

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 June 2016

**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 related to the investigation which followed the leak of a Scotland Office memo prior to the general election of 2015. The Cabinet Office refused to provide it citing provisions of section 31 (law enforcement) as its basis for doing so and section 21 (information available to the requester). The complainant challenged its use of section 31 and the Cabinet Office upheld this at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on the provisions of section 31 it has cited as its basis for refusing to provide the information in question.
3. No steps are required.

#### Request and response

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4. On 1 June 2015, the complainant requested information of the following description:

"I am writing seeking answers to the following questions regarding the Cabinet Office's investigation into the leaking of a memo relating to Nicola Sturgeon's meeting with the French ambassador earlier this year.

The Cabinet Office's media team refused to answer these questions, so I request that you consider this as a Freedom of Information request.

- 1- When did the inquiry about the leaking of the memo commence?
- 2- How many people were asked to respond to the inquiry?
- 3- What date were they asked to respond to questions surrounding the leaked memo?
- 4- On what date(s) did the inquiry receive its replies?
- 5- Did Alistair Carmichael and his special adviser Euan Roddin inform the inquiry that they were behind the leaked memo prior to the 7 May election?
- 6- Why was it not possible to publish the outcome of the inquiry until 22 May, two weeks after the general election?
- 7- If there were delays in getting a response from anyone involved, what reasons were given for the delay?
- 8- Did the general election campaign have anything to do with the delay in completing the inquiry?
- 9- How much public money did the inquiry cost?

A swift response to the above would be much appreciated."

5. On 26 June 2015, the Cabinet Office responded. It refused to provide the requested information. It cited the following exemptions:  
  
Questions 1 and 9: section 21 (reasonably accessible by other means);  
  
Questions 2 – 8: section 31(1)(g) (law enforcement)
6. The complainant requested an internal review on 9 July 2015. He specifically asked the Cabinet Office to review its response in respect of questions 2 – 8. The Cabinet Office sent him the outcome of its internal review in a letter dated 28 July 2015. It upheld its original position.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 10 November 2015 providing him with all the information the Commissioner needed to proceed with his investigation of the complaint. The complainant had disputed the Cabinet Office's refusal to provide the information described in questions 2 – 8. The complainant had contacted the Commissioner earlier but had not provided enough evidence to support his complaint.

8. The Commissioner has considered whether the Cabinet Office is entitled to rely on section 31(1)(g) as its basis for refusing to provide the information it holds within the scope of requests 2 – 8.

## Background

9. On 3 April 2015, the Daily Telegraph published an article based on a leak that came from the Scotland Office.<sup>1</sup> The Independent Press Standards Organisation later upheld a complaint about the article.<sup>2</sup> There was an inquiry into the leak (the subject of this request) the completion of which was announced on 22 May 2015.<sup>3</sup> Alistair Carmichael MP (then Secretary of State at the Scotland Office) and his then Special Adviser, Euan Roddin, who was also connected to the matter, accepted the conclusions of the inquiry. Shortly afterwards, legal proceedings were initiated by some of Mr Carmichael's constituents against the former Scotland Office minister. These legal proceedings post-date the request and were ultimately unsuccessful in overturning Mr Carmichael's election as the MP for Orkney and Shetland.<sup>4</sup>

## Reasons for decision

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### Section 31 - law enforcement

10. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. In this case the Cabinet Office considers that section 31(1)(g) applies in conjunction with section 31(2)b.
11. Section 31(1)(g) states:

*"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—*

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<sup>1</sup> <http://www.telegraph.co.uk/news/politics/SNP/11514933/Nicola-Sturgeon-secretly-backs-David-Cameron.html>

<sup>2</sup> <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-33408441>

<sup>3</sup> <https://www.gov.uk/government/news/scotland-office-memorandum-leak-cabinet-office-inquiry-statement>

<sup>4</sup> <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-35521442>

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),"*

12. Section 31(2)(b) states:

*"The purposes referred to in subsection (1)(g) to (i) are-*

*(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,*

13. The Commissioner first considered whether the Cabinet Office has the authority to exercise a relevant function. The Cabinet Office explained:

"[The] Civil Service code ... states 'ensure you have Ministerial authorisation for any contact with the media' and serve the government, whatever its political persuasion, to the best of your ability in a way which maintains political impartiality and is in line with the requirements of this code, no matter what your own political beliefs are'. Equally Special Advisors and Ministers have their own set of codes to adhere to. Government Departments have a duty to investigate any perceived breaches of these codes and establish if there has been any unauthorised contact with a journalist and if there has been any other improper behaviour. In this case the Cabinet Secretary announced in a statement on 4 April 2015 that the investigation was to 'establish how extracts from a Scotland Office memo may have got into the public domain' ".

14. The Commissioner is satisfied that part of the Cabinet Office's functions include investigating breaches of the Civil Service Code and the Special Advisers Code<sup>5</sup> such that section 31(1)(g) can be engaged, provided the prejudice envisaged would or would be likely to arise.

