

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 July 2012

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

Decision (including any steps ordered)

1. The complainant requested information relating to the minutes of two Cabinet Meetings in 2003 concerning the military invasion of Iraq.
2. The Commissioner's decision is that the exemption under section 35 applied. However, he finds that the public interest favours disclosing the requested information.
3. The Commissioner requires the public authority to disclose the withheld information to the complainant.
4. The public authority must take this step 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 wrote to the Cabinet Office on 19 March 2011 and requested information in the following terms:

"I wish to place a new Freedom of Information request relating to the Cabinet minutes for the Cabinet meetings of 13 and 17 March 2003, which discussed the military invasion of Iraq.

Under the terms of the Freedom of Information Act 2000, I request disclosure of these Cabinet minutes as contained in the ruling of the Information Tribunal (re: the 'Cabinet minutes' case)."

6. The Cabinet Office responded on 28 July 2011. It confirmed that it held information relevant to the request, but refused to disclose it, citing sections 27 (international relations) and 35 (formulation of government policy) of FOIA.
7. The Cabinet Office carried out an internal review of that decision, finally providing its response on 21 December 2011. That review concluded that the Cabinet Office had correctly applied the exemption at section 35(1)(a) and (b). No reference was made to section 27.

Scope of the case

8. The complainant contacted the Information Commissioner (the Commissioner) to complain about the way his request for information had been handled, specifically with respect to the withholding of the requested information on the basis of the public interest test. He also complained about the timeliness with which the Cabinet Office handled his request for information and subsequent internal review.
9. The requested information in this case relates to the minutes of Cabinet Meetings at which the military action against Iraq was considered and discussed (the Iraq War Cabinet Minutes). As the wording of the request implies, both the Cabinet Office and the Commissioner have considered a similar request for information on a previous occasion. Clearly, the Cabinet Office dealt with the request in this case as a valid new request and not a repeated request.
10. With regard to the original request, the Commissioner found the section 35 exemption engaged but required disclosure of the minutes on public interest grounds. That decision (FS50165372) was upheld by a majority ruling of the Information Tribunal – subject to a minor amendment - but was overruled by the then Secretary of State for Justice when he issued a veto certificate in accordance with section 53(2) of FOIA on 23 February 2009.
11. The Commissioner notes that, in correspondence with the Cabinet Office about the handling of his request in this case, the complainant asked why disclosure was still being refused despite the (majority) ruling of the First-tier Information Tribunal backing disclosure in January 2009 (EA/2008/0024 and EA/2008/0029).

12. Whilst acknowledging the existence of that Tribunal decision and the subsequent exercise of the Ministerial veto, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with FOIA.
13. In this case, neither the complainant nor the Cabinet Office disputes that section 35 is engaged. The Commissioner therefore considers the scope of his investigation to be with respect to the balance of the public interest in relation to section 35.
14. In reaching a decision in this case, the Commissioner is mindful of the existence of the Iraq Inquiry. That Inquiry, chaired by Sir John Chilcot, was announced by the then Prime Minister, Gordon Brown, on 15 June 2009. The purpose of the Inquiry is to identify lessons that can be learned from the Iraq conflict. According to the Inquiry's website:

"We will therefore be considering the UK's involvement in Iraq, including the way decisions were made and actions taken, to establish, as accurately as possible, what happened and to identify the lessons that can be learned."
15. At the time of writing, the Commissioner is not aware that the Inquiry has set a date for reporting its findings.

Reasons for decision

16. The Cabinet Office is relying on sections 35(1)(a) and (b) for refusing to disclose the requested information. In other words, it is claiming that the information is held by a government department and relates to the formulation or development of government policy and ministerial communications.
17. Ministerial communications are defined at section 35(5) as including proceedings of the Cabinet, or of any committee of the Cabinet. Having viewed the withheld information, the Commissioner is satisfied that it falls within both subsection 35(1)(a) (the formulation or development of government policy) and (b) (Ministerial communications). In the Commissioner's view, subsection (b) is the more relevant: however, he acknowledges that the withheld information also relates to the formulation or development of government policy at the time by virtue of its subject matter, namely the UK's policy regarding military action in Iraq.
18. Accordingly, he finds the exemption engaged in relation to both subsections being claimed and therefore he has gone on to consider the public interest arguments.

The public interest test

19. Section 2(2)(b) provides that a public authority is not under a duty to disclose information if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it. This means that if the public interest is equally balanced, the information must be disclosed.
20. The Commissioner must consider whether, at the time of the request, the public interest in disclosing the two sets of Cabinet minutes equals or outweighs the public interest in withholding the information. In doing so, he has considered whether, and to what extent, the balance of the public interest has changed since the matter was last considered.

