

Freedom of Information Act 2000

Decision notice

Date: 20 June 2017

Public Authority: Cabinet Office

Address: Room 405
70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information relating to polling data from the 2014 Scottish independence referendum from the Cabinet Office. The Cabinet Office refused the request under section 14(2) of the Act as it considered it was a repeat request.
2. The Cabinet Office's position was based on a case of mistaken identity with the complainant and a previous requester with a similar name. Once this mistake had been pointed out, the Cabinet Office refused the request under section 35(1)(a) of the Act as the information related to the development of government policy, and the balance of the public interest favoured maintaining the exemption.
3. The Commissioner's decision is that section 35(1)(a) of the Act applies, but that the public interest test favours disclosure of the withheld information. The Cabinet Office also breached section 17(1) as it did not apply section 35(1)(a) within the statutory timeframe.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information to the complainant.
5. 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

6. On 18 July 2016, the complainant wrote to the Cabinet Office and requested information in the following terms:

"I am writing to request access to the results of polling carried out by Ipsos Mori and commissioned by the Cabinet Office in advance of the referendum on Scottish independence of 2014.

For clarity, this is the item identified in the Cabinet Office transparency data of expenditure over £25000 in January 2014 as: Cabinet Office, CABINET OFFICE, 21/01/2014, CONSULTANTS VAT RECOVERABLE, DEVOLUTION TEAM, IPSOS MORI LTD, 3000043736, 46550, Market research on attitudes in Scotland towards Scottish independence, TR48NE, Large, Programme.

As you will be aware, the Information Commissioner has already ruled on your refusal to release this item (see adjudication attached). The basis of your refusal, as upheld by the Commissioner, was that the findings of the research continued to form the basis of your Scottish policy making.

However, as the report is now more than two years old and the new Scotland Act has completed its passage into law, the report is of purely historic interest and clearly those grounds for refusal no longer apply."

7. The Cabinet Office responded on 15 August 2016. It refused the request under section 14(2) of the Act because it considered it to be a repeat request. To justify this refusal it cited the previous request from 2014 made by a different person, and included another request from 2015 made by an individual with a similar name to the complainant.
8. The complainant wrote to the Cabinet Office and informed it of its mistake, and requested an internal review.
9. The Cabinet Office issued its internal review on 17 November 2016 and apologised for its mistake. It also amended its position, and stated that section 35(1)(a) of the Act was engaged, as the information related to the development of government policy. The Cabinet Office found that the balance of the public interest favoured maintaining the exemption.

Scope of the case

10. The complainant contacted the Commissioner on 17 October 2016 to complain about the delay in obtaining an internal review from the Cabinet Office. Once the complainant obtained a copy of the Cabinet

Office's internal review he confirmed he wished to appeal against the section 35(1)(a) refusal of his request.

11. The Commissioner considers the scope of the case to be whether the Cabinet Office is entitled to refuse the request under section 35(1)(a) of the Act. She will also consider the procedural issues surrounding the Cabinet Office's handling of the complainant's request.

Reasons for decision

Section 35(1)(a) – formulation of government policy

12. Section 35(1)(a) of the Act states:

"(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –

(a) the formulation or development of government policy,"

13. In order for information to engage the exemption at section 35(1)(a) it must relate to the formulation or development of government policy. The Commissioner uses a wide interpretation of the phrase "relates to", and accepts any significant link between the information and the formulation or development of government policy is sufficient to engage the exemption.
14. The Commissioner's guidance confirms that for the purposes of section 35(1)(a) the definition of government policy can be seen as *"a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives."*¹
15. The withheld information consists entirely of tables showing outcomes of polling questions about the 2014 Scottish independence referendum carried out by Ipsos MORI. The tables show the outcomes of polling questions from October 2013 to September 2014.
16. Section 35(1)(a) is a qualified exemption, meaning that it is subject to a public interest test. Should the Commissioner find that the exemption is engaged she will then need to determine the balance of the public interest.

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf#page=8>

Does the withheld information relate to the formulation or development of government policy?

17. The Cabinet Office argued that the withheld information related to the UK Government's policy of 'strengthening the Union'. Specifically maintaining Scotland's place within the Union.
18. The Commissioner is aware that the withheld information dates from 2014, before the Scottish independence referendum, whereas the request was made on 18 July 2016. As a result of the independence referendum the UK Government drafted the Scotland Act 2016, which achieved Royal Assent on 24 March 2016. It is evident that the withheld information was created for the purpose of informing the independence referendum and had a part in helping with the Scotland Act 2016, but both those events had concluded by the time the request was made. The Commissioner is conscious that policy making cannot be a "seamless web"² and that there must be a distinct point where information is no longer of significant value to government policy.
19. However, the request post-dates the result of the EU referendum, in which the UK as a whole voted to leave the EU but Scotland voted to remain in the EU. There was discussion about whether this would bring about a second independence referendum in Scotland, and was part of the reason that the Prime Minister Theresa May described the Union as a "precious bond" and took steps to visit the Scottish First Minister Nicola Sturgeon.³ It is clear that despite the Prime Minister only being in office for a matter of weeks that there was a policy of 'strengthening the Union' as described by the Cabinet Office.
20. The Cabinet Office argued that the withheld information "comprises part of a wider body of research being collected...to inform ongoing policy development on the Government's high-level policy objective of strengthening the Union". The Commissioner agrees, whilst the information might not be current, it still provides a valuable insight into the thoughts of Scottish voters around the time of the independence referendum. Should further research be carried out to determine the thoughts of Scottish voters the withheld information would have provided a benchmark. This could highlight changes in attitudes and

