

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 November 2023

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 the costs incurred as a result of an appeal to the First-tier Tribunal concerning the Clearing House and previous drafts of documents that had been published in March 2021 about the remit and operation of the Clearing House. The Cabinet Office provided the costs information but sought to withhold the drafts of the previous documents on the basis of section 35(1)(a) (formulation or development of government policy) of FOIA. Due to the passage of time it disclosed one of these documents but sought to withhold the remainder on the basis of section 35(1)(a).
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 35(1)(a) but that in all the circumstances of the request the public interest in disclosing the information outweighs the public interest in maintaining the exemption.
3. The Commissioner requires the Cabinet Office to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the information sought by question 3 of her request.
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. The complainant submitted the following request to the Cabinet Office on 10 June 2021:

"This is a request for information under the Freedom of Information Act. I would like to request the following information. Please note there are several parts to this request:

(1) In regards to Cabinet Office v Information Commissioner and Jenna Corderoy, please provide the following information:

- Please provide the total amount of money spent by the Cabinet Office on this case.
- Please also provide a detailed breakdown of costs.

(2) The Cabinet Office published 'The Clearing House Remit' in March 2021 (<https://www.gov.uk/government/publications/cabinet-office-and-freedom-of-information>). Please provide:

- The date when this document was created.
- All drafts of this document. I would expect this to include drafts containing any track changes/comments.

(3) The Cabinet Office also published 'Cabinet Office FOI Referral Criteria' in March 2021 (<https://www.gov.uk/government/publications/cabinet-office-and-freedom-of-information>). Please provide:

- The date when this document was created.
- All drafts of this document. I would expect this to include drafts containing any track changes/comments."

6. The Cabinet Office contacted the complainant on 8 July 2021 and confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure on the basis of section 36 (effective conduct of public affairs) of FOIA and it needed additional time to consider the balance of the public interest test.

7. The Cabinet Office issued a substantive response on 9 August 2021. In relation to question 1, the Cabinet Office explained that this information was not held as the invoicing was not yet complete. In relation to questions 2 and 3 it explained that it now considered section 35(1)(a) (formulation or development of government policy) to apply to this information and that the public interest favoured maintaining the exemption.
8. The complainant contacted the Cabinet Office on 19 September 2021 and asked it to conduct an internal review.
9. The Cabinet Office provided her with a response to the review on 8 December 2021. In relation to question 1, the Cabinet Office explained that the invoicing process was complete and provided her with the information sought by this part of the request. In relation to questions 2 and 3 the Cabinet Office maintained that this information was exempt from disclosure on the basis of section 35(1)(a) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 28 January 2022 in order to complain about the Cabinet Office's decision to withhold information falling within the scope of her request.
11. During the scope of the Commissioner's investigation the Cabinet Office explained that, given the passage of time, it was now prepared to disclose the document it held falling within the scope of question 2 of the request. In agreeing to disclose this document the Cabinet Office noted that it remained of the view that, at the time of the request, the public interest favoured withholding this document.¹
12. With regard to the remaining withheld information falling within the scope of question 3 of the request, the Cabinet Office explained to the Commissioner that it remained of the view that this was exempt from disclosure on the basis of section 35(1)(a), or albeit in the alternative, that the information was exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) of FOIA.²
13. Given the Cabinet Office's position regarding the information falling within the scope of question 2, this decision notice simply considers

¹ This document was disclosed to the complainant on 25 October 2023.

² Sections 35 and s36 are mutually exclusive and cannot apply to the same information.

whether the information falling within the scope of question 3 was exempt from disclosure at the time of the request.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

14. Section 35(1)(a) of FOIA states that:

“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”

15. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

16. The Commissioner takes the view that the ‘formulation’ of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.

17. ‘Development’ may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

18. Ultimately the key point is that policymaking can take place in various ways; there is no uniform process. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.

19. The Commissioner’s guidance on section 35 includes the following examples of different processes that might involve policy:

- White Papers, bills and the legislative process;
- initiatives to review and improve existing policies;
- Ministerial speeches;
- press releases;
- responding to unexpected events;
- responding to questions put to Ministers; and
- unusually sensitive or high-profile operational decisions.

20. Furthermore, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
- the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.³
21. The Cabinet Office argued that the government policy which the withheld information relates to is the policy regarding the operation and remit of the former Clearing House function. The Cabinet Office explained that the documents in the scope of the request were drafted by policy officials for Ministers to consider and agree regarding the departments that were proposed to fall within the Clearing House remit. The documents also sought Ministers' agreement regarding the basis on which departments should refer cases to the Cabinet Office Clearing House function. The Cabinet Office noted that the documents reflect the iterative process of policy development whereby officials provide advice to Ministers for consideration and discussion in order to come to a settled position.
22. The Commissioner accepts that the nature of the decisions concerning the Clearing House within the withheld information clearly have an operational dimension. However, the Commissioner is conscious of the external focus that had fallen on the Clearing House since late 2020 and as a result the high profile nature of the decisions concerning its remit and operation. Furthermore, as is clear from the information itself, decisions regarding the remit and operation of the Clearing House were ones that involved final decisions being taken by a Minister. On this basis the Commissioner is prepared to accept that the withheld information falls within the scope of section 35(1)(a) of FOIA.

