

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 February 2016

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested from the Cabinet Office polling information collected in advance of the referendum on independence for Scotland. Following an earlier decision notice from the Information Commissioner requiring it to respond, the Cabinet Office did so. It refused to provide the requested information citing section 35 as its basis for doing so. It failed to conduct an internal review despite the complainant's request.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 35 as its basis for refusing the request.
3. No steps are required.

Request and response

4. On 23 September 2014, the complainant requested information of the following description:

"1. The number of opinion polls conducted by or on behalf of the UK Government between October 2012 and 18 September 2014 [to] ascertain the attitudes and voting intentions of voters in relation to Scottish independence.

2. Copies of all the questions asked in each poll.

3. Copies of all results from each poll.

4. The cost of each poll.

The provision of this information in electronic format only is fine.

Many thanks."

5. On 21 October 2014, the Cabinet Office wrote to the complainant to say it needed more time to consider the balance of public interest in relation to the application of section 35(1)(a) formulation/development of government policy). It said it would respond by 18 November 2014. It did not. The complainant sent a letter on 23 November 2014 asking for an internal review of how the Cabinet Office had handled the case. She also set out general concerns about its proposed use of section 35.
6. On 24 July 2015 (several months after the original request and following the Commissioner's decision notice Ref: FS50572275 dated 18 June 2015) the Cabinet Office provided a full response.
7. With regard to request 1, it gave the figure of 12. With regard to requests 2 and 3 it gave some information but withheld other information citing the exemption at section 35(1)(a) as its basis for doing so. It said:

"Some questions and data sets in scope of parts 2-3 of your request are considered exempt as they form a key part of continuing policy formulation and development on maintaining and strengthening the Scottish devolution settlement." It provided a full response to request 4.
8. The complainant had requested an internal review of the Cabinet Office's initial failure to respond in a letter of 23 November 2014. As noted above, in the same letter, she also raised concerns about section 35 in the same request for internal review. She did not receive a letter setting out the outcome of the Cabinet Office's internal review.

Scope of the case

9. The complainant contacted the Commissioner on 29 July 2015 to complain about the way her request for information had been handled.
10. The Commissioner has considered whether the Cabinet Office is entitled to rely on section 35(1)(a) as a basis for withholding that information within the scope of requests 2 and 3 which remains withheld.

Reasons for decision

11. Section 35(1) provides that "Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or 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 the purpose described in the sub-section in question.

13. Section 35(2) provides that –

“Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

for the purposes of subsection (1)(a), as relating to the formulation or development of government policy”

14. The Cabinet Office explained that the information related to the Scottish devolution settlement and that the process of developing government policy on this subject was ongoing - significant devolution legislation was being considered by Parliament at the time this decision note was drafted. It also explained how the withheld information was connected to the development of that policy – it will be used as a comparator with the same or similar questions being asked again. The resulting responses and the withheld information will inform the development of government policy on Scottish devolution.

15. Following the approach set out in his guidance on section 35 (pages 40-41) the Commissioner considers that the requested information can be classed as statistical information as described in section 35(2).¹ However, the Commissioner accepts that there is enough evidence to support the Cabinet Office’s argument that the information would be used to support developing policy on Scottish devolution. Although the information could be described as statistical, further relevant decisions have yet to be taken. The Commissioner therefore agrees that section 35(1)(a) can still apply to the requested information and section 35(2) is not relevant.

16. In light of the Cabinet Office’s explanation and the withheld information itself, the Commissioner is satisfied that it falls within the class of

¹ ICO guidance on section 35 FOIA.

<https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

information described in section 35(1)(a). As such, he is satisfied that section 35(1)(a) is engaged.

Public interest test

17. By virtue of section 2(2), a public authority can only rely on section 35(1)(a) as a basis for withholding information if the public interest in maintaining that exemption outweighs the public interest in disclosure.

The complainant's arguments

18. The complainant queried whether the withheld information could be exempt under section 35(1)(a). For reasons set out above, the Commissioner does not agree with this. The complainant argued that, even if this exemption were engaged, the large amount of public money spent on the polls referred to in the requests favours the disclosure of the information. The complainant referred in general to the fact that the referendum to which the polls related had been completed by the time of the request.

