

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 April 2017

Public Authority: Department for Communities and Local Government

Address: 1st Floor NW
Fry Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Communities and Local Government (the Department) concerning the decision to cease Cornish Language funding. The Department initially relied on section 36 to withhold the requested information. However, during the course of this investigation, it instead sought to rely on section 35.
2. The Commissioner's decision is that the Department was entitled to rely of section 35 to withhold the requested information. However, in taking 114 working days to complete the public interest test and respond fully to the request, the Commissioner finds that the Department has breached section 17(3) of the FOIA.
3. The Commissioner does not require the Department to take any steps in this case.

Request and response

4. Following an initial request on 7 May 2016, on 7 June 2016, the complainant made the following refined information request to the Department:

"April 2016 (or thereabouts), the DCLG has written to Cornwall Council to inform it of the immediate cessation of annual funding of up to £150,000 to support the Cornish minority language.

I would like to refine my request to only cover information pertaining specifically to the decision to cease funding."

5. On 4 July 2016, the department responded to the complainant, confirming that the information was held and stating that it required extra time to consider the public interest test, citing section 36 of the FOIA as the section it was considering.
6. The Department then contacted the complainant on a further four occasions to extend the deadline for the public interest test for section 36; 1 August 2016, 30 August 2016, 27 September 2016, and finally 24 October 2016.
7. The Department responded to the request On 16 November 2016. It stated that it was relying on section 36(2)(b)(i) and (ii) of the FOIA to withhold the information.
8. On 17 November 2016 the complainant requested an internal review. The Department provided the outcome of this on 16 December 2016 in which it maintained its original position in respect of the application of the exemption. With regard to the complainant's concerns about the delay, the Department apologised for the number of times the deadline was extended, but stated that this was not a breach of the FOIA as it does not prescribe a time scale for consideration of the public interest test.

Scope of the case

9. The complainant initially contacted the Commissioner on 13 September 2016 to complain that the Department had failed to respond to his request. Once the Department had responded, the complainant asked the Commissioner to review the substantive reasoning behind refusing the request. He also asked that she consider the time it has taken the Department to respond.
10. During the course of the Commissioner's investigation, the Department was invited to reconsider its response to the request, and decided that section 35(1)(a) applied to the withheld information, rather than section 36.
11. Therefore, the scope of this case is to determine whether the Department was entitled to rely on section 35 to withhold the requested

information. It will also consider whether the Department breached any procedural sections of the FOIA.

Reasons for decision

Section 35 – formulation of government policy

12. Section 35(1)(a) of the FOIA states that:

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

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

13. The Department considers that the requested information concerning the decision to cease funding for the Cornish Language is part of the inter-related and overarching issues of the Cornish culture, heritage and language as an ethnic minority. It argues that policy decisions on how the government supports Cornwall were at the time of the request, and are now still under consideration.

14. The Department has provided some background to the Cornwall policy in support of its position:

- *“funding to support the development of the Cornish language was a part of Cornwall Council’s financial support for some time until it was discontinued in March 2016.*
- *Following representations from council officials, interested residents and local MPs there were discussions within this Department and with others as to whether and how such funding should continue across the rest of 2016.*
- *These discussions therefore took place leading up to and across the period covered by the FOI request (i.e; decisions were still pending on this funding stream as at late 2016) and indeed were still under consideration when you wrote to us.*
- *In early 2017 an announcement concerning the Cornish Cultural Fund (which relates closely to Cornish language support) was made and Cornwall Council has very recently written to the Secretary of State on a number of cultural issues [supporting information provided to the Commissioner]”*

15. The withheld information consists of the business case and submissions to the Minister on the decision to cease Cornish language funding, along with an email read-out of the Minister’s meeting on the matter and

emails outlining the outcome of that meeting. The Commissioner is satisfied that this is information pertaining specifically to the decision to cease funding, as requested.

