

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 September 2012

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

#### Decision (including any steps ordered)

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1. The complainant requested information concerning international aid policy and national security. The Cabinet Office refused to disclose this information and cited the exemption provided by section 35(1)(a) (information relating to formulation or development of government policy) of the FOIA. It also later cited sections 23(5) (information relating to security bodies) and 24(2) (national security) and stated that it neither confirmed nor denied whether it held any further information falling within the scope of the request.
2. The Commissioner's decision is that the Cabinet Office has dealt with the request correctly in relation to the majority of the information in connection with which section 35(1)(a) was cited. However, in relation to a minority of this information, the Commissioner finds that this exemption was not cited correctly. The Commissioner also finds that the Cabinet Office cited sections 23(5) and 24(2) correctly in relation to any other information that it may or may not hold.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information specified at paragraph 35 below in relation to which the Commissioner finds that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
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

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5. On 26 October 2010, the complainant wrote to the Cabinet Office and requested information in the following terms:
  - (i) *"policy documents, briefings and memoranda in the National Security Secretariat concerned with UK overseas aid and international development policy created since the taking office of the new administration"*
  - (ii) *"the minutes of the meeting(s) of the National Security Council where overseas aid / international development and its contribution to national security was discussed."*
6. The Cabinet Office responded substantively to these requests on 13 December 2010. It stated that the requests were refused and cited the exemptions provided by the following sections of the FOIA: 27 (prejudice to international relations), 35(1)(a) (information relating to the formulation or development of government policy) and 35(1)(b) (information relating to Ministerial communications).
7. Following an internal review the Cabinet Office wrote to the complainant on 20 April 2011. It stated that the refusal of the requests was upheld, with the exemptions provided by the following subsections of the Act cited, as well as those cited in the refusal notice:
  - 27(1)(a) (prejudice to relations between the UK and any other State)
  - 27(1)(b) (prejudice to relations between the UK and any international organisation or international court)
  - 27(1)(d) (prejudice to the promotion or protection by the UK of its interests abroad)
  - 27(2) (confidential information obtained from a State other than the UK or from an international organisation or international court)
  - 29(1)(a) (prejudice to the economic interests of the UK)

## Scope of the case

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8. The complainant contacted the Commissioner on 27 April 2011 to complain about the way his request for information had been handled. The complainant argued that the exemptions had been applied incorrectly, or that where the exemptions were engaged, the public interest favoured disclosure.
9. In correspondence with the Commissioner's office the Cabinet Office stated that it was also citing section 27(1)(c) (prejudice to the interests of the UK abroad).
10. During the Commissioner's investigation the Cabinet Office introduced the exemptions provided by sections 23(5) and 24(2) of the FOIA. These exemptions remove the obligation to confirm or deny whether the public authority holds any relevant information that relates to, or was supplied by, any of the security bodies listed in section 23(3) or that is required to be exempt for the purposes of safeguarding national security. The position of the Cabinet Office was that it wished to apply these exemptions to neither confirm nor deny whether it held any information beyond that which it had previously confirmed was held.

## Reasons for decision

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### Section 35

11. As noted above the Cabinet Office has cited a number of exemptions. The Commissioner has focussed first on section 35(1)(a) as this was cited in relation to the entirety of the information in question. This provides an exemption for information that relates to the formulation or development of government policy. Consideration of this exemption is a two-stage process. First, in order for the exemption to be engaged, the information must fall within the class described in section 35(1)(a); that is, it must relate to the formulation or development of government policy. Secondly, this exemption is qualified by the public interest, which means that even if the information is exempt it must nevertheless be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
12. Covering first whether this exemption is engaged, the argument of the Cabinet Office is that the information in question related to the formulation or development of government policy in that it related to the formulation of the Strategic Defence and Security Review (SDSR) and

the National Security Strategy (NSS). The Commissioner accepts that both the SDSR and the NSS do represent government policy. The next step, therefore, is to consider whether it is accurate to state that the information in question relates to those policy matters.

13. The Cabinet Office has identified four categories of information which fall within the scope of the exemption. These categories and the explanations for these provided by the Cabinet Office are as follows:

- Policy documents

These are papers prepared by officials outlining policy options.

- Public consultation documents

These relate to a public consultation in the area of international aid and include correspondence with third parties.

- NSC minutes

Minutes of meetings of the National Security Council.

- Other correspondence

Correspondence between Ministers and officials concerning the SDSR and that relate to the issue of international aid policy.