The Cabinet Office's arguments

19. The Cabinet Office made the following arguments in favour of disclosure:
 - there is a public interest in transparency and the positive effect this can have on the public's engagement with government;
 - there is a public interest in disclosing more detail about how over £500,000 of public money had been spent;
 - disclosure would better inform the debate on devolution;
 - "releasing this information shows that policy decisions have been taken on the best available information";
 - "disclosure could increase the quality of decision making if officials are aware that the public will also be able to scrutinise the data that their decisions are based on"; and
 - there would be increased public understanding of how public opinion information is collected and how the collected data "informs important constitutional decisions".
20. However, it made the following points in favour of maintaining the exemption:
 - there was a public interest in maintaining a safe space to consider a body of research for policy development;

- disclosure would distort the way policy is developed as pressure would be put on policy makers to respond prematurely or disproportionately where particular points attract public attention; and
 - when government conducts polling research, it does not tell those polled that they are being asked for their opinion by the government. Disclosure of the questions would jeopardise its polling activity because respondents might tailor their responses based on who was asking the question. This was contrary to the public interest.
21. It argued that, on balance, the public interest in preserving the safe space in which it could formulate and develop its policies regarding devolution outweighed the public interest in disclosure.

The Commissioner's decision

22. A key factor in the Commissioner's decision is the timing of the request. Although the referendum has been carried out, the information is still being used in the development of policy on devolution for Scotland. The Commissioner agrees that the public interest in protecting the safe space in which the policy is developed is particularly weighty.
23. The Commissioner acknowledges that there continues to be a keen and detailed debate about the future of Scotland's place in the United Kingdom. The complainant has also made a compelling point about the cost to the public purse of the polls in question which adds weight to the public interest in disclosure.
24. The Commissioner also acknowledges that section 35(4) is relevant to considering the public interest:
- In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.*
25. The UK electorate are entitled to expect as much transparency as possible from the government regarding a matter of considerable constitutional importance. Policies in respect of further devolution for Scotland inevitably impact on the rest of the UK. There is an ongoing debate about the further devolution of law-making and revenue-raising powers to the English Regions and to other parts of the Union (Wales and Northern Ireland). Arguably disclosure may shed some light on the government's approach to devolution across the UK in general terms.

Where disclosure would serve this interest, weight could be added to the public interest in disclosure.

26. However, the Commissioner also recognises that there was a compelling public interest in allowing the government the safe space it needed to consider the withheld information in conjunction with newer information it collects in order to develop its policy on devolution for Scotland. Premature release of the information could create a distraction to the work carried out in that safe space. The government would need to spend time reacting to commentary on the withheld information. Public money would therefore not be well-spent if disclosure resulted in a considerable distraction from the original purpose of the exercise.

Section 35 (Conclusion)

27. The Commissioner thinks that fettering the UK government's ability to develop its policy on further devolution for Scotland – a matter of considerable constitutional importance for the whole of the UK - would not be in the public interest. The Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this view, he has given particular weight to the timing of the request – draft legislation is currently under consideration (see Note 1). There is a more compelling public interest in protecting the safe space in which the UK government could develop its policies relating to devolution. Disclosure in this case would undermine that safe space to a considerable degree which would be contrary to the public interest.

Other Matters

28. The Commissioner notes that the Cabinet Office failed to conduct an internal review despite the complainant's request. The Commissioner regularly has occasion to criticise the Cabinet Office in the "Other Matters" section of decision notices about the length of time it takes to conduct internal reviews. In this case, none was conducted at all, despite the complainant's request for one.
29. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to 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.
30. As the Commissioner has made clear in his Guide to FOIA, he considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers 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. The Commissioner would expect the public authority to keep the complainant fully informed of likely timescales in such exceptional circumstances. He would, in most cases, consider 40 working days to be a reasonable time for the completion of an internal review where exceptional circumstances prevail.

31. In this case, no internal review was conducted despite the complainant's request. The Commissioner notes that this followed the Cabinet Office's failure to respond to the initial request which resulted in his decision notice Ref: FS50572275 dated 18 June 2015. The Commissioner finds that the Cabinet Office's failure to respond to the request for an internal review is unacceptable. He asks the Cabinet Office to ensure that future requests for internal reviews are handled appropriately and in accordance with his guidance.

Right of appeal

32. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. 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.
34. 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

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