16. The Commissioner has viewed the withheld information in the context of the background of the policy on Cornwall as an ethnic minority. She has taken into account the case of *DfES v The Information Commissioner & Evening Standard (EA/2006/0006)*, in which the Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of the information rather than on a line by line dissection. The Commissioner has therefore looked at whether the overall purpose and nature of the information supports the characterisation of relating to formulation or development of government policy. On this basis, she is satisfied that it is information relating to the formulation or development of government policy. She is therefore satisfied that the exemption is engaged.

The public interest test

17. Section 35 is a qualified exemption and is therefore subject to the public test at section 2 of the FOIA. 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 in his request for an internal review submitted that the public interest is best served by disclosing any of the requested information.
19. The Department recognises that there is a general public interest in the disclosure of information concerning the way government works and the policy making process, and such transparency allows for greater accountability which in turn may lead to increased public trust and confidence in the workings of government. It also acknowledges that there is an understandable local interest in the funding decision, and that disclosure of the requested information would enable the public to be better informed as to the decision making and accountability in government in relation to development of the Cornish language.
20. The Commissioner notes that at the time of the initial request of 7 May 2016, there had been a number of national news stories in late April

2016 on the topic of Cornish language funding cuts¹ following the letter to Cornwall Council in which the cuts were announced. The Commissioner therefore accepts that there is clearly some public interest in the subject.

21. The Department also directed the Commissioner to the website of George Eustice MP for Camborne, Redruth and Hayle which contains an article from 9 March 2017 on the topic of funding for Cornish culture and language². The Commissioner notes that in March 2017, there were also national news stories on the subject³.

Public interest in maintaining the exemption

22. The Department has put forward a number of public interest arguments in support of maintaining the exemption and continuing to withhold the requested information which the Commissioner has paraphrased:

- *There is a strong public interest in ensuring that there is an appropriate degree of safe space in which officials are able to gather and assess information and provide advice to Ministers which will inform their eventual policy decisions. In turn Ministers must feel able to consider the information and advice to reach objective, fully-informed decisions without impediment and free from the distraction that the information will be made public. Such safe space is needed to safeguard the effectiveness of the policy process. The withheld information closely informs the previous decision around this funding and the Department states that it is likely to inform the on-going response to Cornwall council's most recent letter on the matter and can also be expected to feature in any pending decisions on Cornish language funding.*
- *The timing of a request is often crucial. Once the formulation or development of a policy has been completed, the risk of prejudicing the policy process by disclosing information is likely to be reduced and so the public interest in maintaining the exemption deserves less weight. At the time of the request, the*

¹ <http://www.bbc.co.uk/news/uk-england-cornwall-36104716>

² <https://www.georgeeustice.org.uk/news/cornish-culture-fund>

³ <https://www.theguardian.com/uk-news/2017/mar/10/council-of-europe-criticises-uk-for-cornish-language-funding-cuts>

decision on Cornish language funding, and the Cornish Cultural Fund, was still being given consideration.

- *The need for safe space around the advice therefore remains, pending discussions and decisions that are due on recognition, support and funding for support for Cornish culture, language and heritage. If the withheld information, containing advice and recommendations from officials to Ministers on the funding questions, and subsequent discussions about that, had been made public at the time of the response to the complainant, or now, it could only have exacerbated the partisan views of all interested parties, encouraging further pressure on the Government then and now to address this issue in specific ways and thus inevitably requiring additional consideration of those specific options by officials and Ministers. An avenue of open consideration of a sensitive policy decision would be effectively hampered at least or even closed off to the Government. Instead, an appropriate degree of safe space should be maintained around this information at least until the current considerations around support for Cornish culture, heritage and language have been concluded and any further policy decision announced.*
 - *Such unnecessary effort and adverse consequence is avoidable. Even were the Department to disclose the information with an explanation and to set it in context such efforts might, in any case, not be successful in correcting misunderstanding and/or deliberate misinterpretation and its consequences. It is possible that such an unhelpful state of affairs may even lead officials and Ministers, under media and public pressure, to insufficiently consider the full range of factors that are otherwise necessary to ensuring that objective, reliable analysis of the full range of options could be arrived at.*
 - *Clearly the above are all factors that would serve to undermine the effective conduct of Ministerial business and, in this case, current consideration of policy on support for Cornish culture and language. In conclusion, at the time of the request and now there was and is a need for an appropriate degree of safe space within which officials and Ministers could consider live policy issues.*
23. The Commissioner understands that the main thrust of the Department's public interest arguments concerns maintaining a safe space in which officials are free to provide full and frank advice to Ministers, which in turn the Ministers can consider unhindered and undistracted by premature public involvement.

Balancing the public interest

24. In determining where the balance of the public interest lies the Commissioner first notes that the exemption is a class-based exemption. This means that it is not necessary for it to be demonstrated that any prejudice, inhibition or harm would result from disclosure in order for the exemption to be engaged. There is, therefore, no inbuilt weight in favour of maintaining the exemption which automatically transfers across to the public interest weighting. In view of this, the Commissioner considers that the specific nature of the information and its context are key influences on the outcome of the public interest test. The timing of the request and response is therefore highly relevant.
25. As recognised by the Department, the Tribunal has made it clear that in cases where section 35(1)(a) applies, central to the consideration of the public interest test is the timing of any request; because once the formulation or development of a policy has been completed, the risk of prejudicing the policy process by disclosing information is likely to be reduced and so the public interest in maintaining the exemption deserves less weight. The Department considers that the request and the withheld information should be considered in the context of the development of policy on support of Cornish culture and language. It acknowledges that whilst the decision to withdraw the then current funding model was taken, there are ongoing policy decision to be made concerning Cornish language funding as part of the wider policy on Cornish culture and Cornish as an ethnic minority. The Department has provided evidence to demonstrate that Cornwall Council continues to correspond with the Department on the matter of the recognising the Cornish as a national minority, and the funding that may be available to develop the Cornish culture, including the Cornish language.
26. It is clear to the Commissioner that a policy decision was made prior to the request to withdraw a particular funding stream for the Cornish language. However, the Department has demonstrated that that decision was part of a greater policy on how to fund and support Cornish culture, including the Cornish language, in the bigger picture of Cornish Devolution.
27. The Commissioner agrees that whilst the decision to withdraw a specific funding stream was part of a wider policy on Cornish culture, and that there is still a requirement for a safe space for officers and Ministers to consider all aspects of the wider policy, free from the interference of the public.
28. The Commissioner has had regard to the arguments in favour of disclosing the requested information, and agrees that it would add to the transparency of decision making. This is the case here as the decision is likely to have a significant impact on the public purse, and will also

impact on a large number of individuals, particularly the Cornish and those invested in the revival of the Cornish language.

29. The Commissioner considers that at this time, when the development of the policy on supporting Cornish culture and the Cornish language remains ongoing, the public interest remains in favour of maintaining the exemption.

Section 17 – Refusal of request

30. Section 17(3) of the FOIA states that if a public authority is relying on a qualified exemption, such as section 35, the time limit for compliance may be extended in order to consider the public interest in maintaining the exemption or disclosing the information. A public authority may take such time as is 'reasonable in the circumstances', and must then either disclose the requested information or explain to the applicant why the public interest in maintaining the exemption outweighs the public interest in disclosure.
31. The Commissioner's guidance 'Time limits for compliance under the Freedom of Information Act' states that:

"...our view is that an authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days. An extension beyond this should be exceptional."
32. In its internal review response to the complainant, the Department put forward its position that the FOIA does not define what is 'reasonable' and whilst the Commissioner's guidance suggests that an authority should not normally take more than an additional 10 working days, this is best practice. It therefore stated that the Department was not in breach of the legislation by extending the public interest test beyond 20 working days.
33. However, the reviewing officer stated that the number of extensions taken in this case was excessive, and he apologised on behalf of the Department for this.
34. The Department took 114 working days to respond fully to the request, setting out its decision in light of the public interest test. The Commissioner considers that this is clearly excessive, as acknowledged by the Department itself in its internal review response. The Commissioner therefore finds that the Department has breached section 17(3) by not completing the internal review request in such a time as is reasonable in the circumstances.

Right of appeal

35. 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

36. 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.
37. 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

Andrew White
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