Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **5 February 2020**

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

Decision (including any steps ordered)

1. The complainant has requested information on communications in 2003 between Prime Minister Tony Blair and Chancellor Gordon Brown referring to a referendum on whether the UK should join the Euro.

2. The Commissioner's decision is that the Cabinet Office has appropriately applied the exemptions at section 35(1)(a) and (b) – Formulation of government policy and Ministerial communications, however, the public interest favours disclosure of the information.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Disclose the requested information

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 3 April 2019 the complainant wrote to the Cabinet Office and requested information in the following terms:

"I am only interested in information generated between 1 March 2003 and 1 June 2003.

I am only interested in those direct contacts and communications between

the named individuals below. Please do not include contacts and communications written on their behalf by any members of staff.

1. During the aforementioned period did Prime Minister Tony Blair write to Gordon Brown, the then Chancellor about the possibility of the UK holding a referendum on whether the UK should join the Euro and or the rights and wrongs of such a referendum.

2. If the answer to question one is yes can you please provide copies of this correspondence and communication including emails.

3. During the aforementioned period did Mr Brown write to Tony Blair about the possibility of the UK holding a referendum on whether the UK should join the Euro and or the rights and wrongs of such a referendum.

4. If the answer to question three is yes can you please provide copies of this correspondence and communication including emails.

5. During the aforementioned period did Tony Blair write to Alastair Campbell his then Director of Communications about the possibility of the UK holding a referendum on whether the UK should join the Euro and or the rights and wrongs of such a referendum.

6. If the answer to question five is yes can you please provide copies of this correspondence and communication including emails.

7. During the aforementioned period did Mr Campbell write to Tony Blair about the possibility of the UK holding a referendum on whether the UK should join the Euro and or the rights and wrongs of such a referendum.

8. If the answer to question seven is yes can you please provide copies of this correspondence and communication including emails."

6. The Cabinet Office responded on 1 May 2019 with a refusal notice in reliance of the exemptions at section 35(1)(a) & (b).

7. Following an internal review the Cabinet Office wrote to the complainant on 17 May 2019 upholding the initial response.

Scope of the case

8. The complainant contacted the Commissioner on 21 May 2019 to complain about the way his request for information had been handled.

He explained his view that the information requested is historic material "which poses no threat to current decision making." He further explained:

"I maintain there are strong public interest grounds for disclosure given that both Mr Blair and Mr Campbell are both prominent figures in the current campaign to force a second Referendum into Britain's EU membership."

9. The Commissioner considers the scope of her investigation to be the application of the section 35 exemptions to the content of the withheld information, in the circumstances of this case.

Reasons for decision

Section 35: Formulation of government policy

10. Section 35 FOIA states:

"(1) 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

11. The Commissioner's view is that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.

12. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private. Her guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

13. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.

14. The Cabinet Office explained that the withheld information relates to monetary and financial policy in relation to European policy. It went on to explain its view that, at the time of the request response, these policy areas remained live issues, especially in the political climate at that time. It added that Mr Blair continues to be a key contributor in the current public debate on European policy. The Cabinet Office went on to advise:

    ".. the Cabinet Office is confident that despite the date of these exchanges, the issues are beyond doubt sufficiently 'live' as to deem their potential release premature."

15. The Commissioner is satisfied that the exemption at section 35(1)(a) is engaged in this case as she considers that the information relates to the formulation of government policy at the time.

16. Section 35(1)(b) provides that information held by a government department is exempt information it if relates to Ministerial communications. Section 35(5) defines 'Ministerial communications' as any communication between a Minister of the Crown and;

    "includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales."

17. Having inspected the requested information the Commissioner is satisfied that the withheld information falls within the description set out at section 35(1)(b), therefore the exemption is engaged.

Public interest test

18. Sections 35(1)(a) and 35(1)(b) are qualified exemptions and therefore subject to the public interest test. The Cabinet Office provided combined public interest arguments for section 35(1)(a) and section 35(1)(b). The Commissioner has therefore considered whether the public interest in favour of maintaining either or both of the exemptions outweighs the public interest in favour of disclosure of the information.

Public interest in favour of disclosing the withheld information

19. The Cabinet Office recognised the general public interest in openness. It further recognised that the decisions ministers make may have a significant impact on the lives of citizens across the UK, and there is a

public interest in their deliberations being transparent. The Cabinet Office also recognised that openness in government may increase public trust and engagement with government and has beneficial effects on the overall quality of government. Furthermore it acknowledged the specific public interest in the public being well-informed about the government's monetary and financial policy and relations with the European Union. The Cabinet Office noted that disclosure of the withheld information could advance the public interests identified above.

20. In bringing his case to the Commissioner the complainant focussed on the balance of the public interest favouring disclosure of the requested information from 2003 because individuals named in the request have been prominent figures in the debate regarding the UK's membership of the European Union.

