

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 November 2016

Public Authority: Department for Work and Pensions

Address: Caxton House, 4th Floor
6 -12 Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested information regarding the dates and participants of Childcare Implementation Taskforce meetings.
2. The Commissioner's decision is that Department for Work and Pensions wrongly relied on sections 35(1)(a) and (b) to withhold the requested information from the complainant.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the withheld information
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.

Background

5. A number of Implementation Taskforces have been established to monitor and drive delivery on the government's perceived most important crosscutting priorities. These taskforces (according to the government) will bring together the key Ministers and officials on a regular basis to track progress; spot potential problems and blockages and agree plans for resolving them; maintain momentum and ensure accountability; and make sure that actions are followed through. Each taskforce will report to the Prime Minister and Cabinet on a regular basis. Matters requiring collective agreement will continue to be dealt with by Cabinet and its committees¹.
6. The Childcare Implementation Taskforce is one such taskforce. Its terms of reference is broadly stated as follows²;
 - Driving delivery of a coherent and effective government - wide childcare offer to support parents to work.
7. On 9 February 2016, in answer to a parliamentary written question, the government explained³ how many times another Implementation Taskforce (Child Protection) had met.

Request and response

8. On 21 December 2015, the complainant wrote to Department for Work and Pensions (DWP) and requested information in the following terms:
 - How many times the Childcare Implementation Taskforce has met since being set up since June?
 - The dates of the meetings?

¹

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/515673/2016-04-11_Cabinet_Committees_final_arp.pdf

² *ibid*

³ <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-02-01/25246/>

- And, who was in attendance?
9. The DWP responded on 19 January 2016 and refused to provide the requested information citing the following sections of the FOIA:
 - Sections 35 (1)(a) and (b)
 10. The DWP provided an internal review on 11 February 2016 in which it maintained its original position.

Scope of the case

11. The complainant contacted the Commissioner 18 February 2016 to complain about the way her request for information had been handled.

Reasons for decision

12. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled;
 - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request
and
 - (b) if that is the case, to have that information communicated to him.
13. Section 35(1)(a) provides an exemption for communicating information that relates to the formulation or development of government policy. Consideration of this exemption involves two stages. First, the exemption must be engaged by the information in question falling within the class described in this section. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
14. As to whether this exemption is engaged, the question here is whether the information in question relates to the formulation or development of government policy.
15. The DWP has explained to the Commissioner, that the withheld information relates to government policy on childcare. The taskforce is responsible for driving delivery of: 30 hours of free childcare for working

parents of three and four year olds; Tax-Free Childcare for working families; and up to 85% support with childcare costs in Universal Credit.

16. The DWP further explained that policy development on some aspects of the childcare offer such as the increase in Universal Credit support had been completed when the complainant submitted the request. However policy development on other aspects of the childcare offer was on-going and continues to be on-going. This includes the development of the national early years funding formula to ensure funding for free childcare entitlements is fairly allocated. It also included key elements of the 30 hour entitlement such as how places might be delivered more flexibly to meet the needs of working parents.
17. The Commissioner is readily satisfied that the withheld information relates to the process of reforming government policy on childcare and so to the formulation and development of government policy. This information is, therefore, exempt by virtue of section 35(1)(a).
18. Section 35(1)(b) states that information held by a government department or by the National Assembly for Wales is exempt information if it relates to Ministerial communications. FOIA explains that in this context 'Ministerial communications' means any communications between the Ministers of the Crown and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet.
19. The DWP avers that the information in scope relates to the Childcare Implementation Taskforce. The information on who is in attendance is held in the minutes of the meeting which are shared between Ministers on the Taskforce. The Commissioner is accordingly satisfied that this "sharing" is a ministerial communication for the purposes of section 35(1)(b). Accordingly the Commissioner considers the exemption provided by section 35(1)(b) to be engaged.
20. Having found that the exemptions are engaged, the next step is to consider the balance of the public interest. Sections 35(1)(a) and (b) are qualified exemptions, so the information must nevertheless be disclosed if the public interest in maintaining the exemptions does not outweigh that in disclosure.
21. In considering the DWP' submissions the Commissioner has taken into account the comments of a key Information Tribunal decision⁴ involving

⁴DFES v Information Commissioner and Evening Standard (EA/2006/0006)

the application of section 35(1)(a). 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 test: firstly the timing of the request and secondly the content of the requested information itself.

