

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 April 2018

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

Decision (including any steps ordered)

1. The complainant has requested information on information relating to Cabinet discussions concerning the European Union ('EU') referendum in the period immediately before and after the referendum.
2. The Commissioner's decision is that the Cabinet Office has appropriately relied on section 35(3) for section 35(1)(a) and (b) (Formulation of government policy etc. and Ministerial communications) to refuse the request.
3. The Commissioner does not require the public authority to take the any steps to ensure compliance with the legislation.

Request and response

4. On 23 June 2017 the complainant wrote to the Cabinet Office and requested information in the following terms:

"I would like to request access to all information that you hold relating to the discussions reported by the former Chancellor of the Exchequer in today's Evening Standard, i.e.

'Last June, in the days immediately after the referendum, David Cameron wanted to reassure EU citizens they would be allowed to stay,' the paper said. 'All his cabinet agreed with that unilateral offer, except

his home secretary, Mrs May, who insisted on blocking it.'

For the avoidance of doubt, my request relates to, but is not limited to, minutes of Cabinet and Cabinet Committees, related briefing materials and papers, correspondence and any notes, whether official or otherwise, made by ministers, special advisers and officials. This request relates particularly but is not limited to views expressed by the then Prime Minister and the then Home Secretary in the period immediately before the referendum and after it, until Mrs May was appointed as Prime Minister."

5. The Cabinet Office responded on 21 July 2017. It stated that the information was withheld in reliance of section 12(1) FOIA (Time for compliance).

6. The complainant requested an internal review of this refusal and at the same time (21 July 2017) refined his request as follows:

"I would like to pursue narrowing my request in the following way: Official Cabinet and Cabinet Committee minutes relating to my request [i.e. relating to the discussions reported by the former Chancellor of the Exchequer in today's Evening Standard] for a period of 4 weeks after the referendum."

7. Following an internal review the Cabinet Office wrote to the complainant on 18 August 2017 upholding the section 12(1) reliance.

8. On 17 August 2017 the Cabinet Office responded to the refined request with a refusal notice in reliance of section 35(3). Following an internal review the Cabinet Office wrote to the complainant on 8 September 2017 upholding the section 35(3) reliance.

Scope of the case

9. The complainant contacted the Commissioner on 26 October 2017 to complain about the way his requests for information had been handled. In considering this case the complainant asked the Commissioner to be mindful of the following:

"The great public interest in having full and frank disclosure of the formulation of Government policy on a matter of such an important issue – namely the approach to "Brexit" which is the most important issue facing the UK since the Second World War.

That this affects the standing of the Prime Minister who is asking the British people to trust her and her Government on this issue, something that cannot easily be reversed and will affect the life chances of all UK citizens and many EU citizens for many years to come.

The fact that a former member of the Cabinet has already breached Cabinet confidentiality on this particular issue and that other members of the Government are breaching Cabinet confidentiality on a daily basis so exemptions about development of policy do not apply."

10. Following correspondence with the complainant, the Commissioner agreed with the complainant on 5 December 2017 to focus her attention on the Cabinet Office's reliance on section 35(3) to the refined request.

Reasons for decision

11. Section 35(3) of FOIA states:

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

12. In order to engage section 35(3), the Cabinet Office must explain why the requested information would engage one (or more) of the main exemptions of section 35.

13. Section 35(1) of FOIA states:

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,"

14. The Cabinet Office explained to the Commissioner that, if held, the information in the scope of the request would relate to the government policy on international relations between the UK and the EU and (at the time of the request) the commencement of ongoing negotiations that would take place between the UK and the EU.

15. On this basis the Commissioner accepts that section 35(1)(a) is engaged.

16. In addition the Cabinet Office advised that, if held, information in the scope of the request would comprise Ministerial communications.
17. The Commissioner is aware that section 35(1)(b) is to be interpreted broadly which means in practice that information does not have to 'be' a ministerial communication itself; information will also be covered if it recounts or refers to a ministerial communication. Ministerial communications are defined at section 35(5). This specifically states:

"and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet,"

18. The Commissioner is therefore satisfied that any information in the scope of the request (if held) would fall within the exemption provided by section 35(1)(b). Consequently she is satisfied that section 35(3) is engaged.

