

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2018

Public Authority: Cabinet Office

Decision (including any steps ordered)

1. The complainant has requested minutes and all papers of a meeting on immigration held in the early months of 2012 and attended by David Cameron, Steve Hilton and senior civil servants, during which the Government's immigration target was discussed. The public authority withheld the information held within the scope of the request on the basis of section 35(1)(a) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on section 35(1)(a) FOIA.
3. No steps required.

Request and response

4. On 10 November 2016, the complainant wrote to the public authority and requested information in the following terms:

"I am writing to request under the Freedom of Information Act the minutes and all papers of a meeting on immigration held in the early months of 2012 and attended by David Cameron, Steve Hilton and senior civil servants, during which the government's immigration target of 100,000 was discussed.

In his book on the EU referendum campaign, Craig Oliver refers to accessing the "papers of the meeting" on 20 June to review claims made by Hilton in a Daily Mail piece. He obtained these within hours of the article being released, suggesting they are easily obtainable.

Oliver says in his books the papers show the immigration target could easily be achieved. Given the papers have already been the subject of public debate, disclosure and disagreement there is clearly a strong public interest in their prompt disclosure.....

As the immigration target was settled and established policy, the papers refer only to its implementation, and therefore are properly subject for release."

5. The public authority responded on 8 December 2016. It considered that complying with the request would exceed the appropriate limit and consequently relied on section 12 FOIA as its basis for refusing to comply with it.
6. The complainant requested an internal review on 9 December 2016. He challenged the decision on the following grounds:

"Your reply states it would take more than 3.5 days to retrieve the papers of the meeting, which would therefore exceed cost grounds.

However, in his book – which I referenced specifically in my initial request – Craig Oliver specifically mentions he was able to retrieve the papers for the meeting in the course of a single morning without difficulty."

7. On 26 January 2017 the public authority wrote to the complainant with details of the outcome of the review. The review upheld the original decision to rely on section 12 FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 14 March 2017 to complain about the way his request for information had been handled, specifically the decision not to comply with his request on the basis of section 12 FOIA.
9. During the course of the investigation however, the public authority explained that at the time of the request it was in the process of transferring "the Cameron files" (ie files in relation to David Cameron's term as Prime Minister) from Number 10 to its archives. At the time there was no catalogue and searching through every paper file would have easily exceeded the appropriate limit. The transfer had now been completed and the Cameron files had been properly catalogued and filed away. As a result it had identified a briefing (but no minutes or papers) from a meeting in February 2012 which fell within the scope of the request. It however considered the briefing exempt from disclosure on the basis of section 35(1)(a) FOIA, and, although it did not provide the requisite submissions to the Commissioner in support, section 36(2)(b)(i) FOIA in the alternative.¹
10. The Commissioner advised the complainant of the revised position above on 12 September 2017. On 25 September 2017 he explained to the Commissioner that he considered the information in scope ought to be disclosed, and on 11 October 2017 he confirmed that he was content for the investigation to be restricted to the only information identified within the scope of his request – ie the briefing. The Commissioner has referred to his submissions on the application of section 35(1)(a) at the relevant parts of her analysis below.
11. For the avoidance of doubt, the scope of the investigation was to determine whether the public authority was entitled to withhold the briefing within the scope of the request on the basis of section 35(1)(a) FOIA.

¹ In future the Commissioner expects the public authority to provide its full and final submission upon request. Submissions in respect of any exemptions the public authority wishes to rely including in the alternative must be provided in full from the outset.

Reasons for decision

Section 35(1)(a)

12. Section 35(1)(a) states:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy.”

13. The exemption is one of the class-based exemptions in the FOIA. This means that unlike a prejudice-based exemption, there is no requirement to show harm in order to engage it. The relevant information simply has to fall within the class described, and that would be enough to engage the exemption. The prejudicial effect of disclosure would inevitably be considered within the framework of the competing public interest factors.
14. The Commissioner considers that the term ‘relates to’ in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that the information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough.
15. The withheld information is a briefing for then Prime Minister David Cameron on 14 February 2012 pursuant to an “immigration stocktake” (a meeting) with Theresa May MP (then Home Secretary) and Damian Green MP (then Minister of State for Immigration) on 15 February 2012. The briefing includes presentation slides prepared by the Home Secretary to inform the meeting.
16. The public authority considers that the briefing relates to government policy because it concerns the efforts of the government to achieve its manifesto commitment to achieve an annual net immigration target of tens of thousands. It explained that this commitment was in the 2010, 2015 and 2017 Conservative Party’s manifestos and therefore remains live government policy.²
17. The Commissioner is satisfied that the withheld information relates to government policy for the reasons above, and on that basis she has concluded that section 35(1)(a) was correctly engaged.
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² <https://www.conservatives.com/manifesto> page 56 of the 2017 manifesto.

Public interest test

18. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
19. The complainant submitted that there was an overwhelming public interest in favour of disclosure because immigration "is consistently polling as the top (or top 3) matter of public concern in opinion polls," and its relation to the EU debate is particularly significant given the UK is currently making a once in a generation decision on how Brexit is handled in relation to it. Furthermore, the advice in the relevant immigration stocktake has been publicly raised and disputed by two former senior Number 10 officials who have both characterised its outcome in directly contradictory terms. Therefore, to suggest after not one but two public discussions of the event of the meeting that the public are not entitled to the actual documents relating to it "would be absurd and directly contradictory" to the principles of the FOIA.
20. The public authority explained that some of the issues discussed; such as those in relation to income thresholds for sponsorship and approaches to removals, remain live topics of Home Office policy which are under review and development. It acknowledged that a decision has been taken in relation to income thresholds for sponsorship but submitted that it remains a topic of live policy development subject to legal challenges.³
21. It argued disclosure would have a major effect on the provision of free and frank advice. This is because part of the nature of stocktakes is to review the objective of a policy and compare it to the status quo. They are a place for radical policy development and robust challenge. The aim is to think the unthinkable. The withheld information is free and frank advice to the Prime Minister from officials and the Home Secretary. Disclosing it would undermine the purpose of stocktakes by revealing negotiating positions and red lines. For officials to provide effective options and advice to Ministers regarding progression of government policies and key manifesto commitments, they need to be able to do so frankly, and without fear of premature disclosure.

³ <https://www.theguardian.com/law/2017/feb/22/supreme-court-backs-minimum-income-rule-for-non-european-spouses>

22. Furthermore, while there was a clear public interest in accountability in relation to the process by which the Government agrees on and delivers its policy, there is a similar public interest in protecting the safe space for officials to discuss options and provide advice to Ministers.
23. Finally, even if it were to accept that the policy process was complete at the time of the request⁴ this does not mean that the public interest must immediately switch to favouring disclosure. Given the candid nature of the discussions the public interest continues to remain firmly in favour of non-disclosure.

Balance of the public interest

24. In February 2012 Steve Hilton was Director of Strategy for David Cameron who was the Prime Minister and leader of the Conservative Party. At the same time Craig Oliver was Mr Cameron's Director of Communications. Both were clearly senior and high profile positions at Number 10. Although it is not clear from the withheld information that either Mr Hilton or Mr Oliver or both, were present at the meeting on 15 February 2012, it is clear that they were both privy to the withheld information having being copied in along with other senior officials. On 21 June 2016 Steve Hilton claimed that civil servants had informed David Cameron in 2012 it was impossible to meet the Conservative Party's commitment to cut immigration to tens of thousands.⁵ Mr Hilton who campaigned for the UK to leave the EU made this claim in support of his view that no British government could control immigration while still a member of the EU. As can be seen from the complainant's request, this claim was contradicted by Craig Oliver who claimed that officials had said that the Conservative Party's immigration target could easily be achieved.
25. In light of the above, the Commissioner shares the view that there is a public interest in releasing information that would enable the public to form their own opinion on whether David Cameron was so advised. Having said that, it is not apparent to the Commissioner that the withheld information would be decisively informative in that regard. It is not a record of the actual meeting on 15 February 2012. While inferences could be drawn one way or the other from the briefing, it is

⁴ Though it stressed that the commitment to reduce annual net immigration to tens of thousands is set out in the current Conservative party manifesto and remains a live policy.

⁵ <http://www.bbc.co.uk/news/av/uk-politics-eu-referendum-36582295/steve-hilton-we-must-leave-eu-to-control-immigration>

highly unlikely to set the record straight in terms of either Mr Hilton's or Mr Oliver's claim.

26. The Commissioner considers that there is a strong public interest in maintaining the exemption. The commitment to reduce annual net immigration to tens of thousands remains a Conservative Party policy. Policy decisions were taken by the last Coalition Government under David Cameron with a view to achieving this target such as setting a minimum income threshold for sponsoring family members to settle in the UK. The commitment however remains in the current Conservative Party manifesto because it has yet to be achieved. Therefore, in the Commissioner's view disclosure of the withheld information which is quite candid is highly likely to result in a chilling effect on free and frank discussions and advice pursuant to the commitment to reduce net immigration to tens of thousands.
27. The fact that it relates to discussions at very senior levels of government on an issue of considerable public interest likely to be subject to further policy developments increases the chances of less candid views from officials in future out of fear that their views could also be revealed prematurely. The Commissioner recognises that civil servants should be impartial and robust when giving advice and not easily deterred from expressing their views by the possibility of future disclosure. Nevertheless, she considers that in the circumstances, there is a real prospect of inhibiting free and frank discussion in relation to the immigration target.
28. While there would be a persuasive case for maintaining a safe space for discussions in relation to the immigration target, the Commissioner notes that the withheld information and the meeting to which it relates was nearly five years old at the time of the request. In her view, a safe space was not required specifically in relation to the round of discussions in February 2012 at the time of the request in 2016. However, although the public authority has not stated that there were any at the time, the public interest in maintaining a safe space for related discussions on the immigration target would be strong if such discussions had been ongoing on at the time of the request.
29. Having considered the factors in favour of maintaining the exemption and in favour of disclosing the withheld information, the Commissioner has concluded that the balance of the public interest lies in favour of maintaining the exemption.

Right of appeal

30. 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

31. 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.
32. 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

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