

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

### **Decision notice**

**Date:** 8 November 2016

**Public Authority:** Cabinet Office

**Address:** 70 Whitehall  
London  
SW1A 2AS

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

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1. The complainant submitted a request to the public authority for copies of all material received by the public authority from other government departments in response to the call for evidence by the Independent Commission on Freedom of Information in October 2015.
2. The Commissioner's decision is that the public authority was entitled to withhold the requested information on the basis of the exemption at section 35(1)(a) FOIA.
3. No steps are required.

#### **Request and response**

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4. The complainant submitted a request for information to the public authority on 24 March 2016 in the following terms:

"This request relates to the call for evidence by the Independent Commission on Freedom of Information in October 2015.<sup>1</sup>

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<sup>1</sup> This was chaired by Lord Terence Burns GCB. Hereinafter referred to as "the Burns Commission"

- a) Please send me a copy of all material received by the Cabinet Office from other government departments with a view to it potentially contributing to a written response to the Commission,
  - b) Please send me a copy of the latest available version of a draft written response to the Commission prepared by the Cabinet Office.
5. The public authority issued its response to the request on 20 April 2016. It confirmed that it held some information within the scope of the request and explained that the government did not submit a response to the Burns Commission. It withheld the information held within the scope of the request on the basis of the exemption contained at section 35(1)(a) FOIA.
  6. The complainant requested an internal review on 21 April 2016.
  7. The public authority wrote back to the complainant on 19 May 2016 with details of the outcome of the internal review. The review upheld the original decision.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 22 June 2016 in order to complain about the public authority's decision to rely on the exemption at section 35(1)(a) to withhold the information held within the scope of his request. He provided the Commissioner with submissions to support his view that the withheld information was not exempt from disclosure under FOIA and the Commissioner has referred to these submissions at the relevant parts of her analysis below.

### **Reasons for decision**

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#### **Background**

9. The Burns Commission was set up by the last conservative government on 17 July 2015 to review the FOIA as it has developed in the ten years since it came into force.

10. The Commission's terms of reference were as follows:

"The Commission will review the Freedom of Information Act 2000 to consider whether there is an appropriate public interest balance between transparency, accountability and the need for sensitive information to have robust protection, and whether the operation of the Act recognises the need for a "safe space" for policy development and implementation

and frank advice. The Commission may also consider the balance between the need to maintain public access to information, and the burden of the Act on public authorities, and whether change is needed to moderate that while maintaining public access to information.”

11. It received over 30,000 written responses to its call for evidence. Having considered all of the responses, the Commission concluded that the FOIA is generally working well, and that it has been one of a number of measures that have helped to change the culture of the public sector. It also made a range of recommendations to improve clarity and certainty around the operation of the FOIA.
12. The government’s response to the Commission’s report was laid before Parliament and published on 1 March 2016<sup>2</sup> alongside the report.<sup>3</sup> The government addressed some of the recommendations immediately in its response and stated that other recommendations would be given further consideration.

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

13. Section 35(1)(a) states:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy.”

14. Section 35(1)(a) is one of the classed based exemptions in the FOIA. This means that there is no requirement to demonstrate the likelihood of prejudice in order to engage the exemption. The withheld information simply has to fall within the class described which means, insofar as section 35(1)(a) is concerned, that it simply has to relate to government policy in the broad sense of the term “relates to”. Although, there is no need to show a likelihood of prejudice in order to engage the exemption; inevitably, this is considered in assessing the balance of the public interest.
15. The public authority pointed out that the Burns Commission was established to inform government policy on the development of the FOIA. It therefore considers that information relating to work of the

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<sup>2</sup> <https://www.gov.uk/government/speeches/open-and-transparent-government>

<sup>3</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/504139/Independent\\_Freedom\\_of\\_Information\\_Commission\\_Report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504139/Independent_Freedom_of_Information_Commission_Report.pdf)

Commission including responses to call for evidence relates to the development of that policy.

16. The FOIA does not define "government policy". The Commissioner considers that in broad terms it can be seen as a government plan or process to achieve a particular outcome. Ten years after the FOIA came into force, the government decided to review its operation in practice with a view to improving aspects of the Act it considered was perhaps not being applied in the way that Parliament intended. The Burns Commission was established to inform the government's intention. It follows therefore that evidence which was prepared to enable the work of the Commission relates to the development of the policy with regards to the post-implementation review of the FOIA. The Commissioner is therefore satisfied that the withheld information relates to the development of government policy. The fact that responses from central government departments were ultimately not submitted to the Commission does not undermine this finding. The withheld information was clearly supplied in the context of the post-implementation review of the FOIA which was being led by the government.
17. The Commissioner has therefore concluded that the withheld information engages the exemption at section 35(1)(a).

