

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2022

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking minutes of any Cabinet meeting from 2020 where the review into the fit and proper person test carried out by Tom Kark QC was discussed. The Cabinet Office refused to confirm or deny whether it held the requested information on the basis of section 35(3) of FOIA.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 35(3) of FOIA to refuse to confirm or deny whether it holds the requested information.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the Cabinet Office on 25 October 2020:

'I note the prior request I made was too big so I have reduced the request which I hope will enable it to be enacted.'

1. *Minutes of any meeting where the Kark review has been discussed in a cabinet meeting in 2020*.¹
5. The Cabinet Office responded on 16 November 2020 and explained that it was relying on section 35(3) of FOIA to refuse to confirm or deny whether it held any information falling within the scope of the request.
6. The complainant contacted the Cabinet Office on the same day and asked it to conduct an internal review of this response.
7. The Cabinet Office informed her of the outcome of the internal review on 10 December 2020. The internal review upheld the Cabinet Office's reliance on section 35(3).

Scope of the case

8. The complainant contacted the Commissioner on 10 December 2020 in order to complain about the Cabinet Office's reliance on section 35(3) of FOIA. The complainant's grounds of complaint are considered below.

Reasons for decision

9. Section 35(3) of FOIA states that:

"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)."
10. Therefore, in order to engage the section 35(3) exemption, the requested information, if held, would need to be exempt from disclosure on the basis of one of the exemptions contained in section 35(1).
11. In the circumstances of this case the Cabinet Office explained that the relevant exemptions were sections 35(1)(a) and (b) which state that:

¹ In July 2018 Tom Kark QC was commissioned by the then Minister of State for Health (Stephen Barclay MP) to write a report and to make recommendations in relation to the Fit and Proper Person Test as it applies in the context of health and social care.

In November 2018, Mr Kark provided his report to Mr Barclay's successor as Minister of State, making a number of recommendations. The report was published in February 2019. <https://www.gov.uk/government/publications/kark-review-of-the-fit-and-proper-persons-test>

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy,

(b) Ministerial communications,'

12. The definition of Ministerial communications at section 35(5) of FOIA specifically includes the 'proceedings of the Cabinet or of any committee of the Cabinet'.
13. The Cabinet Office argued that the requested information, if held, would relate to the formulation or development of government policy in respect of the issues covered by the Kark review. Furthermore, the Cabinet Office argued that given the scope of the request, seeking as it does minutes of any Cabinet meeting, the requested information, if held, would also relate to Ministerial communications.
14. The Commissioner agrees with this assessment and is therefore satisfied that the Cabinet Office is entitled to engage the neither confirm nor deny provision on the basis of section 35(3) of FOIA.

Public interest test

15. 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.

Public interest in confirming whether or not the requested information is held

16. The complainant argued that the Cabinet Office's responses to her appeared to contain a standard, generic response and there was no evidence that it had considered the specific circumstances of this case when considering the balance of the public interest test. The complainant noted that in her request for an internal review she had only asked for past information regarding the Kark review and disclosure of this (if it existed) would not in her view limit any future discussions. She also argued that existence of any of the requested information (if held) would only show that the Kark review had been discussed, it would not affect the ability to discuss the review as this had already been published by the government in February 2019.
17. In her request for an internal review, the complainant had also asked the Cabinet Office to explain, how in determining the balance of the public interest, it had taken into consideration the number of adverse incidents in the NHS per year that happen by staff not raising concerns in confidence as per the Kark review or the avoidable deaths that occur.

18. Furthermore, in her submissions to the Commissioner the complainant cited various case law which in her view supported the position that the public interest favoured confirming whether or not the requested information was held. For example, the case *Department of Health v Information Commissioner, Healey & Cecil* (EA/2011/0286 & 0287, 5 April 2012² where the request was submitted after policy decisions had been taken. The complainant noted that the Kark review had been published in February 2019 (the complainant's point being that her request was submitted after the review was complete).
19. She also cited the case *OGC v Information Commissioner & the Attorney General* [2008] EWHC 737 (Admin)³ in which the High Court had considered an appeal against the disclosure of gateway reviews of the government's identity card programme. The complainant emphasised that Burnton J had observed that section 35 could not be seen as creating a presumption of a public interest in non-disclosure (para 79).
20. The complainant also cited the non-information rights case *Chesterton Global Ltd & Anor v Nurmohamed & Anor (Rev 1)* [2017] EWCA Civ 979⁴ where the point was made that '*in any case the tribunal in deciding whether a disclosure was in the public interest would have to consider all the circumstances, but he suggested that the following factors would normally be relevant... (a) the numbers in the group whose interests the disclosure served*'.
21. In relation to the circumstances of her request, the complainant highlighted a report by MPs concerning 'speak up culture' affected by the Kark review standards.⁵ She also cited the data collected by the Freedom to Speak Up Guardians which is submitted to the National Guardian's Office⁶ and as well as cross party groups relaying evidence about the lack of protection for whistle-blowers.⁷