15. The Commissioner has dealt first with whether the exemption is engaged. Consideration of prejudice based exemptions such as 31(1)(g) involves two stages. First, in order to be engaged, the following criteria must be met:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information

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<sup>5</sup> <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>

being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and

- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
16. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
  17. Covering first whether the exemption is engaged, the relevant applicable interests cited in this exemption are "*ascertaining whether any person is responsible for any conduct which is improper*". The Commissioner is satisfied that the withheld information is about this topic. He has considered the withheld information and it clearly relates to these applicable interests.
  18. Next, the Commissioner has considered whether there would be a causal relationship between disclosure and the prejudice which the exemption is designed to protect against. He has also looked at whether the resultant prejudice which is alleged is real, actual or of substance.
  19. The information requested is fairly detailed and relates closely to both the chronology and the substance of the investigation. The Cabinet Office argued the importance of protecting the confidentiality of the process. If this was undermined, it would make it more difficult to conduct similar investigations in the future because individuals would not be reassured that the process would remain confidential. This would make it more difficult to obtain co-operation from anyone with relevant testimony or evidence. This applied not only to the Cabinet Office but also to any other department conducting a similar inquiry in the future.
  20. The Commissioner agrees that there is a causal link between disclosure and the prejudicial outcome covered by the exemption and that the alleged resultant prejudice would be of substance. He accepts the proposition that disclosure of the requested information could undermine the confidentiality of the process. The Commissioner recognises the importance of confidentiality in ensuring the effectiveness of the process.
  21. The Cabinet Office has argued that the higher level of prejudice is applicable here. In other words, it asserts that the prejudicial outcome "would" arise as a result of disclosure.

22. The Commissioner notes that the request was made shortly after an announcement of the completion of an investigation into the leak of a Scotland Office memo (see footnote 3). In the Commissioner's view, this adds to the sensitivity that release of any detail of the investigation would have. He further agrees that, in the light of the timing of the request, disclosure of the information held by the Cabinet Office within the scope of the requests would give rise to the prejudicial outcome described in the exemption. The Commissioner read and considered the withheld information before reaching this view.
23. As the Commissioner accepts that the outcome of disclosure predicted by the public authority would occur he is therefore satisfied that the exemption provided by section 31(1)(g) in conjunction with section 31(2)(b) is engaged.

#### The public interest test

24. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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

25. The Cabinet Office acknowledged the strong public interest in disclosing the information, in particular to Alistair Carmichael MP's constituents. Mr Carmichael was, at the time, Secretary of State at the Scotland Office and was closely connected to events surrounding the leak. As noted above, legal proceedings were initiated against Mr Carmichael by a group of his constituents. The Cabinet Office explained that it took these points into account when it considering this matter.
26. The events in question took place around the time of the UK general election in 2015. There is a public interest in making public whether or to what extent the timing of the general election had an impact on the investigation. This would be served by disclosure in this case.

#### *Public interest arguments in favour of maintaining the exemption*

27. In favour of maintaining the exemption, the Cabinet Office stressed the public interest in maintaining the confidentiality of the investigation process. Individuals would be less likely to co-operate where confidentiality could not be secured. It stressed the need for a safe space in which such investigations are undertaken to allow free and frank cooperation. It also drew attention to the relatively small numbers and the ease with which individuals could be identified.

28. In its view, even though the investigation had been completed at the time of the request, this did not lessen the public interest in protecting the safe space in which such investigations are conducted.
29. It also argued that public trust in the process would be undermined by disclosure and that there was a strong public interest in maintaining the integrity of such investigations in order to reassure the public that they were properly conducted.
30. Disclosure here would also set expectations for disclosure in any future investigations. This could damage investigations where too much emphasis needed to be made on presentation. Again, the damage this would cause to the investigation process would not be in the public interest.

*Balance of the public interest arguments*

31. The Commissioner agrees that there is a strong public interest in protecting the safe space in which such investigations are conducted. He also agrees that this would be undermined by disclosure.
32. The Commissioner also accepts that setting a precedent for the disclosure of the requested information could create a distraction from the investigation process itself. Presentation of such information may well require additional context. Disclosing context may, of itself, be prejudicial to the inquiry.
33. The Commissioner is mindful of the fact that there may be considerable public distrust around any investigation, particularly where the leak is damaging to the government. However, that is not, in the Commissioner's view, good reason to undermine any investigation into the leak through disclosure of details of that investigation.
34. He is also mindful of the fact that the events in question took place around the time of the general election of 2015 and that there is a public interest in understanding whether or to what extent this had a bearing on the investigation.
35. The Commissioner also recognises that, to an extent, the public interest in maintaining the exemption for information to do with a specific leak investigation may diminish over time. However, he is satisfied that this is not such a case here. The request came shortly after the reported conclusion of the investigation and, as such, the information remains sensitive. This, in the Commissioner's view, adds weight to the public interest in maintaining the exemption in this case.

## **Conclusion**

36. The Commission has concluded that the public interest in maintaining the exemption provided by section 31(1)(g) in conjunction with section 31(2)(b) outweighs the public interest in disclosure. In reaching this view he has given particular weight to the public interest in protecting the safe space in which such investigations are conducted. He has also given weight to the fact that the information was created relatively recently. This adds to its sensitivity in the Commissioner's view.



## Right of appeal

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37. 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)

38. 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.
39. 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**  
**Principal Adviser**  
**Information Commissioner's Office**  
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