Public interest arguments in favour of disclosing the requested information

21. In correspondence with the Commissioner, the complainant brought to his attention examples of declassified documents from the Iraq Inquiry which he considers relevant to the issues in this case.
22. Arguing in favour of disclosure, the complainant also told the Commissioner that he considered that:

"disclosure of the minutes is still highly relevant and in the public interest".

23. The Cabinet Office acknowledges there is a general public interest in disclosure of information, recognising that:

"openness in government may increase public trust in and engagement with the Government...."

and

"the decisions Ministers make may have a significant impact on the lives of citizens, and there is a public interest in their deliberations being transparent".

24. In correspondence with the Commissioner, the Cabinet Office acknowledged that, in this case, there is a strong public interest in how the government reached a decision to commit British forces to military action. Similarly, it told the complainant that it took into account the public interest in:

"understanding the UK's relations with Iraq and the circumstances in which the UK committed forces to Iraq".

25. The Cabinet Office acknowledges that there have been changes of administration since the minutes were produced and that this could be seen as a factor in favour of disclosure.
26. Notwithstanding its recognition of the above arguments in favour of disclosure, the Cabinet Office advised the Commissioner that it considers that the public interest factors in favour of disclosure have in fact diminished with the passage of time, particularly given the current work of the Iraq Inquiry (discussed further below).

Public interest arguments in favour of maintaining the exemption

27. The Cabinet Office identified a number of arguments in favour of maintaining the exemption:
 - the public interest in protecting the constitutional convention of the policy making process;
 - the public interest in protecting the constitutional convention of Cabinet collective responsibility;
 - the Iraq Inquiry chaired by Sir John Chilcot; and
 - the change of administration.
28. Stressing the importance of the two conventions to the effective functioning of a central element of the nation's system of government, the Cabinet Office told the Commissioner:

"Essentially the Cabinet Office maintains that two important public interests favour withholding all of this information. They are the public interest in preserving the confidentiality of the policy making process and the public interest in protecting the constitutional convention of Cabinet collective responsibility".

29. Arguing strongly against disclosure, the Cabinet Office told the complainant:

"Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications.... If discussions were routinely made public there is a risk that Ministers may feel inhibited from being frank and candid with one another. The convention of Cabinet collective responsibility depends on free discussion for the full consideration of policies and actions as each Cabinet member knows that they are individually responsible for the decision reached in Cabinet. If the quality of underlying collective decision making decline, this could undermine decision making".

30. Under the convention, members of the Cabinet must publicly support all Government decisions made in Cabinet, even if they do not privately agree with them and may have argued in Cabinet against their adoption. They must also preserve the confidentiality of the Cabinet debate that led to the decision.
31. The complainant told the Commissioner:

"Frankly, it is impossible not to conclude that lies have been told about the applicability of Cabinet collective responsibility around the Iraq invasion. Different witness evidence to the Chilcot Inquiry is blatantly contradictory on this".
32. With respect to the Iraq Inquiry (also known as the Chilcot Inquiry) the Cabinet Office argued that the public interest in favour of releasing the Cabinet minutes is diminished by the work of the Inquiry. It argued that:

"the Inquiry's forthcoming report will address the public interest in understanding more about the way in which the decisions to deploy British forces in Iraq were taken".
33. Furthermore, in the Cabinet Office's view, there is a very strong public interest in the Inquiry continuing its work to produce its report and a risk that premature disclosure under FOIA could undermine its work.
34. With respect to the Inquiry itself, and the eventual outcome of the Inquiry, the Cabinet Office argued that the very existence of the Inquiry weakens the public interest in disclosure.
35. It confirmed to the complainant that the Inquiry had had access to the information within the scope of the request in this case.
36. The Cabinet Office acknowledges that there have been changes of administration since the minutes were written. However, it argued that despite those changes, many of the participants at the Cabinet meetings in scope of this request remain politically active. In its view, this is a factor which diminishes the impact of the passage of time and adds weight to the public interest in favour of maintaining the exemption.

Balance of the public interest arguments

37. As the Cabinet Office is citing multiple limbs of the exemption, the Commissioner must consider separately, in the case of each limb of the exemption, whether the public interest in disclosing the information under consideration equals or outweighs the public interest in maintaining the exemption.