14. The Commissioner's approach to the term 'relates to' as it is used in section 35(1)(a) is that this can safely be interpreted broadly. If it appears that the overall purpose of a document concerns the formulation or development of government policy, it will be accepted that its content falls within the scope of section 35(1)(a) without the need for a line by line analysis.
15. Taking this approach here, the Commissioner is satisfied that this information all relates to the formulation or development of government policy. His view is that much of this information is very clearly covered by this exemption, in particular the papers prepared by officials and that which records exchanges between officials and Ministers. This type of information forms a central part of the policy making process and is squarely within the class of information covered by this exemption.
16. The other information in question consists of minutes of meetings and correspondence and a briefing relating to a public consultation. Covering the minutes first, having viewed the content of these the Commissioner accepts that they do cover issues of policy development in relation to international aid.

17. Turning to the public consultation information, the Commissioner accepts that public consultation regularly feeds into the policy making process. On the basis of the content of this information, the Commissioner accepts that these documents concern public consultation about the NSS and the SDSR and hence do relate to the formulation or development of government policy.
18. Therefore the Commissioner accepts that all of the information falling within the scope of the complainant's requests relates to the formulation or development of government policy. The exemption provided by section 35(1)(a) of the FOIA is, therefore, engaged in relation to that information.

### **Public Interest Test**

19. Having found that this exemption is engaged, it is necessary to go on to consider the balance of the public interest. In forming a conclusion on the balance of the public interest the Commissioner has taken into account the general public interest in the transparency and openness of the Cabinet Office and of the governmental policy making process, as well as those factors that apply in relation to this specific information. The following analysis relates to all of the information in question, apart from several items of correspondence between the Cabinet Office and charities. The charity correspondence is the subject of a separate conclusion given below at paragraphs 35 and 36.
20. Covering first those factors that favour disclosure of this information, the Commissioner considers the subject matter to be highly relevant. This concerns international aid and development within the context of national security. It is widely recognised that national security is a key responsibility of any government. The view of the Commissioner is that information recording policy formulation in the areas of defence and national security will always be the subject of strong public interest. In this case the information records the formulation of key policy decisions by the Government as to how it intends to approach these challenges in future. The Commissioner considers the subject matter of this information to be a factor in favour of disclosure of significant weight.
21. The issue of public spending was high on the political and media agendas at the time of the request. The current Government has been clear that a key priority for it is to reduce public spending. The information in question here concerns policy options formulated with the wider policy objective of reducing public spending as one of the key imperatives. The view of the Commissioner is that there is a valid public interest of significant weight in the disclosure of this information in order

to contribute to and improve public understanding about policy formulated with the aim of reducing public spending.

22. Early in its tenure the current government announced that international development would be protected in its programme of spending cuts. The Commissioner believes that this is very relevant in that openness concerning these policy making processes would assist public understanding as to why the decision was made to protect spending in this area at a time of great pressure on public spending and as to how the Government has gone about ensuring that this spending is protected. This contributes further to the weight of the public interest in disclosure.
23. Also of significance is the high level of detail within this information. This means that disclosure of this information would provide a genuine insight into the policy making process to which it relates, which underlines the public interest in disclosure.
24. The Cabinet Office has advanced two main arguments as to why the balance of the public interest favours the maintenance of this exemption relating to the importance of preserving the confidentiality of the policy making process. The first concerned the possibility of harm to the quality of the policy making process if those involved in this were not confident that their contributions would remain confidential. The second argument concerned the convention of collective Cabinet responsibility and the possibility of harm to this if the information in question were disclosed.
25. The Commissioner recognises that the argument concerning the preservation of a space within which to carry out the policy making process is valid on the grounds that this will assist in the open discussion of all policy options, including those that may be considered politically unpalatable. The weight that this argument carries in each case will vary, depending on the circumstances that apply in each case.
26. In this case the view of the Commissioner is that the stage reached in the policy making process at the time of the request, the level of detail of the information in question and the subject matter of this information are relevant when considering what weight should be given to the public interest in preserving the space within which to carry out the policy making process.
27. Reference is made above to the level of detail within this information. Whilst this is included above as an argument in favour of disclosure of this information, this is also relevant when considering whether the



information should be withheld owing to the harm that may result through disclosure. This information includes content that is attributed to named officials. Given this, the Commissioner accepts that the argument that disclosure could result in inhibition to officials when participating in future policy making processes is relevant. However, the Commissioner also notes that officials are under a duty to participate in the policy making process fully, reducing the weight that this argument might carry in favour of maintenance of the exemption.

