.

### **Section 35(1)(b): Ministerial communications**

19. Section 35(1)(b) states that information is exempt from disclosure if it is held by a government department and relates to Ministerial communications. The Cabinet Office relied on section 35(1)(b) in respect of all the withheld information.
20. As all three letters clearly constitute Ministerial communications the Commissioner is satisfied that the withheld information falls within the scope of the exemption and therefore section 35(1)(b) is engaged in respect of all the withheld information.

### **Public interest test**

21. Sections 35(1)(a) and (b) are qualified exemptions and are therefore subject to the public interest test. The Commissioner must therefore consider whether the balance of the public interest lies in favour of maintaining the exemptions or whether it lies in favour of disclosure of the information.

#### *Public interest arguments in favour of disclosing the requested information*

22. In its refusal notice of 13 October 2014, the Cabinet Office acknowledged that there, *'is a general public interest in disclosure of information'* and recognised that, *'openness in government may increase public trust in and engagement with the government'*. The Cabinet Office recognised that the decisions made by Ministers may have a significant impact on the lives of citizens and there is a public interest in their deliberations being transparent.
23. In submissions to the Commissioner the Cabinet Office provided more specific public interest factors in favour of disclosure of the requested information. It recognised that, *'there is some public interest in disclosing information about the review of a service currently provided by departments to trade unions and their members'* and noted that, *'these interested parties clearly have an interest in understanding the background to change in policy'*. More generally, the Cabinet Office stated that there is a public interest in public authorities being accountable for the cost of providing a facility such as Check Off and *'disclosure of the information would enable the public to assess whether*

*a department's decision to retain or remove the "check-off" facility was made for sound reasons and on the basis of good quality advice'.*

24. The complainant stated that there was a public interest in disclosure of the requested information since at the time of his request the decision had been made to end Check Off within the Home Office and that decision had been the subject of parliamentary scrutiny and media coverage.

*Public interest arguments in favour of maintaining the exemptions*

25. In its refusal notice, the Cabinet Office stated that there is 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. It stated that Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications. The Cabinet Office contended that, *'the candour of all involved would be affected by their assessment of whether the content of the discussions will be disclosed prematurely'*. It submitted that the routine disclosure of Ministerial discussions would pose a risk that Ministers could feel inhibited from being frank and candid with each other. *'As a result the quality of debate underlying collective decision making would decline, leading to worse informed and poorer decision making'*.
26. In submissions to the Commissioner, the Cabinet Office submitted that the *'starting point'* for considering the public interest arguments in favour of maintaining sections 35(1)(a) and (b) is that Check Off *'is an extremely sensitive and politically divisive issue'*. The Cabinet Office stated that this was demonstrated by the way the issue had been reported in the press. The Cabinet Office contended that this sensitivity was particularly acute in the context of the Coalition Government which was in place at the time of the request, *'where parties with opposing views must maintain and present a unified position in order to govern effectively, even in the face of issues such as "check-off" that can polarize debate along party political lines'*. Even where there is a majority government, the Cabinet Office contended that *'it is crucial that a safe space is protected where these differences of opinion can be debated openly and in confidence. It is equally important that Ministers can communicate confidentially about this issue without risk that their communications may be published or disclosed'*.
27. In respect of the particular public interest attached to section 35(1)(b), the Cabinet Office stated that:

*'The information is a communication between Ministers, and withholding this information ensures that the constitutional convention of collective*

*responsibility of Ministers is protected. Maintaining collective responsibility is fundamental to the continued effectiveness of Cabinet government. Allowing ministerial correspondence to enter the public domain may make it more difficult in future for the Cabinet to maintain collective responsibility, as the risk of a non-unified ministerial front on policy becomes greater'.*

28. The Cabinet Office contended that there must be *'a clear, compelling and specific justification in order to outweigh the obvious interest in protecting communications between Ministers on this issue, and protecting the safe space for this subject to be debated'*. Whilst recognising that section 35 is not an absolute exemption, the Cabinet Office did not consider that any such specific justification existed in this case to outweigh the public interest in maintaining the exemptions.