2

<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i70/DFE S.pdf>

³ <http://www.bbc.co.uk/news/uk-northern-ireland-36789572>

possible trends, which would inform the UK Government on how to develop its policy.

21. The Commissioner is satisfied that the information relates to the development of government policy on strengthening the Union and so engages the exemption at section 35(1)(a). Whilst the information is not the most up-to-date data on Scottish voting intentions in any potential second referendum, the information would naturally be of value to the development of the UK Government's policy. As the Commissioner has found the exemption to be engaged, she will go on to consider the balance of the public interest.

Arguments in favour of maintaining the exemption

22. The timing of the request was only weeks after the vote to leave the EU – arguably one of the most seismic political events in the UK's recent history – and the UK Government was potentially entering a period of drastic change. There is an argument that it is necessary to provide a safe space to the new Prime Minister and her Cabinet during such a period in order for it to remain stable. The Prime Minister made it clear early on in her premiership that the preservation and strengthening of the UK was of great significance. The Cabinet Office stated this was a high-level policy of the UK Government and so it follows that information relating to such a policy should be withheld from disclosure.
23. The Cabinet Office argued that disclosure would open up the information to intense scrutiny, which would potentially lead to pressure from certain groups to focus policy upon specific aspects of the data. The Cabinet Office considered this increased the weight behind the safe space argument, and so showed that the balance of the public interest favoured maintaining the exemption.
24. The Cabinet Office also argued that disclosure of the withheld information would reveal the methodology employed in market research carried out on behalf of the UK Government. It explained that whilst it was known that the Cabinet Office had paid Ipsos MORI for research, when the research was being carried out Ipsos MORI did not state who the research was being done on behalf of. This is in accordance with the Market Research Society's code of conduct, which confirms that the confidentiality of a client must be maintained.⁴ Disclosure would reveal the question types and approach taken by the UK Government, and the

⁴ See paragraph 10 –

<https://www.mrs.org.uk/pdf/mrs%20code%20of%20conduct%202014.pdf>

Cabinet Office considered that the effectiveness of any future research would be compromised were this methodology to be disclosed into the public domain. The Cabinet Office argued that prohibiting the UK Government from conducting further rounds of research effectively was not in the public interest.

Arguments in favour of disclosing the withheld information

25. The Commissioner's previous decision notice concerning this information stated:

"A key factor in the Commissioner's decision is the timing of the request. The referendum had not yet been carried out and there was a keen and detailed debate about the future of Scotland's place in the United Kingdom ongoing at the time of the request. Also, the request was made very shortly after the research was completed and it is reasonable to assume that the information was still being actively used and considered."⁵

26. The age of the information is still a significant factor in assessing the balance of the public interest, as is the relationship of the information to the Scottish independence referendum, but the timing of the request has altered and the Commissioner's decision must reflect that.
27. Whilst most of the information is from 2014 – and so only two years old at the time of the request – the research's primary purpose was to inform the outcome of the Scottish independence referendum in September 2014. Following the outcome of the referendum the UK Government passed through the Scotland Act 2016 to give further powers to the Scottish government. Both these had passed by the time of the complainant's request, as had a further general election and the referendum on the UK's membership of the EU. It is evident that since the research was carried out there had been a number of significant events which make the information historic. The arguments for safe space are reduced by this fact, and the Commissioner considers this to be pivotal in making her decision for this appeal.
28. As evidence for this argument, the Commissioner notes that in Scotland 38% of voters opted to leave the EU in the 2016 referendum. Whilst this did not constitute a majority it is a sizeable minority.⁶ In addition,

⁵ See paragraph 28 – https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043298/fs_50549082.pdf

⁶ <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-36599102>

approximately one third of Scottish Nationalist Party voters – who voted largely in favour of Scottish independence in the 2014 Scottish independence referendum – voted to leave the EU.⁷ Voting one way in the Scottish referendum did not determine the voting intention in the EU referendum. Both referendum decisions would be of significance in any future Scottish independence referendum, and it is clear that the UK Government's policy to maintain the Union would have to take cognizance of this.