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https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i729/2012_04_05;%20DOH%20v%20IC%20%20Healey%20final%20decision.pdf

3 <https://www.bailii.org/ew/cases/EWHC/Admin/2008/737.html>

4 <http://www.bailii.org/ew/cases/EWCA/Civ/2017/979.html>

5 <https://www.theguardian.com/society/2021/jul/06/mps-say-1000-babies-die-preventable-deaths-in-england-each-year>

6 <https://nationalguardian.org.uk/>

7

<https://www.wbuk.org/news#:~:text=The%20All%20Party%20Parliamentary%20Group%2>

22. Finally, the complainant also cited decision notice FS50173181 in which the Commissioner had concluded that the public interest favoured the disclosure of a manual detailing the physical restraint methods used on young people in secure training centres.⁸

Public interest in maintaining the exemption to confirm or deny whether the requested information is held

23. The Cabinet Office argued that the public interest favoured neither confirming nor denying whether the requested information was held for the following reasons:
24. Firstly, because the routine disclosure of Cabinet and Cabinet committee meeting agenda items would adversely affect the ability of Ministers to organise themselves to respond to policy questions. To confirm or deny whether or not the Cabinet Office holds the minutes in question would be to disclose the meeting agenda of Cabinet; and,
25. Secondly, in any case the routine disclosure of Cabinet and Cabinet committee meeting minutes would undermine the ability of Ministers to discuss matters freely.
26. In support of these points, the Cabinet Office made the following further submissions to the Commissioner:
27. The Cabinet Office argued that if it were to confirm that it did or did not hold the minutes for a particular item's discussion at Cabinet, it would be possible to identify whether or not the Cabinet had discussed a particular item. Furthermore, it would be possible for a group of people coordinating their efforts to send requests asking the Cabinet Office for minutes from particular discussions. If the Cabinet Office had to confirm or deny that those were held, then it would be possible for the public to ascertain the agenda of Cabinet on a regular basis.
28. The Cabinet Office emphasised that the principle of collective responsibility⁹ extended to the subjects discussed by the Cabinet as well

[0%28APPG%29%20for%20Whistleblowing.put%20whistleblowing%20at%20the%20top%20of%20the%20agenda](https://www.parallelparliament.co.uk/APPG/Whistleblowing)

<https://www.parallelparliament.co.uk/APPG/Whistleblowing>

⁸ https://ico.org.uk/media/action-weve-taken/decision-notice/2009/504630/FS_50173181.pdf

⁹ Collective responsibility is the longstanding convention that all ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions.

as the contents of those discussions. It argued that making public the discussions of Cabinet meetings subjects the collective decision-making processes of government to undue early scrutiny which damages the process as it can lead to perverse incentives and ultimately a lack of free and frank exchange of ideas. Essentially, the Cabinet Office argued that it is for Ministers to determine how often and when they meet to discuss a policy.