#### *Balance of the public interest arguments*

29. The Commissioner considers that there is a strong public interest in information concerning changes to the Check Off system. That public interest encompasses both information relating to the departmental wide policy review of the Check Off system initiated by the former Minister for the Cabinet Office, and information concerning any delegated policy decision by an individual government department (in this case the Home Office) to end Check Off within that department. As the fifth largest department in terms of civil service staff the Commissioner notes that for the year 2013-14, the Home Office (and its arm's length bodies) employed an overall total of 31,204 staff<sup>2</sup>. Any decision would have the potential to impact upon and affect staff who are members of a trade union.
30. In respect of the wider policy of the Cabinet Office asking individual government departments to review their existing Check Off arrangements, the Commissioner considers that the public interest in transparency and accountability is even stronger, not just because of the much greater numbers of civil service staff affected, but also because (as the Cabinet Office has noted), this review was initiated and conducted by the former Minister for the Cabinet Office, whose own publicly expressed view was that trade unions should have a direct subscription relationship with their members rather than via the government departments in which their members work. For example, the Commissioner notes that in his speech to the Conservative Party Conference on 29 September 2014, Mr Maude described the Check Off

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<sup>2</sup> Figures taken from National Audit Office report

system as '*an outdated practice*' and congratulated both the Home Secretary and the Secretary of State for International Development for being, '*the first to call time on this anachronism in their departments*'.

31. Given the significant responsibility and influence across government departments exercised by the post-holder of Minister for the Cabinet Office, the Commissioner considers (as the Cabinet Office has recognised) that there is a public interest in disclosure of any information which would enable the public to assess whether a department's decision to retain or remove the Check Off facility was made for sound reasons and on the basis of good quality advice.
32. The Commissioner considers that there is a particularly important and strong public interest in the disclosure of such information given that there are reasonable grounds to question the government's contention that ending Check Off would enable public money to be spent more efficiently. In September 2013, the PCS union successfully challenged attempts by the then Secretary of State for Communities and Local Government (DCLG) to end the Check Off system within that department. The Commissioner notes that, as was reported in the media at the time, the annual departmental cost of administering the Check Off system was around £300, but the government's legal costs (the cost to the taxpayer) was approximately £90,000<sup>3</sup>.
33. In submissions to the Commissioner the Cabinet Office stated that the DCLG case '*has little bearing on whether there is a public interest in disclosing information relating to the "check-off" system*'. The Commissioner cannot agree with such a contention. Whilst he would recognise and accept that certain aspects of the DCLG case may well be specific to the contractual circumstances of that department's employees, that case was significant in that it demonstrated that the administrative cost to DCLG of maintaining the Check Off system was negligible, whereas the cost to the public purse of (unsuccessfully) attempting to end it was significant. The Commissioner considers that there is no reason to believe that the negligible administrative cost of maintaining the Check Off system within DCLG is not largely representative of other individual government departments (such as the Home Office).
34. In respect of the actual withheld information in this case, the Commissioner considers that the information which carries the strongest public interest in disclosure is the letter sent by the former Minister for

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<sup>3</sup> <http://www.mirror.co.uk/news/uk-news/eric-pickles-costs-taxpayers-90000-2248197>



the Cabinet Office (via private secretary) to the Home Secretary (and other central government departments). This is because the letter includes advice to departments with regard to Check Off and disclosure of that advice would assist the public in assessing whether a department's decision to retain or remove the Check Off facility was made for sound reasons and on the basis of good quality advice.

