

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 September 2014

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested from the Cabinet Office information relating to COBR(A) meetings since May 2010. It refused to provide this citing provisions of section 35 (formulation/development of government policy) as its basis for doing so. It upheld this position at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 35(1)(a) as its basis for refusing to provide the requested information.
3. No steps are required.

#### **Request and response**

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4. On 30 December 2013, the complainant requested from the Cabinet Office information of the following description:

"Please would you let me know in writing if you hold information of the following description:

Information concerning:

Since (and including) May 2010, when have there been meetings of COBRA, what was the emergency which led to each meeting, and who attended and who was in the chair.

If any part of the information requested is covered by one or more of the absolute exemptions in the Act please treat this request as a request for that part of the information which is not covered by the absolute exemption.

If you need further details in order to identify the information requested or a fee is payable please let me know as soon as possible.

If you are of the view that there may be further information of the kind requested but it is held by another public authority please let me know as soon as possible. Please continue with this application as soon as possible.

I believe that the information requested is required in the public interest for the following reasons:

1. To uphold public confidence that the Government has adequate systems in place to respond to emergencies;
  2. To provide assurance that all stakeholders and interests are represented in COBRA meetings;
  3. To ensure that money is spent correctly when responding to emergencies."
5. On 28 January 2014, the Cabinet Office responded. It confirmed that it held information within the scope of the request. It provided some information as follows:

"As you will probably be aware Senior Officials and Ministers have met on a number of occasions and have discussed the response to a range of emergencies including severe weather, volcanic ash, Japan's earthquake, Libya, In Amenas siege, Woolwich attack and the Westgate bombing.

More, wider information on the central response arrangements is available on the Government's UK Resilience website:

<http://www.gov.uk/emergency-response-and-recovery>"

6. However, it refused to provide other information within the scope of the request and cited sections 24(1) (National security); 35(1)(a) (formulation or development of Government policy): and 35(1)(b) (Ministerial communications) as its basis for doing so.
7. The complainant requested an internal review on 28 January 2014. The Cabinet Office sent him the outcome of its internal review on 14 February 2014. It upheld its original position but appeared to introduce

reliance on section 23(5) insofar as it explained that it was not obliged to confirm or deny whether it held any information within the scope of the request that was exempt under section 23(1) (security bodies exemption).

## **Scope of the case**

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8. The complainant contacted the Commissioner on 4 March 2014 to complain about the way his request for information had been handled. He had contacted the Commissioner on 19 February 2014 but he had not supplied all relevant documents in support of his complaint.
9. The Commissioner has considered whether the Cabinet Office was entitled to rely on the exemptions it had cited as a basis for refusing to provide the information within the scope of the request that it has confirmed it holds.
10. Given that the request specifically excluded information to which an absolute exemption would apply, the Commissioner did not look at whether the Cabinet Office was entitled to refuse to confirm or deny whether it held information relating to security bodies that fell within the scope of the request.

## **Reasons for decision**

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### **Section 35(1)(a) – formulation and development of government policy**

11. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation and development of government policy.
12. 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.
13. 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. '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.

14. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
15. Furthermore, the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was confirmed by the Information Tribunal in *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007) at paragraph 75(v), and *DWP v Information Commissioner* (EA/2006/0040, 5 March 2007) at paragraph 56.
16. In describing these general principles, the Commissioner fully recognises that policymaking can take place in a variety of 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.
17. Nevertheless, 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.
18. The Cabinet Office did not provide the Commissioner with access to the withheld information arguing that the sensitivity of the information precluded access. However, it provided the following lengthy explanation as to why section 35(1)(a) was engaged. This expanded upon the explanation it provided to the complainant in its notice of refusal where it said:

"As you will probably be aware Senior Officials and Ministers have met on a number of occasions and have discussed the response to a range of emergencies including severe weather, volcanic ash, Japan's earthquake, Libya, In Amenas siege, Woolwich attack and the Westgate bombing.