29. The Cabinet Office emphasised that for the effective functioning of government, Ministers require safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction, including at Cabinet. It explained that in order to protect the private space for free and frank ministerial debate, and the ability of Ministers to organise themselves as they see best, there is a longstanding convention that information about Cabinet, including what topics were discussed, is not disclosed publicly.
30. The Cabinet Office argued that to confirm or deny whether or not it held the requested information, and thus regularly reveal the Cabinet agenda, would undermine that privacy. This is because if Ministers knew that the topics of Cabinet discussions would be made public prematurely they would approach discussions at Cabinet differently. The Cabinet Office suggested that Ministers may be less frank and candid with one another, as they would consider that their individual contributions relating to a particular topic may be subject to premature public scrutiny (before the transmission of Cabinet minutes to The National Archives following the 20 year rule). Ministerial discussions and decision making at Cabinet would therefore decline.
31. The Cabinet Office also argued that just as officials should benefit from such space when developing government policy, Ministers should be able to have the benefit of being able to debate live issues and reach decisions in an atmosphere which encourages full and frank discussion. It argued that it would plainly not be in the public interest for the quality of debate at Cabinet meetings to diminish and that it would similarly not be in the public interest if the decisions made at Cabinet meetings were poorly informed.
32. The Cabinet Office explained that the Cabinet is the ultimate policy decision making body in the government. The matters it discusses are, by definition, still live. There is a strong public interest in discussions being conducted effectively.
33. By way of example, the Cabinet Office explained that if a new policy undergoing development within a government department, reached Cabinet for final approval to be implemented, and Cabinet determined that the policy was not in a state of readiness to be implemented, it would need to go back to the department for further development. If the

fact that such a policy proposal had reached Cabinet became publicly known and the discussions that were had around it disclosed, it would subject the policy and associated ministerial discussions to a considerable degree of scrutiny while it was still undergoing development. This would not be to the benefit of that policy's development.

34. In addition, the Cabinet Office argued that in its view, the disclosure of Cabinet meeting agendas, or regular confirmation that a particular subject had, or had not, been discussed by the Cabinet, could give rise to misunderstandings as to how Cabinet meetings are conducted. The Cabinet Office argued that it would be easy for people to draw inferences from certain matters being put before the Cabinet while others were not; for conclusions to be reached about matters being discussed by the Cabinet on certain dates; and even for assumptions to be made about the ordering of agenda items for consideration by the Cabinet. It suggested that this would not aid public understanding of how the Cabinet operates or how its meetings function. It noted that not all matters requiring the collective consideration of Ministers are brought to Cabinet; as the Cabinet Manual observes at paragraph 4.9, *'Cabinet committees help to ensure that government business is processed more effectively by relieving pressure on Cabinet'*.¹⁰
35. The Cabinet Office also emphasised the sensitivity of Cabinet meeting minutes. It noted that the Cabinet Manual states at paragraph 4.1, *'Cabinet is the ultimate decision-making body of government.'* The Cabinet Office argued that it follows that the business of the Cabinet is accompanied by a considerable degree of scrutiny and that in view of their importance in the governance of the country, it is crucial that Cabinet and Cabinet committee meetings are effective means of conducting government business. The Cabinet Office emphasised that it is also crucial that Cabinet and Cabinet committee meetings permit private space for ministerial debate. It is therefore a long-standing convention that Cabinet Minutes are not made public.
36. In support of this point, the Cabinet Office cited paragraph 2.1 of the Ministerial Code which states: *'...Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in*

¹⁰ <https://www.gov.uk/government/publications/cabinet-manual>

Cabinet and Ministerial Committees, including in correspondence, should be maintained'.¹¹

37. The Cabinet Office argued that Ministers having the ability to express themselves freely is an important component of the principle of collective responsibility, which is a cornerstone of Cabinet government. If Cabinet minutes were released then the public would be privy to the confidential policy debate of Ministers before collective agreement was reached.
38. The Cabinet Office argued that the importance of confidentiality in Cabinet proceedings cannot be understated with paragraph 11.18 of the Cabinet Manual stating that '*...the Government's working assumption is that information relating to the proceedings of Cabinet and its committees should remain confidential*'.
39. The Cabinet Office argued that Ministers will reach collective decisions more effectively if they are able to debate questions of policy freely and in confidence. In its view the maintenance of this convention is fundamental to the continued effectiveness of Cabinet government, and its continued existence is therefore manifestly in the public interest.
40. In addition, the Cabinet Office argued that the release of Cabinet meeting minutes would set a precedent for the routine disclosure of minutes. Releasing Cabinet meeting minutes would expose individual Ministers, and the meeting itself, to undue public scrutiny. As a result Ministers would feel less able to express their views freely and frankly, and the quality of the underlying debate would decline.
41. With regard to the points made by the complainant in her request for an internal review (paragraphs 16 and 17) the Cabinet Office noted that the complainant assumed that the publication of minutes relating to a Cabinet meeting during the course of 2020 could have no impact on how Cabinet meetings operate in the future. However, for the reasons set out above, it did not consider this to be the case.
42. The Cabinet Office argued that whether or not the Kark review had been published at the time that Cabinet held meetings during 2020 or at the time of the request is irrelevant. Rather, it explained that the necessity of it neither confirming or denying did not hinge on the Kark review in any way; rather the Cabinet Office's principal concern was to maintaining the integrity of the Cabinet and its proceedings.

