

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 May 2017

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

Decision (including any steps ordered)

1. The complainant has requested information about Nick Clegg's entitlement to the Public Duties Cost Allowance ("PDCA") from the Cabinet Office. The Cabinet Office refused to provide it citing section 21 (information accessible by other means) and section 35 (formulation/development of government policy). The complainant disputed the Cabinet Office's use of section 35. The Cabinet Office upheld its use of section 35 following internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 35 as its basis for withholding the information to which it has been applied. However, the Cabinet Office contravened its obligations under section 10 (Time for compliance) when it failed to provide a response within a reasonable time having extended the time for compliance in order to consider the balance of public interest test in respect of section 35.
3. No steps are required.

Request and response

Background

4. The Public Duties Cost Allowance (PDCA) was introduced to assist former Prime Ministers, still active in public life, with the costs of continuing to fulfil public duties. In addition, former Prime Ministers are entitled to claim a pension allowance to contribute towards the pension costs of their staff. This is limited to a maximum of 10% of their staff salary

cost. The then Prime Minister, David Cameron, agreed that the former Deputy Prime Minister, the Rt Hon Member for Sheffield Hallam, Nick Clegg, should be able to have access to the allowance "to recognise the special position he held in the Coalition Government."

5. On 12 July 2016 the complainant requested information of the following description:

"I see from your latest accounts that the PDCA is now available to Nick Clegg.

Please provide me with an electronic copy of all recorded information you hold regarding Nick Clegg's eligibility for this allowance, except (1) details of his claims, and (2) the total amount he has claimed.

This will no doubt include information on how he came to be eligible, who proposed it, his response, and so on."

6. On 9 August 2016, the Cabinet Office said it needed further time to consider the public interest test in relation to section 35. It said it aimed to provide its response by 7 September 2016.
7. However, it was not until 22 September 2016 that the Cabinet Office issued a refusal notice. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
- section 21 (information readily available). It provided links for the information to which it had applied this exemption.
 - section 35(1) (formulation/development government policy)
8. The complainant requested an internal review on 23 September 2016. The Cabinet Office sent him the outcome of its internal review on 20 October 2016. It upheld its original position and explained that the delayed response which he had queried was due to an internal administrative error.

Scope of the case

9. The complainant first contacted the Commissioner on 9 September 2016 regarding the Cabinet Office's delayed response to his initial request. The Cabinet Office provided its response – a refusal notice on 22 September 2016. On 21 October 2016, the complainant wrote again to the Commissioner to complain about the way his request for information had been handled after the Cabinet Office's internal review of its initial refusal. He remained concerned about the delay which had arisen and he also disagreed with the Cabinet Office's use of section 35.

10. The Commissioner has considered whether the Cabinet Office is entitled to rely on section 35 as its basis for refusing the information it holds within the scope of the request to which this exemption has been applied. The Commissioner has also considered whether the Cabinet Office has complied with its obligations in terms of the FOIA's requirements on timeliness.

Reasons for decision

Section 35 – formulation or development of government policy, etc

11. Section 35(1)(a) states –

“Information held by a government department or by the National Assembly of Wales is exempt information if relates to

(a) the formulation or development of government policy,”.

12. The Cabinet Office argued that “The remaining information in scope of the request relates to the development of policy relating to the operation of the PDCA”. The Cabinet Office provided limited detail to explain what work it was doing on the development of this policy. However, the Commissioner is satisfied, in the circumstances of this case, that the development of policy in this area is ongoing and that the information in question relates to it to an extent which is sufficient to engage the exemption cited.
13. The complainant argued that this information was about a decision concerning specific expenditure rather than a decision about the formulation of government policy.
14. Having read the withheld information, the Commissioner disagrees. She is satisfied that the information does relate to the development of policy regarding the operation of the PDCA as the Cabinet Office asserts.
15. In comparing the withheld information with other information that is publically available, the Commissioner noted some similarities regarding the detail of the operation of the PDCA. However, the Commissioner is satisfied that there are sufficient differences between what is publically available and what is in the withheld information to warrant reliance on this exemption and to indicate that the matter is under development.
16. The Commissioner has therefore determined that the exemption provided by section 35(1)(a) is correctly engaged in respect of the information which remains withheld.