38. As he considers section 35(1)(b) to be the more relevant, the Commissioner has first considered the public interest in respect of that limb of the exemption. In doing so, he notes that, in this case, the public interest arguments put forward by the Cabinet Office in relation to section 35(1)(a) are broadly similar to those cited in relation to section 35(1)(b).
39. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
40. The Commissioner recognises that the content and context of the requested information will invariably be important factors when balancing the opposing public interests. For example, he recognises that factors in particular cases, such as the importance of the issue or project and the extent of public expenditure, may be more significant (in public interest terms) than the alleged virtues of safeguarding candour and frankness.
41. In considering the opposing public interest factors in this case, the Commissioner has found the following to be particularly relevant.

General transparency and accountability

42. The Commissioner considers that there is clearly a public interest in transparency and the accountability of public authorities. He also recognises that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He therefore gives weight to the argument that disclosure in cases such as this enhances the public's ability to scrutinise the way in which important decisions are taken, for example the decision to go to war.

The gravity of the issue under discussion – the decision to send UK armed forces into a conflict situation

43. The Commissioner recognises that the decision was controversial and that ministers resigned over the matter. He also acknowledges that the decision impacted on the lives of a significant number of people and impacted significantly on the lives of a number of people.

Preserving the confidentiality of the policy making process and the convention of collective responsibility

44. The Cabinet Office argued that there is a need to balance the requirements of openness and transparency against the proper and effective functioning of government.
45. In considering this matter, the Commissioner has been mindful of the public interest in a public authority having effective processes which allow it to openly debate issues of significant public interest without undue inhibition.
46. With respect to section 35(1)(a) he recognises the public interest in the need for a "safe space" for government Ministers and civil servants to formulate policy and debate issues openly away from public scrutiny.
47. He gives weight to the generic argument that there is a risk that full consideration of the options, discussions and decision making could be compromised if ministers believed their views would be made public. He accepts that that would not be in the public interest. However, he is not satisfied that he has been presented with evidence that disclosure in this case would have this effect.
48. The Commissioner has also considered the extent to which an earlier decision continues to impact on current policy. In doing so, he notes that, at the time of this request, the UK's involvement in military action in Iraq had ceased.
49. Turning next to the matter of the convention of collective Cabinet responsibility, the Commissioner considers that that convention is designed to protect both the integrity of the policy formulation and development process protected under s35(1)(a), and the Ministerial decision making process protected under s35(1)(b).
50. He recognises that preserving the convention of Cabinet collective responsibility allows the Government to be able to engage in free and frank debate in order to reach a collective position. He recognises the public interest in allowing free and frank debate in order to agree a collective position, to the extent that it serves to improve the quality of the final decision.
51. He considers that preserving the convention also allows Government better to present a united front after a decision has been made. In the Commissioner's view, there is a public interest in the Government being able to present a united front, as this prevents valuable government time from being spent publicly debating and defending views that have only ever been individual views rather than Government positions, and in commenting on the meaning and implications of a divided Cabinet.

52. He accepts that, necessarily given the nature of the information discussed at Cabinet Meetings, there will be circumstances when Ministers need to be confident that they are able to speak candidly, and if necessary argue over different approaches, without the fear that such discussions will be prematurely disclosed. If Ministers feel inhibited in their discussions, this might adversely affect the decision making process on critical issues. In the Commissioner's view, such an adverse consequence would clearly not be in the public interest.
53. The Commissioner also acknowledges the potential for the convention to be undermined by the routine early disclosure of minutes of Cabinet meetings.
54. He therefore accepts that Cabinet confidentiality is a strong factor favouring the maintenance of the exemption. He acknowledges, however, that how much weight the public interest in maintaining the convention of Cabinet collective responsibility will carry in any individual case, will vary depending on all the specific circumstances of the case and the public interest in disclosure of the particular information at issue.
55. When determining how much weight the public interest in maintaining the convention will carry in this case he considers it appropriate to take account of the extent to which damage to Cabinet collective responsibility might be caused by the disclosure of the information at issue. In other words, in this case, he has focused on the damage that might be caused by the disclosure of these particular minutes, giving due consideration to the circumstances of the case, including the passage of time.
56. In this respect, he has considered the extent to which the views of different ministers can be identified, both with respect to those views being specifically attributed and with respect to the context of what is said enabling the identification of individuals. He has also taken into account whether any of the ministers in the Cabinet at the time are still in office and notes that some are still active in politics.

The change of administration

57. The Commissioner considers it relevant when considering the balance of the public interest in this case that the withheld minutes are those of two Cabinet meetings held under a previous administration. Furthermore, that administration was of a different party political composition than that which was in office at the time of this request (and this decision notice.)

