

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 August 2017

**Public Authority:** Department for Communities and Local Government

**Address:** 1<sup>st</sup> Floor NW  
Fry Building  
2 Marsham Street  
London  
SW1P 4DF

#### Decision (including any steps ordered)

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1. The Complainant 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 on section 35 to withhold the requested information.
3. The Commissioner does not require the Department to take any steps in this case.

#### Request and response

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4. On 28 October 2016 the complainant made the following information request with reference to Cornwall Council's announcement in April 2016 that the Government had ceased its funding for the Cornish language:

*"Please provide me with all and any documents relating to this decision including, among others, the brief for ministerial decision, any explanatory notes, any impact assessment, other documents which set out the rationale and projected consequences of the decision, as well as any internal, cross-governmental and external correspondence (including e-mails) including any written notes, emails, or records of*

*meetings involving the following MPs: James Wharton MP, Sheryll Murray MP, Steve Double MP, Scott Mann MP, Sarah Newton MP, Derek Thomas MP and George Eustice MP and any other Minister, MP or Civil Servant."*

5. The Department responded on 23 November 2016 and advised that the requested information was exempt under section 36(2)(b)(i) and (ii) of the FOIA.
6. The complainant requested an internal review on 23 November 2016. The Department provided him with the outcome of this on 22 December 2016 in which it maintained its position that section 36 applied.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 31 December 2016 to complain about the way his request for information had been handled. He asked the Commissioner to investigate and consider whether the information could be released.
8. 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.
9. Therefore, the scope of this case is to determine whether the Department was entitled to rely on section 35 to withhold the requested information.

### **Background**

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10. The Department explained to the Commissioner that it considered this request to be matched in key areas to a similar earlier request considered by the Commissioner in the decision notice FS50646198, and also a third request FS50664037 which was under investigation along with the request in this case. All three have a focus on the detail of the decision to cease the funding of the Cornish language following the announcement in March 2016. The Department states that due to the very similar nature and timings of the requests, it considers that the arguments advanced in FS50646198 apply to this case and also to FS50664037.
11. The Commissioner recognises that although the dates of the requests vary from 7 May 2016 to 28 & 31 of October 2016, the dates of the internal review responses are all between 16 & 22 December 2016, and

so the arguments in the previous case (FS50646198) remain relevant to this case, and to the third linked case.

12. As each request has been made by a separate requester, and as each request is slightly different, albeit for predominately similar information, the Commissioner will address each separately. However, she notes that there will be a substantial degree of crossover between the three cases.

## Reasons for decision

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### Section 35 – formulation of government policy

13. 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,”.*

14. The Department has confirmed to the Commissioner that all material relating to the decision to cease funding for the Cornish language was considered for the previous case FS50646198. It therefore considers that the arguments advanced for the application of section 35 in respect of the previous case apply here.
15. The previous case concerned a request for *“information pertaining specifically to the decision to cease funding”*. The request in this case is very similar in that it asks for *“all and any documents relating to this decision...”* the detail the requester goes on to specify is encompassed within this broad request. The Department has confirmed that all the information it holds relating to the decision to cease Cornish language funding was identified in that case, and that the withheld information is the same in this case. The Commissioner has viewed the withheld information, she is satisfied that it falls within the scope of the request.
16. The Department has acknowledged that the timing of requests is crucial to the application of section 35 and the consideration of the associated public interest test. To this end. It has confirmed that at the time of the internal review of the request in this case, which follows the internal review in the earlier case (FS50646198) by only 6 days, the decision on Cornish language funding, and the Cornish Cultural Fund, was still being given consideration.
17. Having confirmed that the withheld information is the same for both requests, and that the timing of the internal reviews differs by less than one week, the Commissioner agrees with the Department’s approach that the arguments advanced in FS50646198 also apply directly to this

case. For completeness, the Commissioner will repeat those arguments here.

18. 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 still now under consideration.
19. The Department has provided the following 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]"*
20. 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**

21. 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**

22. 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.
23. The Commissioner notes that prior to the request, there had been a number of national news stories in late April 2016 on the topic of Cornish language funding cuts 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.
24. The complainant's internal review request stated that he did not accept the reasoning behind the response and found that it added to the perception of the Government being deceptive. He argued that the information was not a matter of national security, and that withholding it was a misuse of the legislation. The Commissioner considers that these arguments broadly align with the concepts of transparency and accountability and confidence in government decisions.
25. The complainant also informed the Commissioner that he and others were astounded by the Department's response, not least due to the relatively small amount of money that had been set aside for Cornish language funding. He argues that in Wales and Scotland there is greater transparency over similar matters. He says that there is immense interest in the subject and that clarity over language exists for Scotland and Wales, but not in Westminster.
26. 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 language. The Commissioner notes that in March 2017, there were also national news stories on the subject. Which demonstrates that there is a continued public interest in the matter, and which also demonstrates that the matter of funding for Cornish culture and language funding

### **Public interest in maintaining the exemption**

27. 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 as follows:

- 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 and the internal review response, the 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.
28. 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**

29. In determining where the balance of the public interest lies, the Commissioner first notes that this 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.
30. 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 decisions 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 recognising the Cornish as a national minority, and the funding that may be available to develop the Cornish culture, including the Cornish language.

31. 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.
32. The Commissioner agrees that 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, particularly with regard to support of and funding for the Cornish language, free from the interference of the public.
33. The Commissioner has had regard to the arguments in favour of disclosing the requested information, and agrees that it would add to the transparency and accountability in decision making. Particularly as the decision is likely to have a significant impact on the public purse, and will also impact on a large number of individuals, mainly the Cornish and those invested in the revival of the Cornish language.
34. The Commissioner considers that at this time, when the development of the policy on supporting Cornish culture, encompassing the Cornish language, remains ongoing, the public interest remains in favour of maintaining the exemption.
35. The Commissioner therefore finds that the Department was entitled to rely on section 35 to withhold the requested information.



## Right of appeal

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36. 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)

37. 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.
38. 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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