

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 May 2018

**Public Authority:** The 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 Cabinet Office for a report generated as a result of a lessons learned exercise into the 'Exemplar Programme', a project concerning the transformation of digital services. The Cabinet Office withheld the information on the basis of section 35(1)(a) (formulation and development of government policy). The Commissioner has concluded that the information is exempt on the basis of section 35(1)(a) but that in all the circumstances of the case the public interest in disclosing the information outweighs the public interest in maintaining the exemption.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with a copy of the withheld information, ie the PowerPoint presentation on the lessons learned from the Exemplar Programme.
3. 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

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4. In 2012, as part of the Government Digital Strategy (GDS) the Cabinet Office and other government departments identified 25 high-volume transactional services for end-to-end service redesign. These services, known as the Exemplar Programme, were expected to be made available to the public by March 2015.
5. The National Audit Office (NAO) report, *'Digital transformation within government'* which was published in March 2017 found that the Exemplar Programme was *'successful in delivering some new services and improving the user experience of some existing services. The programme concluded in 2015 with 15 of the 25 exemplars available as live services and a further five accessible to the general public in trial form. Some of the remaining services have since become available.'*<sup>1</sup>

## Request and response

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6. The complainant submitted the following request to the Cabinet Office on 27 July 2017:

*'I recently read the NAO report on Digital transformation within government, at this link: <https://www.nao.org.uk/wp-content/uploads/2017/03/Digital-transformation-ingovernment.pdf> . Paragraph 11 refers to a lessons learned exercise [about the Exemplar Programme] conducted in 2015. Is it possible to submit an FOI request to receive a copy of the detailed outputs from this lessons learned exercise please?'*
7. The Cabinet Office responded to the request on 21 August 2017 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of the exemptions contained at sections 35(1)(a) (formulation and development of government policy) and 35(1)(b) (Ministerial communications) of FOIA.

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<sup>1</sup> Paragraph 3.4 <https://www.nao.org.uk/wp-content/uploads/2017/03/Digital-transformation-in-government.pdf>

8. The complainant contacted the Cabinet Office on the same day in order to ask for an internal review of this decision. Having failed to receive a response the complainant contacted the Cabinet Office on 25 October 2017 in order to chase up the outstanding response. The Cabinet Office did not respond to this email and also failed to conduct an internal review.

## Scope of the case

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9. Following the Cabinet Office's failure to complete the internal review the complainant contacted the Commissioner on 26 October 2017 in order to complain about its decision to withhold the information falling within the scope of his request.
10. During the course of the Commissioner's investigation the Cabinet Office explained that it was no longer seeking to rely on section 35(1)(b) only section 35(1)(a) as the basis upon which to withhold the requested information. The information itself consists of a PowerPoint presentation on the lessons learned from the Exemplar Programme.
11. With regard to the Cabinet Office's failure to complete the internal review, the Commissioner has commented on this in the Other Matters section at the end of this notice.

## Reasons for decision

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### Section 35 – formulation and development of government policy

12. The Cabinet Office argued that the entirety of the PowerPoint presentation was exempt on the basis of section 35(1)(a) of FOIA. This exemption states 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'*

13. 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 these purposes.

14. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
15. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
16. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
  - the final decision will be made either by the Cabinet or the relevant minister;
  - the Government intends to achieve a particular outcome or change in the real world; and
  - the consequences of the decision will be wide-ranging.
17. The Cabinet Office argued that the withheld information related to the Government's approach to the digital transformation of public services. Furthermore, the Cabinet Office explained that the withheld information contains information relating to the ongoing policy development of a number of other government departments, albeit it did not identify these departments or specify which policies.
18. The Commissioner accepts that the withheld information relates to the formulation and development of policy in relation to the Government's approach to the digital transformation of public services in respect of the Exemplar Programme. On this basis, the Commissioner accepts that section 35(1)(a) is engaged.
19. However, in the Commissioner's view the Cabinet Office has not sufficiently explained or identified the other policies which it considers the withheld information to also relate to, ie the policies of other government departments. It should be remembered that the withheld information covers 25 different government websites operated by a variety of government departments across Whitehall. The Commissioner cannot therefore accept that this line of argument provides an additional basis upon which to argue that section 35(1)(a) is engaged.