The public interest test

17. As section 35 is a qualified exemption it is subject to the public test at section 2 of the FOIA. 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 in disclosure

18. The complainant put forward the following arguments in favour of disclosure:

"The Cabinet Office's internal review response revealed, for the first time, that Nick Clegg himself requested the allowance (as opposed, for instance, to the civil service suggesting it) - this not only indicates that at least that portion of the requested information can safely be disclosed without prejudicing public interests, or else the Cabinet Office would not have revealed it, but also underlines the public interest in this case. A Cabinet minister asked to be given £115,000 per year, without precedent [the complainant's emphasis] and was given it."

19. The complainant also referred to a previous case which had been considered by the First-tier Tribunal (Information Rights) *Webber v Information Commissioner* (EA/2015/0194)¹ and argued that this case had shown the public interest in transparency on the subject of PDCA.

20. At paragraph 33 of the Tribunal's decision in that case it says:

"Just as with MPs' expenses, the importance of transparency and accountability is heightened where, as here, the system involves self certification by the persons claiming public money. We do not agree with the Commissioner that the public interest is any the lesser because the information is not needed for the public to exercise a decision at the ballot box.² On the contrary, because the allowance is claimed by those no longer holding elected office, and because the allowance can be claimed for the rest of the former Prime Ministers' lives, whether or not they are engaged in activities that may be perceived to be of public benefit, we consider that the public interest in seeing that the use of

¹ [http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1760/Webber,Gabriel-%20EA2015-0194%20\(22-03-16\).pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1760/Webber,Gabriel-%20EA2015-0194%20(22-03-16).pdf)

² The Information Commissioner's decision referred to in this paragraph can be found here: https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432395/fs_50560132.pdf

public money is appropriate and is properly accounted for, is arguably even greater.”

21. It should be noted that the Tribunal, in this case, was looking at section 41 (information in confidence). It is widely accepted that although section 41 is an absolute exemption, consideration as to whether it is engaged includes consideration of whether there is a public interest defence to a potential action for breach of confidentiality.
22. The Cabinet Office set out the following points in favour of disclosure:

“The Cabinet Office recognises that there is a general public interest in being able to evaluate the way that Government makes decisions about spending. This makes for greater accountability, increases public confidence in government decision-making and helps to encourage greater public engagement with political life. We also recognise some of the specific public interests raised by [the complainant] in his correspondence with the Cabinet Office. [The complainant] sets out the public interest in greater transparency surrounding how and why allowances of this kind are paid to former ministers, which we accept. This public interest is largely met by the regular publication of the amounts claimed through PDCA by former Prime Ministers in the annual accounts of the Cabinet Office. In addition, the Minister for the Cabinet Office has provided some further information in his response to a parliamentary question on the specific eligibility of Mr Clegg, which we believe provides an appropriate level of transparency. I have included links to those responses below.

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-02/44043/>

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-02/44045/>

In the responses, the Minister sets out that the “the then Prime Minister agreed that the former Deputy Prime Minister, the Rt Hon Member for Sheffield Hallam, should be able to have access to the allowance to recognise the special position he held in the Coalition Government.” [The complainant] argues that there is a public interest in knowing how Mr Clegg became eligible to claim the PDCA and in our view, this response fulfills that public interest.”

Public interest in maintaining the exemption

23. The complainant did not set out any arguments in favour of the maintaining the exemption, neither did the Commissioner ask him to.

24. The Cabinet Office stressed the importance of allowing a safe space in which to discuss a policy where its formulation had yet to be completed. With specific reference to the withheld information, it explained the importance of allowing officials to “discuss and advise on all possible options for the development of a policy, particularly in case where the policy has already drawn negative media attention”. It was referring here to press coverage of Mr Clegg’s reported eligibility for the PDCA.³
25. It also explained the importance of Ministers having the assurance that options presented to them were being or had been comprehensively considered by officials. The Commissioner accepts that disclosure would inhibit the safe space in which options are discussed which could lead to insufficient information being relied upon for decision making.