Public interest in favour of maintaining the withheld information

21. The Cabinet Office stated its view that:

"…there is a public interest in protecting the process of policy formulation and ensuring that Ministers can engage in policy discussions confident that the details of their discussions will remain confidential. Although the material held by the Cabinet Office is now 16 years old, the Ministers involved at the time of the formulation, particularly Mr Blair, continue to feature prominently in the ongoing debate over future UK relations with the European Union."

22. Following from this the Cabinet Office added that disclosure of the information held would be likely to re-frame current discussions in the light of past and settled positions. The Cabinet Office explained to the Commissioner that this would neither further the debate nor advance public understanding of the issues today. In such circumstances it considers that the public interest in protecting a safe space for Ministers and their advisers to consider policy options overrides the general public interest in openness.

23. The Cabinet Office further advised:

"Disclosing the information four years ahead of time would render unpredictable when and in what conditions sensitive political information such as this would be disclosed. This would increase the pressure on Ministers and officials to avoid recording matters on which they disagree other than in formal contexts. This will deprive future generations of a complete record of policy deliberations. Unless there is a compelling public interest in disclosure these documents should remain closed. No such public interest is present in this case."

24. The Cabinet Office drew the Commissioner's attention to Parliament's recognition that the section 35 exemption was created because it

recognised that "the disclosure of certain types of information, such as Ministerial communications, Cabinet papers and minutes would always be likely to prejudice the effective conduct of public affairs." It went on to explain that in the Constitutional Reform and Governance Act 2010, Parliament gave its view that such information should normally be opened after 20 years.

25. The Cabinet Office concluded that in relation to section 35(1)(a) the UK government's policy towards the European Union remains "in a state of flux". Therefore, it advises:

"the policy exemption must still be seen as live and not yet approaching historic, this is key in this instance as Mr Blair remains a prominent figure in the ongoing debate, despite being no longer being [sic] a Member of Parliament, Peer or Minister."

Balance of the public interest

26. The Commissioner is satisfied that the exemptions at sections 35(1)(a) and section 35(1)(b) are engaged, however, as she has previously advised, she does not consider that there is an inherent or automatic public interest in maintaining them. The exemptions are not absolute but are subject to the public interest test. This means that Parliament was of the opinion that in some cases the public interest would lie in the disclosure of information into the public domain, despite the exemptions being engaged.

27. In respect of the exemption at section 35(1)(a) the Commissioner notes that the policy in question was not under formulation or development at the time of the request. She accepts that the information concerns the UK and Europe and 'relates' to policy at the time. Currently significant policy making is taking place relating to Brexit, the UK and Europe. Although the UK's departure from the EU is now settled the UK's future relationship with the EU remains a current matter for debate. However, simply because information concerns Europe and policy making does not mean that the information from 16 years ago is 'live' because the policy making at the time of response to the request was "in a state of flux".

28. The Commissioner is not persuaded by the Cabinet Office's argument that disclosure of the requested information would influence the content of future discussions. The Commissioner accepts that disclosure would allow scrutiny of the decision making at the time. The Commissioner's view is that such scrutiny would assist the public's understanding as to how government considers issues of significance such as whether the UK should have held a referendum on the UK joining the Euro. Mr Blair chooses to involve himself in the recent on-going debate despite no

longer being a Member of Parliament, Peer or Minister. The Commissioner is not convinced that Mr Blair's decision to place himself in the public arena during recent debate should impact on the public interest in disclosure.

29. The Commissioner is concerned at the Cabinet Office's suggestion that disclosure may result in Ministers and officials seeking to avoid recording matters on which they disagree, other than in formal contexts. She would hope that Ministers would conduct and record their discussions appropriately irrespective of any future disclosures. Moreover she believes that the public has a right to expect that government Ministers will fulfil their responsibilities in the proper manner and maintain appropriate records.

30. In the Commissioner's opinion it is unreasonable for any Minister to expect that policy development and decision making should be exempt from any scrutiny. She considers that Ministers, as senior politicians and members of the Government, should acknowledge the strong and legitimate public interest accountability.

31. The Commissioner is satisfied that there is a strong public interest in the public being fully informed as to how the government of the day considered the UK joining the Euro and a referendum on the issue. The impact of the UK leaving the European Union has created a significant public interest in both implemented and developing policy and government communications.

32. The Commissioner recognises that there are public interest arguments both in favour of maintaining the exemption and in favour of disclosure. The Commissioner is satisfied that there is a considerable weight attached to the public interest in the content of the withheld information. On balance, she considers that in the current circumstances of national debate there is a compelling public interest in the policy making at the time concerning the UK and Europe. She acknowledges that this was 16 years ago at the time of the request, not 20 years, at which time such information should be opened, as noted by the Cabinet Office in paragraph 23 above. Clearly the withheld information concerns a settled position on the policy of the time, notwithstanding this, she considers that the information would advance public understanding of decision making in Government.

33. In the circumstances of this case the Commissioner considers that the public interest in maintaining the exemptions at section 35(1)(a) and section 35(1)(b) does not outweigh the public interest in disclosure of the information.

Right of appeal

34. 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@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.

36. 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