35. Some of the information in the letter from the Home Secretary to Mr Maude (and attached to the same) concerns legal advice as to the Check Off position within the Home Office (the Cabinet Office has also applied section 42(1) to this particular information). The Commissioner considers that the rest of the information contained in the specific correspondence (two letters) between the Home Secretary and the former Minister for the Cabinet Office carries appreciably less public interest weight in transparency and accountability, since it largely reflects the publicly known views of Mr Maude and the Home Secretary on the Check Off issue.
36. Whilst the Commissioner is clear that there is a strong public interest in disclosure of some of the withheld information (i.e. the advice to departments from the former Minister for the Cabinet Office), he considers that there are also strong counter arguments in favour of maintaining the cited exemptions in the public interest. He considers that the timing of the request in this case, in terms of the circumstances and context existing at the time, has an important bearing on determining the balance of the public interest. In respect of the Home Office position in particular, although the Commissioner acknowledges that moves were underway to remove Check Off within that department at the time of the complainant's request on 18 September 2014, the actual implementation of this decision did not take effect until 12 January 2015, when Check Off was ended within that department. Therefore, at the time of the request the departmental policy remained at the developmental (albeit advanced), stage.
37. In respect of the wider policy of the Cabinet Office's review of the Check Off system across government, the Commissioner notes that the Cabinet Office has stated that this policy remained at the developmental stage at the time of the complainant's request. Given that some government departments were still consulting with the trade unions about the Check Off issue at the time of the request and those consultations were clearly related to the advice circulated to departments by the then Minister for the Cabinet Office as part of the Cabinet Office review, the Commissioner accepts that the policy remained at the developmental stage and that the withheld information carried significant sensitivity as a result.

38. The Commissioner considers that the legitimate and important public interest both in protecting the safe space for policy formulation or development (section 35(1)(a)) and maintaining the collective responsibility of Ministers (section 35(1)(b)) is strongest where the policy matters in question remained live and ongoing (or relatively recent) at the time of the request. Where this is the case there will usually be a compelling public interest in preserving the necessary safe space and the important convention of collective responsibility as set out in the Ministerial Code.
39. The Commissioner considers that this is the case in this instance. Both the Home Office policy review of Check Off and the Cabinet Office wider policy review of the facility were at the developmental stage at the time of the request. The Commissioner accepts, as the Cabinet Office has argued, that Ministers must be able to have the safe space to discuss policy freely and frankly, exchange views on available options and understand their possible implications without the threat of *premature* disclosure of such discussions. Such disclosure would risk inhibiting the candour of policy debate and deliberation and distract the attention of Ministers and officials from the task of devising rigorous and high quality policy. Neither outcome would be in the public interest.
40. Similarly, whilst the information in scope of this request would not reveal the views of Ministers belonging to parties with opposing views in the former Coalition Government (the Home Secretary and the former Minister for the Cabinet Office being members of the same political party), the Commissioner accepts that the public interest in maintaining ministerial collective responsibility is strong and well-established regardless of the composition of the government of the day.
41. In light of the above factors the Commissioner considers that at the time of the request the public interest in maintaining sections 35(1)(a) and (b) to the requested information was stronger than the public interest in disclosing the same. Therefore, the Commissioner is satisfied that the Cabinet Office correctly withheld all the relevant information under sections 35(1)(a) and (b).
42. However, the Commissioner would reiterate that there is a strong and continuing public interest attached to information relating to Check Off. Government as a whole and individual departments must be accountable and transparent about any decisions to end such a well-established and widely used facility, particularly in view of the lack of specificity about the 'issues' which the Cabinet Office stated had arisen in relation to Check Off. This should be borne in mind by the Cabinet Office when considering any further requests for information regarding this matter.

43. As the Commissioner has found all the withheld information in this case to be exempt from disclosure under sections 35(1)(a) and (b), he has not gone to consider the application of section 42(1) to some of the withheld information.

### **Other matters**

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44. The Commissioner would note that at the start of his investigation, the Cabinet Office advised that only one document was held that was within scope of the complainant's request. However, the contents of that document suggested that further relevant information would be held by the Cabinet Office and indeed further checks and searches carried out by the Cabinet Office (at the Commissioner's request) confirmed this to be the case.
45. The Commissioner would impress upon the Cabinet Office the important need to ensure that appropriately thorough and comprehensive checks and enquiries are made as to the actual extent of relevant information held at an early stage of receiving an information request. It is neither acceptable nor resource efficient for the position to only be ascertained during the course of the Commissioner's investigation and following his own inspection of the information concerned.

## Right of appeal

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46. 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 123 4504

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)

47. 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.
48. 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 .....**

**Alexander Ganotis**  
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