Balance of the public interest

26. The decision to use the PDCA in this way, that is, to allow short-term eligibility for Nick Clegg, is unprecedented. It arose from a relatively rare situation whereby there was a coalition government in the UK and Mr Clegg, as leader of the junior party to that coalition, became Deputy Prime Minister. There had been other previous Deputy Prime Ministers but these were not from a separate party in a coalition government.
27. In the Commissioner’s view, this creates a double-edged argument. On the one hand, because of the uniqueness of the situation, there is a compelling public interest in considerable transparency about the decision making process. According to public statements, the entitlement in Mr Clegg’s case is for the lifetime of the current parliament⁴ rather than “for life” as is the case where former Prime Ministers are entitled to claim the PDCA. On the other hand, the Cabinet Office has explained that the formulation of policy relating to the operation of the PDCA has not been completed. There is therefore a compelling public interest in maintaining a safe space in which policy can be developed when the matter is still being considered.
28. The Commissioner recognises that the uniqueness of the situation adds particular weight to the argument in favour of disclosure. As noted above, there is considerable public interest in understanding as much as possible about the decision to grant entitlement of PDCA to Mr Clegg in

³ <https://inews.co.uk/essentials/news/politics/nick-clegg-awarded-100000-expenses/>
and

<http://www.telegraph.co.uk/news/2016/07/24/nick-clegg-granted-former-prime-ministers-expenses-allowance-wor/>

⁴ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-02/44053/>

the terms announced. As the complainant points out, there remains a considerable public interest in understanding as much as possible about how public money is spent reimbursing members of Parliament and former members of Parliament. However, in the circumstances of this case, the Commissioner attaches greater weight to the public interest in protecting the safe space in which live matters are discussed. While the Commissioner would have hoped for greater detail from the Cabinet Office, she is nevertheless satisfied that the information in question forms part of an ongoing policy development area, based on the Cabinet Office's submission which makes specific reference to the withheld information.

29. The Commissioner has concluded that the Cabinet Office properly applied section 35(1)(a) and that the balance of the public interest lies in maintaining the exemption. In reaching this view, she has given particular weight to the Cabinet Office's assertion that policy development on PDCA remains ongoing. Therefore her decision is that the Cabinet Office was entitled to withhold the requested information by virtue of the exemption at section 35(1)(a).

Section 10

30. Section 10 of the FOIA requires a public authority to confirm it holds requested information and to disclose it within 20 working days following the date of receipt of a request. If it believes it is not obliged to do so it must provide a refusal notice explaining this within 20 working days.
31. Under section 10(3), a public authority may be allowed further time to consider the public interest test in respect of a qualified exemption where it has told the complainant within 20 working days that it is considering reliance on one.
32. Having regard to her own published guidance, the Commissioner considers that a further 20 working days is the maximum time for considering the balance of public interest test that could be considered reasonable. Naturally, the Commissioner would encourage public authorities to take less time than this. Where the maximum time is used for consideration of the public interest test, this would make a total of 40 working days from receipt of request to provision of refusal notice.⁵ An extension beyond this should be exceptional. Examples of such circumstances could include extreme pressures placed on the public authority by a major incident or exceptional levels of complexity

⁵ <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

involving a number of external parties. As noted here, the reason for the delayed response was due to an "administrative error" which does not fall into the category of exceptional circumstances that might necessitate a further delay.

33. The Cabinet Office wrote to the complainant to advise it needed further time to consider the balance of public interest in a letter sent 20 working days after receipt of the request - 9 August 2016. In that letter, it had given a target date of 7 September 2016 to respond. This would have been 40 working days following the date of receipt of the request to the date of the refusal notice. It had also told the complainant in its letter of 9 August 2016:

"If I can reply before that date, I shall do so. If I need more time to consider the balance of the public interest, I shall write again to let you know".

34. Unfortunately, the Cabinet Office provided a refusal notice 50 working days after receipt of the request - 22 September 2016. It did not, as promised, write to tell the complainant that it needed still further time to consider the balance of public interest and missed its own target for response by 10 working days.
35. The Commissioner considers that the Cabinet Office failed to comply with its obligations under section 10 of the Act by failing to provide the complainant with a refusal notice within a reasonable period following its letter of 9 August 2016.
36. The Commissioner urges the Cabinet Office to ensure its systems are sufficiently robust to avoid such errors in the future.

Right of appeal

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

Website: 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
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF