

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2017

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for information relating to changes to the Civil Service Compensation Scheme. The public authority published some of the information held within the scope of the request pursuant to the application of the exemption contained at section 22(1) FOIA. It withheld the remaining information in reliance on the exemptions contained at sections 35(1)(a), 40(2) and 43(2) FOIA,
2. The Commissioner's decision is that the public authority was entitled to withhold the remaining information described as "the withheld information" in the body of this notice on the basis of the exemption contained at section 35(1)(a) FOIA.
3. No steps are required.

Request and response

4. The complainant submitted a request for information to the public authority on 29 July 2016¹ in the following terms:

"under the Freedom of Information Act I would like to see the formal analysis of the CSCS [civil service compensation scheme] consultation which closed in May, the advice to Ministers and senior officials, and the date(s) that it was submitted. I am also seeking clarity on the roles of both the head of the civil service and the chief executive of the civil service regarding this issue.

I would also like to see all the impact assessments associated with both consultation and the review of CSCS.

The decisions being taken regarding the future of the CSCS and public sector redundancy affects millions of people in the public sector, they have an absolute right to see how the policy was developed, how that feeds in to the decision making process, and who was involved."

5. On 24 August 2016 the public authority provided its response to the request. It confirmed that it held the information requested. It explained that an impact assessment would be published alongside the Government's response to the consultation in due course. It consequently withheld the information it intended to publish in future in reliance on the exemption contained at section 22(1) FOIA². The remaining information held was withheld by the public authority in reliance on the exemptions contained at sections 35(1)(a) and (b), and 43(2) FOIA.
6. The complainant requested an internal review on 30 August 2016.
7. The public authority wrote back to the complainant on 22 November 2016 with details of the outcome of the internal review. The review upheld the original decision. The authority also advised the complainant that "the formal analysis of the CSCS consultation and the impact assessment [associated with both consultation and the review of CSCS]" had been published at:

¹ The public authority confirmed this as the date of the request. The complainant was unable to provide a copy of his original request (via email) showing the date of the request.

² This exemption may be applied by a public authority to withhold information intended for future publication.

<http://www.gov.uk/government/consultations/consultation-on-reform-of-the-civil-service-compensation-scheme>

Scope of the case

8. The complainant initially contacted the Commissioner on 28 October 2016 in order to complain that the public authority had not completed its review following his request for an internal review on 30 August 2016. Following completion of the internal review, the complainant contacted the Commissioner again on 27 November 2016, this time in order to complain about the public authority's decision to withhold the information requested.
9. He acknowledged that the public authority had published some information within the scope of his request.³ He however submitted that the authority ought to have disclosed all of the information requested.
10. During the course of the Commissioner's investigation, the public authority withdrew its reliance on the exemption contained at section 35(1)(b). It also sought to additionally rely on the exemption contained at section 40(2) FOIA to a small part of the information held within the scope of the request.
11. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to withhold the remaining information held within the scope of the request (the withheld information) on the basis of the exemptions contained at sections 35(1)(a), 40(2) and 43(2) FOIA.

Reasons for decision

Background

12. The public authority explained by way of background that the Spending Review 2015 announced the government's intention to consult on cross-public sector action on exit pay out terms.
 13. The consultation was launched on 8 February 2016 and looked at reforming the CSCS to meet a number of principles: alignment with
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³ This was the information previously withheld by the public authority in reliance on section 22(1).

wider compensation reforms proposed across the public sector, including the government's manifesto commitment to prevent excessive pay-outs, to create significant savings on the cost of exits and to ensure appropriate use of taxpayers money, and to ensure any early access to pension provisions remains appropriate.

14. The consultation concluded on 4 May 2016, and the government published its response on 26 September 2016. Between 4 May and 26 September the public authority conducted intensive negotiations with the trade unions on the precise shape that the CSCS reforms would take. The government's decision on the terms of the offer on CSCS reform was made on 26 September following those negotiations.
15. The public authority has however advised that the Public and Commercial Services (PCS) union has since sought permission to apply for a Judicial Review of the process and decisions taken in relation to changes to the CSCS. A decision by the court is still pending on whether to grant permission for the Judicial Review to proceed. It explained that should the Judicial Review succeed, one outcome is that the current CSCS reforms would have to be undone. If that was the case, the government's intention would be to re-run the reform process and to implement new reforms. Therefore, the withheld information would be relevant to the position the government would take in any such scenario.
16. It pointed out that there is a precedent for this scenario. In 2010, PCS brought a challenge by way of Judicial Review which resulted in the court quashing the 2010 amendments to the CSCS. The government (of the day) responded to this by carrying out a new reform process, resulting in a reformed set of CSCS terms in December 2010.

Withheld information

17. The public authority clarified that the withheld information consists of advice to a Minister following the end of the consultation period for the CSCS, and of a meeting between the government and representatives from the trade unions. It confirmed that this was all the information held within the scope of the request in addition to the published information.

Section 35(1)(a)

18. The public authority considers the withheld information exempt on the basis of section 35(1)(a).
19. 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.”

20. Section 35(1)(a) is one of the class-based exemptions in the FOIA. This means that there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. Furthermore, the term ‘relates to’ (ie to the formulation or development of government policy) can be interpreted broadly. This means that the information does not itself have to be created as part of the formulation or development of government policy. Any significant link between the information and those activities is enough.
21. Furthermore, if the majority of a piece of information relates to a particular activity, any associated or incidental information will also relate to that activity, even if in isolation it would not be covered.
22. The Commissioner finds that the withheld information relates to the reform of the CSCS particularly in connection to the government’s objective of reducing the costs of redundancy pay outs in the public sector. She has therefore concluded that the withheld information relates to the development of government policy on the CSCS.

Public interest test

23. 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.

Public interest arguments in favour of disclosing the withheld information

24. The public authority recognised that the trade unions and taxpayers have an interest in understanding the background to the changes to the CSCS. It acknowledged that disclosure of the withheld information would enable the public to assess whether the changes to the CSCS were made for sound reasons and on the basis of good quality advice.
25. In his request to the public authority the complainant noted that changes to the CSCS affects millions of public sector workers. He therefore submitted that they have a right to see how such changes were developed and fed into the decision making process.

Public interest arguments in favour of maintaining the exemption

26. The public authority pointed out there continues to be stark differences of opinion between the government and the trade unions on the changes to the CSCS as evidenced by the fact that Judicial Review proceedings are underway. It suggested that disclosing the withheld information under such circumstances is likely to inhibit the provision of free and frank advice to Ministers in future.
27. It also submitted that there was a strong public interest in preserving a safe space to discuss changes to the CSCS in view of the timing of the request. It argued that this safe space was also necessary to enable the provision of free and frank advice to Ministers. It pointed out that while the public interest in maintaining the exemption may diminish over time, the withheld information was, at the time of the request, relevant to discussions relating to CSCS reform, and remains very recent. It therefore submitted that disclosure would not have just interfered with the safe space needed at the time but also in future.

Balance of the public interest arguments

28. The Commissioner shares the view that the withheld information would shed additional light on the rationale for the changes to the CSCS. It would also inform the debate on whether Ministers considered all possible options and attached appropriate weight to each of the options before the changes were introduced. The Commissioner agrees that the public interest in disclosing the withheld information should not be underestimated in view of the fact that the changes affect a very large number of people.
29. On the other hand the Commissioner accepts that there was a significant public interest at the time of the request in preserving a safe space to enable officials and Ministers discuss proposed changes to the CSCS free from external interference and distraction. Rather than having robust discussions about the options under consideration, officials and Ministers could instead have had to expend resources to justify why an option was or was not being considered and/or whether sufficient weight had been given to an option under consideration. Clearly, such explanations would be premature at that stage whilst options were under consideration and would not have been an effective and efficient way to achieve CSCS reform. Furthermore, releasing the withheld information whilst negotiations were ongoing with the trade unions would have undermined the negotiations.
30. The Commissioner also accepts that the issue more or less remains *live* in view of the fact that a Judicial Review process is underway. She shares the view that this increases the weight of the public interest in maintaining the exemption because the withheld information would be

relevant to steps the government might want to take should the current changes have to be undone.

31. She has therefore concluded that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
32. The Commissioner has not considered the applicability of the remaining exemptions in view of her decision that the public authority was entitled to rely on the exemption at section 35(1)(a).

Right of appeal

33. 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

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

34. 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.
35. 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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