58. In this respect, the Commissioner has consulted his published guidance (LTT 132) that states:

"The Commissioner would also comment that the public interest in maintaining the convention of collective Cabinet responsibility may diminish with changes to the Cabinet, Government restructures or the formation of a new Parliament (a new Parliament is formed following a general election). This would be on the basis that there may be less potential harm (of the kind detailed above) from revealing that a Cabinet that no longer exists were in disagreement, than there might be in revealing that the current Cabinet has divergent views."

59. The Commissioner accepts that the impact of disclosure may be different in circumstances where there has been a change of administration, for example in respect of holding the government of the day to account. Nevertheless, the Commissioner considers that the need for public accountability is very great indeed when any government is discussing the lawfulness of military action and a decision to go to war, irrespective of any change in administration.

The veto

60. The Commissioner has taken into account that the final outcome of the complainant's earlier request for the Iraq War Cabinet Minutes was the exercise of the Ministerial veto. He considers this to be a factor of some relevance to his deliberations in this case. He must consider, for example, whether the reasons for the veto reveal anything new or different about the situation at the time of this request and whether the reasons for the veto have been displaced by subsequent events, such as the change in administration.
61. Notwithstanding the fact that the veto was exercised in relation to the earlier request, the Commissioner recognises that his duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with FOIA, taking into account all the circumstances at the time when the request was made. It should be noted that the Ministerial veto operates only to overturn a particular disclosure decision. It does not have continuing effect as an absolute exemption attaching to the information itself.
62. The Commissioner notes that, in accordance with the relevant policy, the veto was exercised by the then Secretary of State for Justice after consultation with the then Cabinet. In other words, the issue of disclosure was considered in 2009 by a Cabinet of the same administration as that in power at the time of the original request.

63. While mindful of the execution of the veto in the past, and having due regard to the reasons given by the then Secretary of State for Justice for exercising the veto, the Commissioner has focused on the arguments put forward by the Cabinet Office and the complainant in this case. In doing so, he notes that the Cabinet Office has referred him to arguments expressed in that veto on the basis that they still have merit.

Memoirs and other public statements

64. The Commissioner is mindful that memoirs and other public statements exist that make reference to the Cabinet meetings, the minutes of which are the subject of this request. When considering the public interest in disclosure, he has taken into account the volume of information already in the public domain about the decision to go to war. He also considers it appropriate to assess the extent to which the confidentiality of what took place has been eroded as a result of those publications.
65. However, in the Commissioner's view there is a very significant difference between the publication of a personal account of events, for example in a memoir or diary, and the disclosure of the official record of proceedings at the highest level of government. In his view, memoirs are not necessarily endorsed and cannot therefore be regarded as authoritative whereas the release of an official record is qualitatively different.

The passage of time

66. The Commissioner acknowledges that the passage of time is a relevant factor with respect to disclosure. In the Commissioner's view, the age of requested information is also a relevant public interest factor because in many cases it can be seen that its sensitivity decreases over time.
67. Importantly in this case, although the Iraq war was a conflict that continued from 20 March 2003 until 15 December 2011, at the time of the request the UK was no longer actively engaged in that conflict, UK forces having ended combat operations on April 30 2009.
68. The Commissioner notes that the passage of time has led to a number of differences between the circumstances pertaining at the time of this request and those at the time of the earlier request for essentially the same information. For example, the Commissioner recognises that at the earlier time, a FOIA request was the main, if not the only, means by which the information sought might be required to be made available to the public. At the time of this later request, further relevant information had been released into the public domain and the Iraq Inquiry had been established and commenced its work.

69. However, it is still the case that less than 10 years have passed since the date of the Cabinet meetings at issue. The withheld information is therefore still some years away from being considered for routine release as an historic record.

The significance or sensitivity of the information. Is the issue still 'live'?

70. Although the withheld information is now several years old, that does not mean that the issue is not still topical. Taking into account the ongoing public debate and controversy surrounding the lawfulness of military action against Iraq and the decision to go to war, the Commissioner accepts that the issue is still 'live'.
71. He also considers it significant to the balance of the public interest that there is a public inquiry into those matters. In his view, the existence of the Iraq Inquiry suggests that the matter is still live and a matter of significant public interest.

The Iraq inquiry

72. The Commissioner acknowledges that the purpose of the Inquiry is:

"to examine the United Kingdom's involvement in Iraq, including the way decisions were made and actions taken, to establish as accurately and reliably as possible what happened, and to identify lessons that can be learned."