## Public interest test

20. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

### *Public interest in maintaining the exemption*

21. The Cabinet Office emphasised that policy making in respect of the Government's approach to digital transformation of public services is ongoing and therefore was not complete when the complainant submitted his request. The Cabinet Office also emphasised that the policies of other government departments referred to in the withheld information also remained live and ongoing. It therefore argued that disclosure of the withheld information would have a potentially detrimental effect not only on Cabinet Office policy development but on the development of policy in all departments with services covered by the report.
22. Furthermore, the Cabinet Office argued that there is a strong public interest that policy-making and its implementation are of the highest quality and informed by a full consideration of all the options. Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications. The candour of all involved would be affected by their assessment of whether the content of the discussions will be disclosed prematurely. If discussions were routinely made public there is a risk that Ministers may feel inhibited from being frank and candid with one another. As a result the quality of debate underlying collective decision making would decline, leading to worse informed and poorer decision making.
23. More specifically, the Cabinet Office explained that the report in question was prepared in an unofficial capacity by an individual to inform the GDS management team. The figures in the presentation were never signed off or audited in any way, or agreed with departments. Consequently, the Cabinet Office argued that releasing the data the NAO used, ie the withheld information, could impact adversely on the Cabinet Office's ability to engage fully with departments in the future.
24. Finally, the Cabinet Office argued that there are already detailed accounts of the transformation programmes referred to in the withheld information in the public domain and that the availability of this

information decreased the public interest in the disclosure of the withheld information.<sup>2</sup>

*Public interest in disclosure of the withheld information*

25. The Cabinet Office acknowledged that there is a general public interest in disclosing information and that openness in government may increase public trust in, and engagement with, the Government. It also recognised that decisions government departments take, particularly when considering the way in which Government interacts with citizens, may have a significant impact on the lives of citizens.
26. The complainant argued that it is incredibly important that we all learn from the lessons of project delivery, across government departments, the private sector and across society. He emphasised that the withheld information has been generated as a consequence of a significant amount of public investment and there is a huge amount of public interest in getting it released.

*Balance of the public interest arguments*

27. Having considered the public interest arguments put forward by both parties the Commissioner has decided that the public interest favours disclosing the withheld information. She has reached this conclusion because of two broad reasons; firstly, she is not persuaded that the Cabinet Office's arguments for maintaining the exemption attract particular weight, and secondly, she believes that there is a strong public interest in the disclosure of this information.
28. With regard to the Cabinet Office's arguments, the Commissioner notes that it has argued that the Government's approach to digital transformation of public services is ongoing. The Commissioner does not dispute that this is the case. However, as her guidance on section 35(1)(a) makes clear she does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. 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.<sup>3</sup> In the particular circumstances of this case the Commissioner notes that the Exemplar

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<sup>2</sup> <https://www.gov.uk/transformation>

<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf> - See paragraph 37

Programme, to which this information specifically relates, concluded in 2015. Whilst the Commissioner notes that further projects were launched, and no doubt will continue to be started to transform digital services, the policy making in relation to the Exemplar Programme itself was clearly complete at the point the complainant submitted his request. In light of this, and taking into account, her position in respect of a seamless web of ongoing policy development, the Commissioner considers it unsustainable for the Cabinet Office to argue that the withheld information in this case concerns ongoing government policy. Rather, the Commissioner considers this information to relate to a particular aspect of government policy making in respect of digital services, namely the Exemplar Programme, and that this was complete at point the request was submitted.