Public interest test

19. Section 35(3) is subject to a public interest test and therefore the Cabinet Office may only maintain this exclusion from its duty to provide confirmation or denial where the public interest in doing so outweighs the public interest in disclosure.
20. In its submissions to the Commissioner the Cabinet Office acknowledged the general public interest in openness and in Ministers' deliberations being transparent. It explained that it recognises that openness in government may increase public trust in and engagement with the government resulting in a beneficial effect on the overall quality of government.
21. Balanced against this, the Cabinet Office went on to explain its view of the factors in favour of maintaining the exemption. It considers that there is a strong public interest in maintaining "the sovereignty of the decision making process". The Cabinet Office argued that by confirming or denying the topics discussed at Cabinet the ability of Ministers to determine the agenda for Cabinet, without inappropriate consideration to public pressure dictating what should, or should not, be considered; would be weakened. This is because revealing what has been discussed by Cabinet may create pressure for Ministers to place undue consideration on what the public reaction would be when deciding the Cabinet's business. This could result in undue focus on matters other than the decision making itself, which could, in turn, influence the content of the discussions at the expense of good government.
22. The Cabinet Office explained its view that Cabinet meetings provide a confidential space in which Ministers can speak with candour about the whole of Government. The guarantee of a safe space provides an

environment for internal candour from which, the Cabinet Office argues, the public ultimately benefit.

23. The Cabinet Office argued that the expectation of members of Cabinet and Cabinet Committees is that their detailed consideration of policy options, and the content of those discussions, will remain private.
24. The Commissioner accepts that it is in the public interest to avoid any detrimental effect on the ability of the Cabinet to most effectively manage its business. By confirming holding information on topics discussed four weeks after the EU referendum, the Cabinet Office would create an opportunity for judgement of the discussions or options considered by Ministers, rather than Ministers being answerable for the decisions taken.
25. The Commissioner notes that it is the Cabinet Office's policy, along with other government departments, not to comment on leaked correspondence or other material that is not authorised for publication. The Cabinet Office's view is that leaks undermine the confidence of ministers and reduce the quality of debate inside government. The Commissioner has previously acknowledged this policy in her decision notices. The Commissioner accepts that the report of Mr Osbourne's comments does not affect the balance of the public interest.
26. The Commissioner understands the complainant's concerns regarding the potential detrimental impact on the human rights of individuals as a result of government's handling of discussions with the EU. She understands the public interest in all matters concerning Brexit, the significance of discussions with the EU and the impact on lives in the UK. The public is concerned that the government is clear in its plans and seeks to discover greater clarity of the way forward. It is desirable to have full and frank disclosure of a settled position.
27. Notwithstanding the public's concern the Commissioner is not convinced that confirming or denying holding information comprising minutes of Cabinet or Cabinet committees in relation to EU citizens remaining in the UK, including comments from specific members of Cabinet, is sufficiently weighty to overturn the exclusion to confirm or deny.
28. The Commissioner has considered this case in the circumstances existing at the time of the request. In the Commissioner's opinion the recent nature of the requested information arguably strengthens the public interest in maintaining the exclusion to confirm or deny.
29. The Commissioner notes that information concerning the Government's position on EU citizens in the UK and their rights and status after the UK leaves the EU was published on 26 June 2017.

30. The Commissioner also notes that the Cabinet Office explained the principle of Cabinet collective responsibility to the complainant. She would point out that the Cabinet Manual sets out the way in which Ministers' contributions are made in Cabinet, in order to preserve collective responsibility:

"Minutes are taken for each Cabinet and Cabinet committee meeting, forming part of the historic record of government. They record the main points made in discussion and the Cabinet or Cabinet committee conclusions as summed up by the chair. To help preserve the principle of collective responsibility, most contributions by ministers are unattributed. However, points made by the minister introducing the item and the chair's summing-up are generally attributed."

31. Following on from this, if the Cabinet Office did hold Cabinet and Cabinet Committee minutes relating to the complainant's request it would be unlikely that any contribution would be attributed and therefore unlikely to provide information with regard to the then Prime Minister and Home Secretary, as stated in the request. There is a very strong public interest in protecting the confidentiality of communications between Ministers within Cabinet. This public interest extends beyond this specific request and concerns the maintenance of a 'safe space' for debate and protection of the deliberative process and the convention of Cabinet collective responsibility.
32. The Commissioner considers that in general there is a considerable weight in favour of transparency of government policy with respect to the UK leaving the EU. However, this case relates to a request for information concerning the fresh negotiations involved with the formulation and development of government policy discussed in Cabinet or Cabinet committees.
33. The Commissioner considers that there is a public interest in ensuring that those exemptions which neither confirm or deny holding requested information are applied consistently. This factor adds further weight in determining that in the particular circumstances of this case, the public interest favours upholding section 35(3).
34. Consequently, in all the circumstances of this case the Commissioner is persuaded that the public interest in neither confirming nor denying outweighs the public interest in knowing whether the information is held. Therefore the public interest favours maintaining the exemption.
35. The Commissioner's decision is that the Cabinet Office was correct in its application of the exemption at section 35(3) FOIA.

Right of appeal

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

Website: 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

**Gerrard Tracey
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