22. Also in forming a conclusion on the public interest balance in this case, the Commissioner has, of course, taken into account the general public interest in the transparency and openness of the DWP, as well as factors that apply in relation to the specific information in question.
23. The DWP has explained that in considering maintaining the exemptions the following public interest arguments were taken into account.
 - Taskforces each have different functions and are chaired by different Ministers with different styles. Some taskforces meet more frequently than others. The number of times a taskforce meets would naturally be perceived as representative of the priority that Ministers place on the taskforce's responsibility.
 - Moreover, inaccurate inferences could be drawn from the dates of specific meetings regarding how the activity related to the wider development and formulation of government policy. Outside of releasing information on the wider context and the discussions had (which would not be appropriate due to the need to secure a safe space for policy development) this could misrepresent the effectiveness of taskforces.
 - This could result in taskforces not meeting, when they potentially should do, so as to avoid the appearance things were not 'on track' or taskforces meeting when not necessary, thus wasting senior officials and Ministers time, due to concerns that if a taskforce was not meeting then there would be an appearance of no activity on a high profile topic.
 - Each Taskforce reports to the Prime Minister and Cabinet on a regular basis. Disclosure would therefore damage collective Cabinet responsibility since Ministers need to have confidence in the method and process adopted for policy development and in the privacy of any debate. Maintaining confidence necessitates keeping confidential both the detailed discussions and the timing and frequency of those discussions. Ministers are accountable to Parliament for decision making and members of the government are required to support official policy, once adopted, even if the individual had argued against it during its development.

- The requested information might appear anodyne, but its disclosure would cause the public to base its interpretation of Ministers' commitment to a Taskforce's priorities on the number of meetings and ignore the other elements of the decision-making process. This in itself would place undue significance on the number of meetings. This misleading impression would run counter to the spirit and practice of democratic accountability underpinning government in the UK.
 - Sometimes a junior minister has expertise on a particular agenda item, on other occasions a Secretary of State may have other commitments that the public interest requires them to attend instead of that Taskforce's meeting. Knowing which Ministers attended each meeting, or whether they delegated attendance, may cause the public or the media to draw misleading inferences regarding the commitment of a Minister to the Taskforce.
 - Each Taskforce can also invite officials or other relevant experts to attend their meetings sometimes, on an ad hoc basis. The public or the media may also draw misleading inferences from who did or did not attend each Taskforce meeting and the timing of their attendance. In order to prevent this, the Taskforce may be loath to bring the right people to the meeting to avoid such inferences being made. As such the meeting will suffer from not having the widest pool of advice and support to draw from. Ministerial discussion that occurred at the Taskforce would suffer as a result and Cabinet itself would be less informed as result. This would not be in the public interest – the attendees at a given meeting should be based on the most useful and expedient way to run the meeting.
24. Covering first the arguments in favour of maintenance of the exemption, when considering the balance of the public interest in relation to section 35(1)(a) the Commissioner will generally always consider it relevant to take into account the public interest in preserving a degree of confidentiality in the policy making process. This is due to the possibility of harm to the quality of that process if those involved were not confident that their contributions would remain confidential.
25. As to the timing of the request, the Commissioner notes that the information sought concerns the dates of past meetings and the participants though not the content of those meetings. The request is not concerned with future events. According to the aforesaid factors, the contextual timing of the request in this case is not a particularly relevant factor.

26. Public interest arguments under section 35(1)(b) should or would normally focus on protecting ministerial unity and effectiveness, and protecting ministerial discussions and collective decision making processes. This reflects the underlying purpose of the exemption.
27. The Commissioner reminds herself that the withheld information consists of the dates that the taskforce met and its participants. The complainant is not seeking what was discussed at those meetings. It is the Commissioner's view that this significantly undermines the DWP's concerns about damaging Cabinet security. This undermining of the DWP's concerns (about collective Cabinet responsibility) are compounded by the government disclosure of how many times another Implementation Taskforce (Child Protection)⁵ had met. The Commissioner notes that that information was disseminated at approximately the same time the DWP's internal review in this matter.
28. The Commissioner appreciates and recognises the subtlety of the DWP arguments for maintaining the exemption. They are, by way of precis, that inferences (whether correctly or not) would be drawn as to the priorities of task forces and how they relate to wider government policy concerns. The DWP further opines that taskforces may feel forced to have meetings to avoid criticisms that they are not meeting enough.
29. The Commissioner does not discount that releasing the withheld information may necessitate the government having to explain why the committee met a certain amount of times and why certain people were (or were not) in attendance.
30. The Commissioner considers that to withhold the information would effectively be saying to the public there is a taskforce but we cannot tell you when it has considered policy or the participants of those considerations. The Commissioner is not satisfied that this it is in the public interest and it runs contrary to the public interest in open government. Releasing the information may have the consequences the DWP has feared. However, in the Commissioner's view, they are not such to warrant the withholding of the requested information. Accordingly, the Commissioner's decision is that the public interest does not favour the maintenance of the exemptions and therefore sections 35(1)(a) and (b) do not operate to withhold the requested information.

⁵ ibid

Right of appeal

31. 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: GRC@hmcts.gsi.gov.uk

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

32. 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.
33. 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

Gerrard Tracey
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