29. In respect of the Cabinet Office's argument that there is a public interest in protecting ongoing policy making by other government departments, given that the Commissioner has not, based on the Cabinet Office's submissions, been able to identify what these policies are, she does not accept that any weight can be attributed to this line of argument when balancing the public interest test.
30. The Commissioner considers that the arguments advanced at paragraph 22 by the Cabinet Office are rather generic ones concerning the risk of a chilling effect if information concerning the formulation and development of policy was disclosed. She also notes that the submissions make reference to discussions between Ministers being inhibited despite the fact that the withheld information in question does not relate to Ministerial communications or correspondence. The Commissioner does accept that there is a risk that disclosures of internal policy discussions could potentially lead to a chilling effect on the future contributions of officials. However, in the circumstances of this case the Cabinet Office's submissions do not lead her to conclude that this is particularly likely. In reaching this finding she would emphasise that in her view the policy formulation and development is no longer ongoing and further the withheld information itself does not, in her view, contain information which could be described as particularly frank or candid in nature. Rather the information is factual in nature or contains brief analysis of the Exemplar Programme.
31. With regard to the Cabinet Office's argument that the figures in the withheld information were not signed off, audited or agreed with the departments, the Commissioner understands this to imply that they could potentially include inaccurate data. If this is indeed the Cabinet Office's intended implication, the Commissioner would emphasise that FOIA provides a right of access to information that public authorities hold. Moreover, FOIA does not require requested information to be complete, accurate or up to date and public authorities, in this case the

Cabinet Office, would have the option to set into context any information that it may consider to be misleading. Furthermore, the Commissioner does not follow the logic of the Cabinet Office's argument that disclosure of information under FOIA could impact on its ability to liaise with other government departments in the future. As noted above, the Commissioner considers the risk of a chilling effect occurring if this information was disclosed to be minimal. Furthermore, the Commissioner does not understand how the unofficial nature of the withheld information would potentially risk undermining this future engagement.

32. The Commissioner acknowledges that the Cabinet Office has already published some information about the lessons learned from the Exemplar Programme. However, in the Commissioner's opinion there is public interest in a public authority presenting a 'full picture' about policy and decision making in order to remove any suspicion of manipulating facts or 'spin'. Furthermore, in the particular circumstances of this case the Commissioner does not consider that the availability of this information has a significant effect on reducing the public interest in disclosure of the withheld information. Firstly, because the withheld information would provide a greater understanding of the lessons learned from the Exemplar Programme compared to the information already in the public domain. And secondly, given the Cabinet Office's acknowledgement that the data within the requested information was not signed off, audited or agreed with the departments despite it being submitted to the NAO, she considers there to be a particularly clear public interest in presenting a full picture of the Cabinet Office's assessment of the Exemplar Programme, however unofficial the assessment contained within the withheld information may be.
33. More broadly, the Commissioner agrees that there is a public interest in government departments being open and transparent about their policy making and that such arguments attract particular weight when that policy making has a direct and practical impact on citizens. Given that the information in question concerns how the public access services from a variety of government departments the Commissioner believes that there is a clear public interest in disclosure of information which assesses the Government's attempts to improve the digital delivery of these services. This is particularly the case in light of the findings of the withheld information itself, as quoted in the NAO report, ie that *'In a lessons learned exercise in 2015, GDS identified positive net present values for only 12 of the 22 exemplars for which data were available. In nearly two-thirds of the exemplars, GDS found that improvements in*



*online services did not result in existing systems being reconfigured or becoming more efficient*.<sup>4</sup> Furthermore, the Commissioner agrees with the complainant that there is a public interest in the disclosure of lessons learned data so that both the public and private sectors can potentially learn from it in order to improve future digital projects. Given that the withheld information covers efforts to improve digital platforms which potentially involve millions of transactions with the public each year the significance of these exemplar projects and the potential insight provided by the withheld information should arguably not be underestimated.

34. For the above reasons the Commissioner has therefore concluded that the public interest in disclosing the information outweighs the public interest in maintaining the exemption contained section 35(1)(a). The Cabinet Office therefore needs to disclose the withheld information.

## Other matters

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35. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. As the Commissioner explains in her guidance, in her view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.<sup>5</sup>
36. In the circumstances of this case the Cabinet Office simply failed to conduct an internal review or even to provide the complainant with an acknowledgment that it had received his request for internal review. It has offered no explanation as to why the internal review was not conducted. The Cabinet Office's handling of this internal review request therefore clearly fell short of the way in which the Commissioner expects public authorities to conduct such reviews and in the future she expects the Cabinet Office to adhere to the procedures set out in her guidance.

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<sup>4</sup> See paragraph 11 of the NAO report.

<sup>5</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

## Right of appeal

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37. 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)

38. 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.
39. 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** .....

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**