### **Public interest test**

18. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore also considered whether in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

### **Complainant's submissions**

19. Given the government has already responded to the Commission's report, the complainant has argued that any material which relates to possible legislative change is not the subject of current policy formulation and should be disclosed.
20. He has further argued that the disclosure would not inhibit free and frank discussion and that the public interest would be best served by disclosure in any event.

### **Public authority's submissions**

21. The public authority acknowledged that there is a public interest in better understanding how government works and the process by which government develops and agrees policy.

22. It however argued that disclosing the withheld information would inhibit the safe space needed to consider some of the other issues highlighted in the Commission's report that the government announced would be given further consideration just three weeks before the request was submitted. It further argued that some of the withheld information remains live not only in relation to actions following the Commission's report but also in relation to achieving the government's policy objective of balancing appropriately transparency and the need to protect sensitive information.
23. The public authority has also argued that disclosure would have a chilling effect on free and frank discussions given the candid nature of many of the responses from departments. It noted that a number of departments made detailed comments on aspects of the FOIA's operation which it is unlikely they would be prepared to make had they believed they would be released within months. The candid nature of the comments means that the public interest in maintaining the exemption would remain strong for some time especially so shortly after the Commission's report was published.
24. The public authority has also submitted that the public interest in maintaining the exemption would remain strong in the circumstances of this case even if the policy development process relating directly to the Commission does conclude. This is because departments will need to continue to discuss frankly the application of the FOIA in view of some of the comments in the responses provided by departments. It explained that the individuals involved in the policy discussions are the same and therefore premature disclosure would result in a chilling effect on future discussions in this area. More widely, it is very likely that premature disclosure in this context could have a wider chilling effect on the development of potential government submissions to similar inquiries in the future.
25. The public authority therefore concluded that on balance, the public interest in maintaining the exemption outweighs the public interest in disclosure.

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

26. Disclosing the withheld information would enhance the general public interest in transparency. Specifically, the Commissioner considers that the withheld information would shed additional light on the views of central government departments on the operation of the FOIA in practice.
27. The Commissioner considers that the enactment of a policy will more often than not signal the end of the policy formulation or development

process. She considers that 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. She does not accept that there is inevitably a continuous process or seamless web of policy review and development.

28. Therefore, in her view, once a policy decision has been finalised and the policy formulation or development process is complete, the sensitivity of the information relating to that policy will generally start to wane and the public interest arguments for protecting the policy process become weaker. However, each case must be considered on its merits. There could be circumstances whereby the public interest in withholding the requested information remains strong even after the policy formulation or development process is complete.
29. It would not be unreasonable to conclude that in the circumstances, the policy development process was complete once the government had issued its response to the Commission's report which had concluded that the FOIA is generally working well. However, while the government generally welcomed the findings and the main recommendations in the report, it also mentioned that it was going to consider the other recommendations in the report. These include the recommendations to review the operation of the section 45 Code of Practice and to improve guidance, via a revised code of practice, in relation to the application of section 14(1) (vexatious requests).
30. In view of the government's response to the Commission's report, the Commissioner shares the view that there is a strong public interest in protecting the safe space needed for officials and Ministers to further consider some of the Commission's recommendations in the context of its post-implementation review of the FOIA. In her view, disclosure of the withheld information is likely to affect the ability of the government to consider the Commission's other recommendations as well as any other aspects of the Act's operation free from external interference and distraction.
31. The Commissioner accepts that there is a strong public interest in not inhibiting free and frank discussions in relation to the Commission's other recommendations as well as any other aspects of the operation of the FOIA in the context of the post-implementation review of the Act. Disclosure of the withheld information at the time of the request is likely to have a chilling effect on such discussions. Given that the government is still committed to considering other recommendations in the report, officials would not expect their comments to be revealed while discussions further to the recommendations in question are ongoing. The Commissioner accepts that disclosure in the circumstances of this

case is also likely to have a wider chilling effect on similar reviews in the future.

32. The Commissioner does not accept the suggestion that the post-implementation review of the FOIA will remain ongoing on the basis that officials will need to continue to discuss the application of the FOIA in view of some of the responses received from departments pursuant to the Commission's call for evidence. She considers this akin to a continuous process or seamless web of policy review and development which has been roundly rejected by the Information Tribunal.<sup>4</sup>
33. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exemption narrowly outweighs the public interest in disclosing the withheld information in all the circumstances of this case.

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<sup>4</sup> DfES v Information Commissioner & the Evening Standard – EA/2006/0006 & DWP v Information Commissioner – EA/2006/0040

## Right of appeal

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34. 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)

35. 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.
36. 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**  
**Principal Advisor**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**