¹¹ <https://www.gov.uk/government/publications/ministerial-code>

43. With regard to the point at paragraph 17, the Cabinet Office explained that it had made no reference whatsoever to the Kark review or its subject matter in determining that it should neither confirm nor deny whether the information was held. It had not considered the matter of avoidable deaths. Rather, as noted above, the rationale for neither confirming nor denying whether the information was held is rooted in upholding Cabinet collective responsibility.

Balance of the public interest test

44. The Commissioner accepts that it is for the Cabinet and the government to determine the level at which matters are discussed and that process, in itself, deserves protection. He also accepts that if confirmation or denial of the level at which decisions are made were routinely provided, this would inevitably lead to increased pressure on the government over process issues and that this would be contrary to the public interest for the reasons identified by the Cabinet Office. Furthermore, the Commissioner agrees that there is a significant public interest in maintaining and respecting the principle of collective Cabinet responsibility and confirmation as to whether or not the requested information is held would undermine that principle by revealing whether Ministers had discussed a particular issue.
45. For the avoidance of any doubt, by reaching this finding the Commissioner disagrees with the complainant's position that confirming whether or not the requested information is held would not limit future Ministerial discussions. Rather, for the reasons set out by the Cabinet Office, the Commissioner is satisfied that despite the Kark review being published 2019, and this request being submitted in 2020, confirmation as to whether or not the requested information is held would still undermine the principle of collective responsibility.
46. With regard to the public interest arguments in favour of confirming whether or not the requested information is held, the Commissioner does not agree with the Cabinet Office's apparent position that the subject of the request, ie the Kark review, is not material to, or not a key factor in, determining the balance of the public interest. Each request must be considered on its own merits, and in respect of the balance of the public interest test that includes, even in neither confirm nor deny cases, considering the subject matter of the requested information.
47. The Commissioner appreciates that the matters considered by the Kark review, namely the effectiveness of the fit and proper persons test for senior staff in the NHS, are ones of importance not only to those 1.2m people employed by the NHS, but also to the wider public. The Commissioner accepts that confirmation or denial as to whether the review had been discussed in Cabinet meetings would provide some

insight into the level at which the review may have been discussed and considered by Ministers.

48. However, despite the importance of the issues covered by the Kark review, the Commissioner is not aware of any broadly held public expectation that the Kark review had (or had not) been considered at Cabinet level. In light of this the Commissioner is not persuaded that the insight provided by the Cabinet Office confirming whether or not it holds the requested information, would necessarily prove to be a significant one (regardless as to whether or not the information is held). Put another way, the Commissioner does not consider there to be any compelling public interest in confirming whether or not this particular issue had been discussed at a Cabinet meeting, in comparison to providing a similar confirmation/denial in respect of any other matter of similar significance.
49. Furthermore, the Commissioner is not persuaded that the various case law cited by the complainant adds any further weight to the argument in favour of confirming or denying whether the requested information is held. None of the cases cited related to requests where the section 35(3) provision was being considered. To the extent that the cases include points relevant to this request, ie section 35 not being treated as an absolute exemption and the timing of policy making needing to be taken into account when balancing the public interest, the Commissioner considers that his analysis above does this.
50. In conclusion, the Commissioner acknowledges the seriousness of the issues covered in the review, and seriousness of the broader issues regarding whistleblowing within the NHS cited by the complainant and upon which the review touches. However, in the Commissioner's view confirming whether or not the Cabinet Office holds information falling within the scope of the request would only add marginally to the public's understanding of the government's response to the Kark review. In contrast, in his opinion there is a much more significant, and ultimately compelling, public interest in maintaining the exemption given the impact this would have on the government's decision making processes.
51. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 35(3) of FOIA.

Right of appeal

52. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

53. 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.

54. 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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