Public interest test

23. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#whatconstitutesformulation>

Public interest in favour of maintaining the exemption

24. The Cabinet Office emphasised that policy making in relation to the operation of the Clearing House was live and ongoing at the time of the request. In support of this position the Cabinet Office explained that the Clearing House had been the subject of parliamentary questions and correspondence since the publication of OpenDemocracy's report in November 2020 and, at the time of the request in March 2021, it was apparent there likely would be further interest in the operation of Cabinet Office's Clearing House function by Parliament. The Cabinet Office noted that as part of its role in overseeing and scrutinising the work of the Cabinet Office, the Public Administration and Constitutional Affairs Committee agreed the terms of reference for an enquiry into the FOI Clearing House on 28 June 2021, which was officially launched on 8 July 2021.
25. The Cabinet Office argued that there is a very strong public interest in allowing Ministers and officials a safe space in which to have a frank and open space in which to discuss and consider policy options, free from concerns that these discussions will be made public very shortly afterwards. The Cabinet Office noted that the request was submitted only three months after the documents in question had been published. The Cabinet Office argued that for the government to work as efficiently as possible it is important that Ministers and officials can give advice and commentary on that advice without having to also provide contextualising information to those comments in the event these documents are made public; to do so would clearly not be a good use of resources.
26. Furthermore, the Cabinet Office argued that if discussions and drafts such as these, produced over a very short period of time, were routinely made public there is a very real risk that Ministers and officials may feel inhibited from being frank and candid. This would not be in the public interest, particularly when the outcomes of these discussions (ie the agreed remit and referral criteria process) are available in the public domain, meeting the requirements of transparency around the then Clearing House's operation.

Public interest in favour of disclosing the information

27. The complainant noted that the Clearing House was the subject of a tribunal hearing where the judge raised concerns over the lack of transparency about its operation (ie the appeal referred to in question 1

of her request⁴). The complainant also noted that prior to the hearing the Cabinet Office had published 'The Clearing House Remit' and 'Cabinet Office FOI Referral Criteria' in March 2021 but she considered this to be a reaction to the attention that the Clearing House was receiving externally and as result she wished to find out more about how these documents came into being.

Balance of the public interest test

28. With regard to the safe space arguments advanced by the Cabinet Office, the Commissioner accepts that significant weight should be given to such space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making.
29. The Commissioner accepts that in a broad sense the government's policy making in respect of the Clearing House was live at the time of the request given the Parliamentary inquiry and necessary work by the Cabinet Office in response to this external scrutiny. However, the Commissioner considers that some distinction can be drawn between such policy making and decisions about which bodies the Clearing House covered and the basis of any referral to it, ie the latter two matters being set out in the documents published in March 2021. In the Commissioner's view the publication of the documents would suggest that the policy making in these areas was complete at the point that the request was made or at least settled at that point, subject to any further developments.
30. Nevertheless, the Commissioner does accept that given the external attention and scrutiny that the Clearing House was attracting, disclosure of withheld information - relatively soon after its creation - would have been likely to have some impact on the safe space associated with this wider, ongoing policy making. However, having carefully considered the nature of the withheld information in the Commissioner's view the extent to which disclosure of this particular withheld information would have impinged on this safe space is arguably limited.
31. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial

⁴ EA/2020/0240,
<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2848/Cabinet%20Office%20EA.2020.0240%20Open%20Decision.pdf>

and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

32. In terms of the chilling effect arguments, the Commissioner again acknowledges that broader policy making regarding the Clearing House was arguably ongoing and furthermore that the request sought information that had only recently been created. In this context, the Commissioner accepts this means that chilling effect arguments should not be dismissed out of hand and that they do attract some weight. However, having again taken into account the content of the withheld information, the Commissioner considers that such weight is limited. This is because in his view disclosure of the particular information that has been withheld would be unlikely to have a significant impact on the frankness or candour of future contributions by those by officials or by Ministers.
33. With regard to the public interest arguments in favour of disclosure, the Commissioner recognises that the final versions of the documents in question had been already been published prior to the request being submitted. However, the Commissioner is conscious of the public interest in decision making in respect of the Clearing House since late 2020. As a result of this, and given the overarching public interest in the government being open and transparent about its actions, the Commissioner considers there to be a legitimate and clear public interest in the disclosure of the information. Taking all of the factors of this case into account, in the Commissioner's view this narrowly outweighs the public interest in maintaining the exemption.

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: 0203 936 8963

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

Jonathan Slee
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