

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 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 for information relating to the cross-departmental meetings of FOI practitioners.
2. The Commissioner's decision is that the Cabinet Office was entitled to rely on section 35(1)(a) to withhold the information for part of the request, and that the public interest lies in maintaining the exemption.
3. The Commissioner does not require further steps as a result of this decision notice.

Request and response

4. On 19 January 2023, the complainant wrote to the Cabinet Office and requested information in the following terms:

"This is an FOI request relating to the cross-departmental meetings of FOI practitioners.

For each such meeting since 1 Sep 2022, please send me:

- a) the minutes
- b) the agenda
- c) copies of all papers distributed to attendees
- d) copies of all presentations

If you are encountering practical difficulties with complying with this request, please contact me as soon as possible (in line with your section 16 duty to advise and assist requesters) so that we can discuss the matter and if necessary I can modify the request."

5. A response was provided on 16 February 2023, in which the Cabinet Office confirmed that it held some information in relation to points a, b and c and disclosed this information, where held. In relation to point d, the Cabinet Office withheld the one document within scope, which was a slide pack, relying on section 35(1)(a) of FOIA.
6. Upon receiving this response, the complainant requested an internal review on 17 February 2023. On 3 April 2023, the Cabinet Office provided its internal review response, in which it disclosed some of the information contained in the slide pack, but continued to apply section 35(1)(a) to the remainder. It also stated that should section 35(1)(a) not apply, it would rely upon section 36. The Cabinet Office also withheld part of the slide pack under section 40(2) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 5 April to complain about the way their request for information had been handled but did not want to contest the application of section 40(2).
8. In submissions to the Commissioner, the Cabinet Office confirmed that it was also applying section 42(1) to a specific part of the withheld information.

9. Therefore, the scope of this case is to examine the Cabinet Office's application of section 35(1)(a) of FOIA. Should section 35(1)(a) not apply, he will go on to consider the application of sections 36 and 42(1) of FOIA.

Reasons for decision

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

10. Section 35(1)(a) of FOIA allows a public authority to refuse to disclose information if it relates to the formulation or development of government policy.
11. Section 35 is a class-based exemption; this means that information simply has to relate to the formulation or development of government policy; there is no requirement for disclosure to prejudice either of these policy processes.
12. Section 35 is also a qualified exemption which means that it is subject to the public interest test. A public authority may only withhold information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
13. In the Commissioner's guidance¹ it states 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 maker.
14. Development may go beyond this stage to the process involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing, or recording the effects of existing policy.
15. The Cabinet Office explained that the withheld information, 'the slide pack', was presented to the 'Information Rights Forum' held on 16 November 2022, and that the items for this twice-yearly forum are chosen specifically because "they are live and evolving issues relevant to the work of practitioners across government".

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

16. The Cabinet Office confirmed that the withheld information involves the formulation and development of government policies relating to:
- Litigation update
 - the Clearing House Review
 - ICO Casework's new complaints process
 - Section 37
17. The Commissioner has examined the withheld information, and in submissions to the Commissioner, the Cabinet Office provided further details regarding each agenda item. The Commissioner cannot reproduce those arguments here without undermining the exemption. However, he considers that the withheld information relates to the formulation and development of government policy and that section 35(1)(a) is engaged. He has therefore gone on to consider the public interest.

Public interest test

18. Section 35(1)(a) is a qualified exemption and is subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has considered whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure.
19. In balancing the public interest arguments, the Commissioner accepts that there is a public interest in the Cabinet Office being transparent and accountable in the way that it develops policy. Furthermore, as the Cabinet Office explains, there is an interest in how it "carries out its function of providing advice and guidance on matters relating to freedom of information to other government departments".
20. The Commissioner notes the complainant's view that part of the information relates to the Cabinet Office Clearing House and that "there is a particularly high public interest in this information".
21. However, he also accepts that significant weight should be given to 'safe space' arguments; ie the concept that the Cabinet Office needs a safe space to develop ideas and promote frank and free debate regarding live issues.

22. Furthermore, the Cabinet Office explains that disclosure of the withheld information, at the time of the request, "when policy was (and, in relation to some of the items on the agenda, still is) being formulated is likely to have led to external interference and distraction and thereby undermine the effectiveness".
23. The Commissioner is aware that there has been information released into the public domain regarding the Cabinet Office's work on FOI, including a Parliamentary inquiry of 'The Cabinet Office Freedom of Information Clearing House' by the Public Administration and Constitutional Affairs Committee² and Sue Langley OBE's review of the Cabinet Office FOI Clearing House function³. Having scrutinised the withheld information, which includes reference to the Clearing House Review in the slide pack, the Commissioner does not consider disclosure of this would add to the information already in the public domain regarding this matter.
24. The Commissioner therefore concludes that the public interest in maintaining the exemption outweighs the public interest in disclosure, and therefore the Cabinet Office was entitled to rely on section 35(1)(a) to withhold the information in relation to part d of the request.
25. As the Commissioner has considered that section 35 (1)(a) applies to the withheld information, he has not gone onto consider the application of sections 42(1) and 36 of FOIA.

² <https://committees.parliament.uk/publications/22055/documents/163743/default/>

³ <https://www.gov.uk/government/publications/cabinet-office-and-freedom-of-information/freedom-of-information-foi-clearing-house-review-html>

Right of appeal

26. 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

27. 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.
28. 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

Joanna Marshall
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF