

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 October 2018

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for a copy of the minutes of, and any associated papers for, the Domestic Affairs Cabinet committee in January 2003 which considered tuition fees. The Cabinet Office withheld the information in the scope of the request on the basis of sections 35(1)(a) (formulation and development of government policy) and 35(1)(b) (Ministerial communications) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 35(1)(b) of FOIA and that in the circumstances of the case the public interest favours maintaining the exemption.

Request and response

2. The complainant submitted the following request to the Cabinet Office on 8 December 2017:

'I am sending this request under the Freedom of Information Act to ask for the following information:

Any meetings of the Domestic Affairs Cabinet committee in January 2003 which considered tuition fees. The meeting has been referenced in Gordon Brown's memoirs. I would like:

- 1) *A copy of the minutes of the meeting*

- 2) *A copy of any other records of what transpired*
- 3) *Copies of any papers which were circulated in advance of the meeting to those attending*

As the meeting has been described in Gordon Brown's memoirs, I would argue that collective cabinet responsibility has already been breached and that details of the meeting are now public knowledge.¹

3. The Cabinet Office responded on 10 January 2018 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 sections 35(1)(a) and (b) of FOIA.
4. The complainant contacted the Cabinet Office on 11 January 2018 and asked for an internal review to be conducted.
5. The Cabinet Office informed him of the outcome of the review on 23 April 2018. The review concluded that the information was exempt from disclosure on the basis of sections 35(1)(a) and (b) and that the public interest favoured maintaining these exemptions.

Scope of the case

6. The complainant contacted the Commissioner on 26 April 2018 in order to complain about the Cabinet Office's decision to withhold the information falling within the scope of his request.

Reasons for decision

Section 35(1)(b) – Ministerial communications

7. Section 35(1)(b) of FOIA states that:

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to Ministerial Communications'

8. Records of Cabinet meetings are specifically covered by this exemption by virtue of the provision in section 35(5) FOIA which describes the
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¹ Shortly after this meeting, the government announced that it would allow universities to increase the fees it charged from £1,100 a year to £3,000.

http://news.bbc.co.uk/1/hi/in_depth/education/2003/he_overview/2683573.stm

meaning of 'Ministerial communications' for the purposes of the legislation and specifies that this includes the 'proceedings of the Cabinet or of any committee of the Cabinet'.

9. The Commissioner is therefore satisfied that the withheld information, which comprises a copy of the minutes of a meeting of the Domestic Affairs Cabinet committee from January 2003 and the copy of a presentation given at this meeting, engages the exemption at section 35(1)(b).

Public interest test

10. 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 information

11. The Cabinet Office acknowledged the impact that tuition fees have on society and that there is a general public interest in this topic, as well as the need for government deliberations and Cabinet meetings to be transparent on this topic.
12. The complainant argued that the Cabinet Office had failed to give the appropriate weight to a number of factors, which in his view meant that the public interest favoured disclosing the withheld information. The complainant highlighted the following factors:
13. The complainant noted that the Cabinet committee meeting in question took place in 2003, ie 15 years ago and since then there have been four parliaments and three governments. He also noted that none of the politicians involved in the meeting have been in government or even an MP in the governing party since 2010. He argued that this counted against the claim made by the Cabinet Office that 'The candour of all involved would be affected by their assessment of whether the content of the discussions will be disclosed prematurely'.
14. The complainant argued that there is a considerable public interest in understanding what took place during these discussions given that the decision taken at this meeting was hugely controversial and has affected the entire way that higher education is funded in this country and every student and their family since. The complainant argued that the Cabinet Office had not taken the gravity of this decision into account or the millions of pounds involved.
15. The complainant argued that Gordon Brown has already broken Cabinet confidentiality for these collective decisions by writing about the meeting

in his memoirs and thus there is already a report of the events in the public domain. The complainant suggested that disclosing the information would provide clarity on what took place in this incredibly important meeting that had such far-ranging effects. The complainant also noted that there were extensive reports of divisions within government at the time and that the crucial division vote in the Commons was only won by five votes.

Public interest in maintaining the exemption

16. The Cabinet Office argued that ministers must be able to have a safe space in which to have free and frank discussions on controversial and sensitive topics, such as tuition fees, in private. Moreover, the Cabinet Office argued that disclosure of this information could result in a chilling effect, preventing free and frank future discussions on tuition fees. It noted that the issue of tuition fees was still one which was the subject of debate both inside and outside government.
17. However, the Cabinet Office explained that central to its position that the public interest favoured maintaining the exemption contained at section 35(1)(b) was the doctrine of collective responsibility. The Cabinet Office directed the Commissioner to the Cabinet Manual which states that:

'4.4 The Ministerial Code states: 'The principle of collective responsibility, save where it is explicitly set aside, requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and ministerial committees, including in correspondence, should be maintained.'³ Chapter Eleven, paragraphs 11.18–11.20 provide more detail on the confidentiality of Cabinet papers and minutes and the application of the Freedom of Information Act 2000.'²

18. The Cabinet Office explained that further information regarding the confidentiality of Cabinet minutes is set out later in the Cabinet Manual:

'11.7 The record of the proceedings of Cabinet and its committees is kept by the Cabinet Secretariat. This includes agendas, papers,

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60641/cabinet-manual.pdf

minutes and correspondence. Departments should not keep Cabinet or Cabinet committee minutes for longer than four weeks.'