29. The Commissioner has also considered the timing of any second Scottish independence referendum. It was known at the time of the request that the Scottish First Minister, Nicola Sturgeon MSP, thought that the EU referendum result justified a second Scottish independence referendum. This was based on the fact the majority of Scottish voters opted to remain in the EU. However, the decision did not rest with the Scottish government, and must be agreed with the UK Government.
30. At the time of the request there was no indication that a second Scottish independence referendum would be agreed. The UK Prime Minister Theresa May MP stated that she wished the negotiations to leave the EU to last no longer than two years, and that process would begin in the near future. As the negotiations to leave the EU would be a serious undertaking that required much of the UK Government's attention, the Commissioner would not consider it likely that any second Scottish independence referendum would take place before 2019. To accept that the withheld information must be withheld because of the potential for a second Scottish independence referendum would be tantamount to accepting that the information should not be disclosed until the information was five years old. The Commissioner does not see this as a reasonable position.
31. Furthermore, the information would be of benefit for informing debate about attitudes around the time of the Scottish independence referendum. This would have two distinct benefits: firstly, from a historical perspective for those wishing to understand the event within the UK's constitutional history; and secondly, in the event that a second independence referendum was held it would allow individuals from both sides of the debate to have a better understanding of voters' attitudes in 2014. It was evident that following the outcome of the referendum on the UK's membership of the EU there were considerations for a second

⁷ <http://www.newstatesman.com/politics/staggers/2017/03/what-next-snp-voters-who-voted-brexit>

independence referendum within Scotland, so the Commissioner considers that this second argument is more than just hypothetical.

32. The Commissioner considers that there is an argument that disclosure helps promote accountability of government decision making. Public scrutiny of decisions helps ensure that government remains accountable, and focuses policy makers on making decisions that are appropriate and within the public interest.
33. The Cabinet Office argued that disclosure would help reassure the public about the UK Government's decision making process. The withheld information would show the efforts the UK Government goes to in order to determine its policies, and this would inform the public that decisions are taken on the best available information.
34. Where there is spending of public funds by a public authority there is an inherent argument in transparency, so that it can be demonstrated the money was spent on a worthwhile outcome. The Cabinet Office informed the Commissioner that it was publicly known that over £500k was spent on the type of research that comes within the scope of this request. It follows that there is an argument in the public having a right to know what the spending resulted in.

Balance of the public interest

35. The Commissioner acknowledges that the policy of strengthening the Union is certainly of great significance to the UK Government. However, the Commissioner's decision is based on the information itself, and not just the policy to which the information relates. The information was two years old at the time of the request, and is not seen as being vital to the development of the UK Government's policy. Since the research was carried out, the Scottish independence referendum had taken place, and the Scotland Act 2016 had achieved royal assent. Whilst the withheld information may well be of value to the current UK Government as a benchmark for analysing future polling results, this does not mean that the information is particularly sensitive, or that it will play a significant role in the development of the UK Government's current policy.
36. The Commissioner notes the Cabinet Office's arguments that disclosure would impede its ability to carry out future research projects, but she is not convinced this argument has much merit. It is clear that the Cabinet Office has already revealed it used Ipsos MORI to carry out polling in relation to the Scottish independence referendum through the transparency returns that the Cabinet Office routinely publishes. Whilst the public does not know the exact content of the questions and the results, the Commissioner considers their content to be more or less what any reasonable person would expect. Ipsos MORI might have a duty of confidentiality whilst research is ongoing, but this does not

extend to the Cabinet Office – who had already revealed that the research had taken place.

37. The Commissioner's decision is that the balance of the public interest favours disclosure of the withheld information. Any prejudice cited by the Cabinet Office seems relatively minor given the age of the information and the events that have taken place since. Against this, the Commissioner notes the value the information would have in informing the debate for any potential second independence referendum, and adding to historical understanding of the events of September 2014. She also considers it compelling that the information would help show that the UK Government was making policy decisions based on the best available information, and help promote public confidence in the then government's actions.
38. The Commissioner's decision is that section 35(1)(a) of the Act is engaged in relation to the withheld information, but that the balance of the public interest favours disclosure. She requires the Cabinet Office to disclose the information to the complainant.

Section 17(1) – refusal of a request

39. Section 17(1) of the Act states:

"(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

40. The "time for complying with section 1(1)" is 20 working days, unless there are exceptional circumstances which require a public authority to consider the balance of the public interest in relation to a qualified exemption.
41. The Cabinet Office refused the complainant's request under section 14(2) of the Act because it mistakenly thought that the request from 2014 referred to by the complainant in his request for Scottish polling data was made by the complainant. In justifying its refusal the Cabinet Office also mistakenly attributed a request for Scottish polling data made by a requester with a similar name. A section 14(2) refusal can

only be applied to repeated requests that have been submitted by the same requester and so the Cabinet Office erred in its refusal of the complainant's request.

42. Once the Cabinet Office was informed of its mistake it amended its position at internal review and refused the request under section 35(1)(a).
43. As the Cabinet Office took longer than 20 working days to inform the complainant that it wished to refuse his request under section 35(1)(a) it breached section 17(1) of the Act. As the Cabinet Office has informed the complainant of the basis for its refusal no steps are required.

Right of appeal

44. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

45. 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.
46. 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