More, wider information on the central response arrangements is available on the Government's UK Resilience website:  
<http://www.gov.uk/emergency-response-and-recovery>"

19. It also explained to the Commissioner that:

... the purpose and function of COBR(A) are sufficient to establish that the exemption at section 35(1)(a) would be engaged for any information meeting the terms of the request. The exemption at section 35(1)(a) is a class based exemption and is engaged if the information relates to the formulation and development of Government policy. The Tribunal has stated that the phrase "relates to" may be construed widely. It certainly includes the subjects of discussion in a forum established to formulate and develop policy in the circumstances described [in its letter to the Commissioner]".

20. It further explained to the Commissioner that providing information about the timing of the meeting would also relate to the formulation and development of government policy. It would be possible to deduce what subject was discussed by considering the context. Further, information about who attended a particular meeting would also relate to the formulation of government policy because it would be possible to deduce the subject of the meeting from the list of attendees.

21. It argued that "All the information requested relates to the formulation and development of government policy on a diverse range of subjects. It all therefore, falls within the class of information covered by section 35(1)(a) and the exemption is engaged".

22. The Commissioner normally requires access to withheld information in order to consider properly the application to it of the relevant exemptions. If denied such access he may issue an Information Notice under section 51 of the Act requiring it. However, in the particular circumstances of this case, such access is not necessary. The explanation provided by the Cabinet Office is sufficient to enable him to determine whether the information in question fell within the class of information described in section 35(1)(a).

23. The Commissioner accepts the Cabinet Office's arguments as to why the information falls within the class of information described in section 35(1)(a). The website of the UK government explains how it prepares

for, responds to and recovers from emergency situations.<sup>1</sup> In the section entitled "Response and Recovery", it states:

"We make sure that central government is ready to respond to emergencies and provide any support required by local emergency responders.

We do this by:

- working with other government departments and local emergency responders to put in place arrangements to address and respond to an emergency situation
  - coordinating a central government response through the dedicated central government crisis management facilities at the Cabinet Office Briefing Room (COBR), where necessary
  - providing guidance to deal with the immediate and longer-term effects of dealing with an emergency, including rebuilding, restoring and rehabilitating the community".
24. The Commissioner understands the term "COBRA", although often spelt different ways, refers to "Cabinet Office Briefing Room 'A'". The Commissioner does not know whether meetings of the National Security Committee are always located in this specific room but he accepts that the term "COBRA" or "COBR(A)" is universally accepted as a shorthand descriptor for these meetings. In the interests of uniformity, the Commissioner will use the term "COBR(A)".
25. The Commissioner is satisfied that the work described above falls within the definition of the formulation and development of government policy. The extra detail provided by the Cabinet Office does not undermine this description. When the government prepares its response to an emergency situation it is formulating and developing its policy in relation to that emergency situation.
26. The request asked for four items in relation to COBR(A) meetings, namely:
- when have there been meetings of COBR(A);
  - what was the emergency which led to each meeting;

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<sup>1</sup> [www.gov.uk/government/policies/improving-the-uks-ability-to-absorb-respond-to-and-recover-from-emergencies](http://www.gov.uk/government/policies/improving-the-uks-ability-to-absorb-respond-to-and-recover-from-emergencies)

- who attended; and
  - who was in the chair.
27. For obvious reasons, information setting out the nature of the emergency would reveal what policy matter was under consideration. This would therefore fall within the definition set out in section 35(1)(a). Similarly, the Commissioner accepts that providing information about when meetings were held, who attended them and who chaired them would enable anyone to discern what the meeting was about by considering the prevailing circumstances or the departments called upon to contribute or the portfolio of the Minister of State who was appointed Chair. As such, the Commissioner agrees that all the requested information falls within the definition of information set out in section 35(1)(a).
28. By virtue of section 2(2), section 35(1)(a) is qualified by a public interest test. This means that even if the information described in the request falls within section 35(1)(a), the Cabinet Office can only rely on it if the public interest in doing so outweighs the public interest in disclosure.

### **Balance of public interest arguments**

29. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of a key Tribunal Decision involving the application of the section 35(1)(a) exemption. In that case, the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest: firstly the timing of the request and secondly the content of the requested information itself.<sup>2</sup>
30. The Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing

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<sup>2</sup> *DFES v Information Commissioner and Evening Standard (EA/2006/0006)*

public interest in scrutinising and debating the details of the decision. The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.