19. The Cabinet Office argued that it was of note that the expectation of confidentiality of Cabinet minutes was such that even government departments are required to delete their copies after four weeks.
20. The Cabinet Office noted that the Cabinet Manual further went to explain that:

'11.18 The proceedings of Cabinet and its committees are specifically identified in the FOI Act as falling within the exemption at section 35. This is a qualified exemption, meaning that the public interest needs to be considered in each case. As there is always a strong argument in favour of maintaining the privacy of such information, given the public interest in collective responsibility and the maintenance of the ability of ministers to debate and develop policy frankly and freely, the Government's working assumption is that information relating to the proceedings of Cabinet and its committees should remain confidential. However, each case needs to be considered on its merits.'

21. With regard to the specific circumstances of this request, the Cabinet Office acknowledged that although Gordon Brown had written in his book that this meeting took place, and that tuition fees were discussed, it remained of the view the public interest favoured maintaining the exemption.
22. The Cabinet Office argued that within any topic, especially one as sensitive as tuition fees, it is not uncommon that ministers will disagree with the options and opinions of other ministers whilst the policy is still being developed. It emphasised that Cabinet meetings are the absolute form of ministerial communication, where ministerial collective responsibility requires that ministers are able to speak freely and discuss a variety of options before the policy is finalised under a united Cabinet. The Cabinet Office argued that if such meetings were to become public it could inhibit ministers from having a free and frank discussion regarding this topic in the future, resulting in a poor quality of debate leading to ill-informed and poor decision making.
23. The Cabinet Office also suggested that Gordon Brown's memoirs offered his views and his opinions on the subject, but that does not mean that the public interest test favoured the release of the Cabinet meeting minute. This is because in the Cabinet Office's view the mention of the meeting in the memoirs did not breach collective cabinet responsibility as this is his personal recollection and reflections of events, which is very distinct from the official records. The Cabinet Office argued that collective responsibility protects all of the ministers in the meeting including Gordon Brown himself.

24. The Cabinet Office also argued that the material in question would be considered for release under the Public Records Act in 2024 and as such release in response to this request would be six years in advance of that date.

Balance of the public interest test

25. The Commissioner accepts that the Cabinet Office's arguments regarding collective responsibility are clearly relevant to the balance of the public interest test in this case.
26. With regard to attributing weight to these arguments in the circumstances of this case, the Commissioner has considered the comments about collective responsibility set out in her guidance on section 35 of FOIA. The guidance explains that:

'114. Cabinet minutes will engage collective responsibility. For Cabinet minutes in particular, the public interest in preserving collective responsibility is always substantial, and disclosure of Cabinet minutes has rarely been ordered.

115. However, departments should not rely on a blanket policy of non-disclosure, even for Cabinet minutes. It is still possible that a strong public interest in disclosure might override collective responsibility on the facts of a particular case.

116. There is always significant public interest in the disclosure of an impartial record of Cabinet business, even if other accounts are already available (eg from ministerial statements, memoirs, or leaks). This public interest in disclosure will be particularly strong for politically or historically significant events, or where published accounts are inconsistent.³

27. And:

'213. If collective responsibility arguments are relevant, they will always carry significant weight in the public interest test because of the fundamental importance of the general constitutional principle.

*214. This weight may be reduced **to some extent** if the individuals concerned are no longer politically active, if published memoirs or other public statements have already undermined confidentiality on the*

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

particular issue in question, or if there has been a significant passage of time. However, this does not mean that the publication of memoirs will always undermine the confidentiality of the full official record. It will always depend on all the circumstances of each individual case.

215. Whether or not the issue is still 'live' will not reduce the public interest in maintaining collective responsibility (although it will affect the weight of related safe space arguments). This is because the need to defend an agreed position will, by its very nature, continue to be relevant after a decision has been taken, and because of the constitutional importance of maintaining the general principle of collective responsibility for the sake of government unity.'

28. Applying the approach of her guidance to this present case, the Commissioner has compared Gordon Brown's memoir to official Cabinet committee minutes. Having done so she does not accept that the publication of the memoir has undermined the confidentiality of the full official record, or indeed the confidentiality of the presentation which also falls within the scope of the request. The Commissioner therefore agrees with the Cabinet Office that collective responsibility continues to apply to the withheld information. It follows that in light of the comments in her guidance that the Commissioner believes that significant weight should be attributed to the arguments in favour of maintaining the exemption contained at section 35(1)(b) in order to protect this principle.
29. The Commissioner accepts that 15 years have passed since the meeting in question took place and this is clearly not an inconsiderable period of time. Moreover, the Commissioner accepts the complainant's point that none of the individuals involved in the meeting are no longer in government and nor have they been since 2010. However, the information is not due for disclosure under the Public Records Act until 2024. The Commissioner also accepts that the issue of tuition fees remains a current topic and moreover one that is still a controversial and sensitive one. Therefore, the Commissioner accepts that it is not unsustainable for the Cabinet Office to argue that disclosure of the information at this stage would be premature.
30. Such sensitivity of course is a key reason, from the complainant's point of view, why disclosure of this information is in the public interest and the Commissioner does not seek to dispute the significance of the decision in 2003 and its impact on higher education and wider society. The Commissioner also accepts that disclosure of the withheld information would contribute towards greater transparency in relation to this decision as it would provide a detailed record of the Cabinet committee's discussion of this issue. Whilst many of the topics discussed by the Cabinet and by Cabinet committees are by their very nature ones likely to impact on wider society, the Commissioner accepts that the

decision regarding tuition fees in 2003 was both a historically and politically significant event. The public interest in understanding this should not therefore be underestimated.

31. Nevertheless, given that the information continues to attract collective responsibility, and is about a sensitive and controversial topic which is still a matter of public debate, the Commissioner has concluded that there is a greater public interest in maintaining the exemption contained at section 35(1)(b) and withholding this information.
32. In light of this conclusion, the Commissioner has not considered the Cabinet Office's reliance on section 35(1)(a) of FOIA.

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

Jonathan Slee
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