28. As to the stage reached in the policy making process at the time of the request, the Commissioner notes that the SDSR and the NSS were completed shortly before the date of the request, meaning that disclosure would not have had an impact specifically upon those processes. However, the Commissioner accepts that the request is wide in scope such that the information falling within its scope does relate to policy development in the area of international development and aid more widely than solely in relation to the SDSR and the NSS. He also accepts, therefore, that the argument concerning harm to policy making applies directly to the content of the information in question, rather than simply to the policy making process in general.
29. Given the level of detail within the information, that parts of the content can be attributed to named officials and particularly the possibility that policy making processes recorded within this information were ongoing at the time of the request, the Commissioner accepts, in this case, the validity of the argument that the public interest favours maintenance of the exemption in order to preserve the safe space for policy making. In the Commissioner's view this is a factor in favour of maintenance of the exemption of very significant weight.
30. The information includes content that is attributable to a named Minister. In relation to this information the Commissioner considers it appropriate to consider whether disclosure of this information could impact upon the convention of collective Cabinet responsibility, whereby all members of the Cabinet share responsibility for all government policies, regardless of any misgivings they may have voiced privately. This argument concerns whether disclosure of the individual views of a Minister could erode this convention, with a resultant negative impact upon the operation of Cabinet government.
31. In relation to the information in question here, the Commissioner notes that it includes the views of an individual Minister about policy options that were not finalised at the time this information was recorded. For this reason, the Commissioner recognises the possibility that disclosure of this document could lead to an erosion of the convention of collective

Cabinet responsibility, and regards this as a valid factor of significant weight in favour of maintaining the exemption in relation to this information.

32. The Commissioner has recognised valid factors in favour of disclosure of this information, the weightiest of which is the subject matter of the policy which it concerns. Added to these arguments that relate specifically to the information are the more general public interest arguments regarding the transparency of government activity in general and of the policy making process in particular.
33. However, the Commissioner has also recognised the possibility of harm to the policy making process through the disclosure of this information and the fact that disclosure could result in harm to the convention of collective Cabinet responsibility. The Commissioner considers that the weight of these factors in the context of information that records a policy making process of central importance to the work of government tips the balance of the public interest in favour of maintenance of the exemption.
34. The Commissioner has concluded, therefore, that the balance of the public interest supports the maintenance of the exemption and the non-disclosure of the information. As a result, the Cabinet Office is not required to disclose this information.
35. The Commissioner has reached a separate conclusion in relation to correspondence between the Cabinet Office and charities. The Cabinet Office acknowledged that *"the bare correspondence between charity heads and the [Cabinet Office] is not very detailed"* and stated that it was consulting with the charities in question with a view to disclosing this information. However, by the date of this decision notice this correspondence had not been disclosed.
36. In relation to these documents, the Commissioner agrees with the Cabinet Office that their content is not very detailed. Given this, he does not believe that the disclosure of this information would be likely to result in the harm that has been identified in relation to the remainder of the information. However, there remains a public interest in their disclosure, given their relevance to the subject matter of the request. The Commissioner has therefore concluded, in relation to these documents, that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure. As section 35(1)(a) was the only exemption cited in relation to these documents, the Cabinet Office is required at paragraph 3 above to disclose this information.



## Sections 23 and 24

37. The Cabinet Office has cited sections 23(5) and 24(2), the effect of which the Commissioner has described above at paragraph 10, in order to neither confirm nor deny whether it holds any further information falling within the scope of the request. The Commissioner accepts the approach of both sections 23(5) and 24(2) being cited together in some circumstances to neither confirm nor deny whether information is held.
38. The Cabinet Office explained that it could neither confirm nor deny whether it held any information within the scope of the request which would be subject to the exemptions at sections 23(1) and 24(1). It submitted that to confirm or deny whether this was the case would involve the disclosure of exempt information, and may damage national security. In particular, the Cabinet Office stated that the practice of the Government is to not give details of the role of the intelligence services in relation to the work of Cabinet committees.
39. The Commissioner is satisfied that the Cabinet Office is entitled to rely on sections 23(5) and 24(2) in the circumstances of this case. He accepts that revealing whether or not information is held within the scope of the request which relates to security bodies would reveal information relating to the role of the security bodies. It would consequentially also undermine national security and for that reason section 24(2) also applies because neither confirming nor denying if further information is held is required for the purpose of safeguarding national security.
40. Section 24(2) is a qualified exemption subject to a public interest test. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying whether the public authority held information in scope which would have been exempt under section 24(1).
41. The public authority acknowledged that openness increases public trust in, and engagement with, the Government. It however argued that the public interest in safeguarding national security is of such weight that it can only be outweighed in exceptional circumstances.
42. The Commissioner has recognised above at paragraphs 20 to 22 valid factors in favour of disclosure of the information that the Cabinet Office has confirmed that it does hold on the basis of the subject matter of this information. The Commissioner believes that the same public interest

factors extend to favouring the disclosure of the confirmation or denial as to whether any further information is held.

43. However, the Commissioner accepts that in the circumstances of this case the public interest in protecting information required for the purposes of safeguarding national security outweighs the public interest in favour of confirmation or denial.
44. The Commissioner finds that in all the circumstances of this case, the public interest in maintaining the exemption at section 24(2) outweighs the public interest in complying with the duty imposed by section 1(1)(a).

## Right of appeal

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45. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

46. 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.
47. 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** .....

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**