### **The complainant's arguments**

31. As set out in his request, the complainant set out the following arguments in favour of disclosure:
- To uphold public confidence that the Government has adequate systems in place to respond to emergencies;
  - To provide assurance that all stakeholders and interests are represented in COBRA meetings;
  - To ensure that money is spent correctly when responding to emergencies.

### **The Cabinet Office's arguments**

32. The Cabinet Office acknowledged a general public interest in transparency to enhance and increase public understanding and participation in public affairs. It said there was a public interest in assurance that the government was prepared for emergency situations and crises. It also said there was a public interest in understanding how the government prepared for any emergencies
33. It set out the following points in favour of maintaining the exemption:
- There is a strong public interest in allowing ministers and their advisers to consider policy in confidence.
  - Ministers should be able to determine when and how they discuss matters of policy.
  - Ministers should be allowed to focus on the best way of approaching a problem rather than being distracted by public debate about whether or not a COBR(A) meeting should be convened.
  - Considerable information is already put into the public domain, where appropriate, about when a COBR(A) meeting has been called. This indicates that due consideration has been given to the public interest in transparency.
  - Where the government's ability to devise effective policies in an emergency is impeded, this would prejudice the safety and welfare of UK citizens at home and abroad.

- The information is of recent provenance and the intrinsic sensitivity of information considered by COBR(A) justifies extended protection.
- The information includes information about matters still being addressed.

### **The Commissioner's view**

34. In the Commissioner's view, there is a strong public interest in maintaining a safe space within government about when and whether to convene a COBR(A) meeting and also who should attend.
35. While the government may make a statement when a COBR(A) meeting has been convened, this is not always the case. There may also be occasions when the public is not aware that a situation has been warranted sufficiently serious as to require a COBR(A) meeting. Similarly, the government may have information at its disposal which mitigates against the requirement to convene a meeting. However, it may not be appropriate to share that detail with the public for reasons of national security or other potentially prejudicial outcome.
36. The Commissioner accepts the merit in the Cabinet Office's argument that regular reporting about when and whether COBR(A) meetings have been convened would create an unnecessary distraction. In an emergency situation, the government's focus should be on developing an appropriate and expeditious response to that situation. Communication of its actions to the public may form part of that, particularly where the public is aware, in broad terms, of the developing situation. However, in such circumstances, it is for the government to decide how best to respond. The government is answerable to Parliament and, where it falls short in its response to a situation, it must explain its decisions to Parliament.
37. In the Commissioner's view, the public interest in upholding public confidence on the government's handling of emergency situations is adequately served by parliamentary scrutiny of government decision making. There is a compelling public interest in the proper management by government of emergency situations. The Commissioner agrees that this is better served where there is a safe space in which the appropriate response can be determined.
38. The Cabinet Office argued that some of the policies discussed at the meeting in question are still under development and therefore should be afforded particular protection. The Commissioner accepts this as a general principle given the inevitably sensitive nature of the information in question which was created relatively recently.

39. Where the information covers policies which have been determined or emergencies that have now been tackled, the Commissioner accepts that the safe space in which they were addressed is less in need of protection. However, if the requested information was disclosed, it would create, in effect, a historical checklist of what topics were and were not discussed at a COBR(A) meeting. While this may be of interest to the public, the public interest in the availability of such a list is doubtful.
40. It remains for the government to determine the best way to tackle an emergency situation and this continues to be subject to parliamentary scrutiny. Publishing a list of meetings might well lead to a tendency either to convene a meeting simply in order to be seen to do so, even though it was not necessary or, conversely, not to convene a meeting, when it would be beneficial to do so, because of an anticipated adverse reaction or risk of additional scrutiny.
41. That is not to say that information relating to COBR(A) meetings should never be disclosed in response to an information request. A great deal will depend on the prevailing circumstances. However, in the circumstances of this case the Commissioner has concluded that the public interest favours maintaining the exemption.

### **Section 35(1)(a) - conclusion**

42. In light of the above, the Commissioner has concluded that the Cabinet Office is entitled to rely on section 35(1)(a) as its basis for withholding all the requested information. He has therefore not gone on to consider whether section 35(1)(b) applies as well.

## Right of appeal

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43. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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**