73. From reading the correspondence between the complainant and the Cabinet Office, the Commissioner understands that the Iraq Inquiry may be seeking declassification of extracts of the two sets of minutes at issue in this case. However, the Commissioner does not know to what, if any, extent the Inquiry will publish details of the requested information. Nor is he aware that it is known with any certainty when the Inquiry will publish its report.
74. Therefore, in the Commissioner's view, the extent to which the Iraq Inquiry will meet the public interest in respect of the specific matter which is the subject of this decision notice is uncertain, given that it is not clear what information the Inquiry will report on or recommend for disclosure.

Conclusion

75. In considering the opposing public interest factors in this case, the Commissioner has been mindful of the intention behind FOIA, whose short description is:

"An Act to make provision for the disclosure of information held by public authorities".

76. Focusing on the nature of the information itself, in the Commissioner's view there is nothing distinctive about the withheld information in this case; in other words, the withheld information apparently follows the typical pattern of minutes recording Cabinet meetings. He is satisfied that the minutes at issue in this case are neither more nor less full than other minutes of full Cabinet meetings he has seen, nor that they contain either more or less information in respect of the attribution of comments to individual Cabinet members.
77. The Commissioner has also been mindful of the context of the request, including the continuing public interest in matters relating to the Iraq war.
78. He recognises that, since the public interest in relation to a request for the information at issue in this case was last considered, there have been changes in the circumstances relating to the public interest arguments both in favour of disclosure and in favour of maintaining the exemption.
79. With respect to his deliberation in this case, the Commissioner accepts that there are significant public arguments both in favour of maintaining the exemption and in favour of disclosure and that the issues are finely balanced.
80. In reaching a decision in this case, the Commissioner considers it appropriate to take into account the immense public policy controversies generated by the Iraq invasion and occupation and the cost in lives resulting from the conflict. In his view, and in line with the recently expressed view of the Tribunal in the case of *Plowden & FCO v Information Commissioner* (EA/2011/0225 & 0228), information that can provide a better understanding of how the decision to go to war was made is subject to an exceptionally strong public interest in disclosure.
81. However, he acknowledges that the work of the Iraq Inquiry lessens that public interest in disclosure to the extent that the Inquiry's report will contribute to the public being better informed about the circumstances leading to a decision to go to war. At present, however, that is not quantifiable.
82. Having considered the strength of the arguments on both sides of the public interest debate, and taking into account the various changes in circumstances since he last considered this matter, the Commissioner has concluded that there is no good reason for him to reach a substantially different decision in this case to that reached in the

previous decision notice (FS50165372), a decision that was supported on appeal to the Tribunal, albeit by a 2:1 majority.

83. The Commissioner accepts that there will be cases in which it is entirely proper to refuse to disclose Cabinet Minutes under FOIA. Indeed he has upheld refusals to disclose minutes of Cabinet meetings on a number of occasions. However, he considers that the decision to go to war with Iraq was of exceptional gravity and controversy, and continues to be a matter of public debate. He therefore considers that there is a significant and continuing public interest in disclosure of the requested information in this case, in order to serve the interests of accountability and transparency and to inform the public debate surrounding a decision seen as controversial and significant both at the time and since.
84. The Cabinet Office is citing section 35(1)(a) in relation to the same information for which it is citing section 35(1)(b). As he has found the public interest favours disclosure of the information withheld under section 35(1)(b), and as the arguments put forward by the Cabinet Office in relation to section 35(1)(a) are essentially the same, the Commissioner has not gone on to articulate separately the public interest arguments in relation to section 35(1)(a). He is satisfied that the public interest in disclosure of the withheld information outweighs that in the maintenance of that exemption also.

Procedural Requirements

85. Section 1(1)(a) of FOIA requires a public authority in receipt of a request to confirm whether it holds the information requested. Section 10(1) of FOIA provides that a public authority should comply with section 1(1) of FOIA within 20 working days.
86. In this case, the complainant's request was received by the Cabinet Office on 19 March 2011 but the Cabinet Office did not issue its refusal letter until 28 July 2011. The Commissioner therefore finds that the Cabinet Office failed to comply with section 1(1)(a) and breached section 10(1) by failing to comply with section 1(1)(a) within the statutory time period.

Other matters

Time taken conducting the internal review

87. The complainant brought to the Commissioner's attention what he described as:

"the lamentable performance of the Cabinet Office in meeting its legal duties".

88. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
89. The Commissioner is concerned that, in this case, it took more than four months for an internal review to be completed and would remind the public authority of its obligations in this regard.

Right of appeal

90. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

91. 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.
92. 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

Christopher Graham
Information Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF