

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 December 2009

Public Authority: The Cabinet Office
Address: Admiralty Arch
North Entrance
The Mall
London
SW1A 2WH

Summary

The complainant requested information relating to Cabinet discussion of the Westland helicopter company in January 1986. The Cabinet Office confirmed that it held this information, but argued that it was exempt under section 35(1)(b) of the Act (formulation of government policy and ministerial communications). The Commissioner's decision is that the requested information is exempt under section 35(1)(b) but that the balance of the public interest lies in favour of disclosure of some of the information. The Commissioner therefore requires the Cabinet Office to disclose some of the requested information to the complainant.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

The Request

2. On 28 February 2005 the complainant requested the following information from the Cabinet Office under section 1 of the Act:
 - "a) The minutes of the Cabinet meeting held on 9 January 1986
 - b) Any other records of this meeting, such as the hand-written notes made by the Cabinet Secretary or other officials during or shortly after the meeting

- c) The minutes of any other Cabinet meetings or meetings of Cabinet sub-committees (between 1 September 1985 and 1 March 1986) at which the Westland helicopter company was discussed”.
3. On 30 March 2005, the Cabinet Office advised the complainant that it did hold information relevant to the request, but that it was exempt by virtue of sections 35(1)(a) and 35(1)(b) of the Act. Section 35(1)(a) exempts information which relates to the formulation or development of government policy, and section 35(1)(b) exempts information which relates to ministerial communications.
4. The complainant was dissatisfied with this response, and requested an internal review on 31 March 2005.
5. The Cabinet Office responded to the complainant on 28 July 2005. The Cabinet Office apologised for the delay, and confirmed that an internal review had now been completed. The Cabinet Office advised the complainant that it had upheld its original decision to withhold the requested information, although at this stage it claimed reliance only on the exemption at section 35(1)(b) of the Act.

The Investigation

Scope of the case

6. On 13 September 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant claimed to the Commissioner that the Cabinet Office had incorrectly withheld the requested information from him.
7. The complainant also complained to the Commissioner about the substantial delay in conducting the internal review in this case. This is not a requirement of Part I of the Act, and is dealt with at Other Matters below.
8. The Commissioner notes that the complainant requested the minutes of various meetings, which would have included discussion of several different issues. However, throughout the course of the correspondence the complainant referred to his request as covering information relating to the Westland affair only. Therefore the Commissioner's investigation and decision relates only to the parts of the minutes and other records which relate to discussion of this particular issue.

Chronology

9. The Commissioner wrote to the Cabinet Office on 15 February 2006 to seek its submissions on the application of the section 35 exemption claimed. The Cabinet Office responded to the Commissioner on 31 March 2006.
10. Having considered the submission, the Commissioner wrote to the Cabinet Office again on 1 June 2006 to request further information. The Commissioner did not

receive a response, and sent a reminder to the Cabinet Office on 11 July 2006. The Commissioner wrote to the Cabinet Office on 22 August 2006 to advise that he was considering issuing an Information Notice under section 51 of the Act.

11. The Cabinet Office responded to the Commissioner on 24 August 2006. In this letter the Cabinet Office advised that it had discussed this case with one of the Commissioner's senior staff, who had agreed that the Commissioner would meet with Cabinet Office officials to inspect the information in question.
12. Following a change of personnel at the Commissioner's office, a senior representative inspected the withheld information in November 2007. Following a further change in personnel at the Commissioner's office, the Deputy Commissioner inspected the withheld information in September 2008.

Findings of fact

13. The relevant withheld information comprises the minutes and the corresponding entries in the Cabinet Secretary's notebook of the meetings of the Cabinet held on 12 and 19 December 1985 and 9 and 23 January 1986. At the meeting on 9 January, Michael Heseltine resigned his post as Secretary of State for Defence because of his inability to support the Government's position on the Westland helicopter company.
14. The Commissioner has established that various differing accounts of the events of 9 January 1986 were publicly available at the time of the complainant's request. This was as a result of the publication of the memoirs of Margaret Thatcher in 1993, and the diaries of various Cabinet members present at that meeting, including Mr Heseltine himself, as well as various news reports. The Commissioner is aware that detailed accounts of the content of ministerial discussions that day have been put into the public domain by some of the parties to those discussions.
15. The Commissioner accepts that Cabinet collective responsibility is a constitutional convention of government, which provides that members of the Cabinet must publicly support all government decisions made in Cabinet, even if they do not privately agree with them. This support includes voting for the Government in Parliament and the convention applies equally to all members of the Government.

Analysis

Exemptions claimed

Section 35(1)(b): ministerial communications

16. Section 35(1)(b) provides that information held by a government department is exempt information if it relates to ministerial communications. It is a class-based

exemption, and there is no requirement for a public authority to demonstrate prejudice or adverse effect. It is sufficient for the authority to demonstrate that the information falls into the class. Section 35(5) defines 'ministerial communications' as any communication between a Minister of the Crown and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet.

17. The Commissioner notes that in this case the requested information comprises records of the Cabinet discussions and decisions on the Westland issue (see paragraph 13 above). The Commissioner is satisfied that all of the requested information relates to ministerial communications within the meaning of the Act and is therefore exempt under section 35(1)(b).
18. However, section 35 is a qualified exemption and is therefore subject to the public interest test as set out at section 2(2) of the Act. The Commissioner must consider where the balance of the public interest lies, and must decide if the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

Public interest arguments in favour of disclosing the information

19. The Cabinet Office identified a number of arguments in favour of disclosing the withheld information:
 - Disclosure would demonstrate greater transparency in how Government operates.
 - Disclosure would enable the public to assess the quality of debate between ministers and the quality of decision making.
 - Disclosure would increase the public's capability to contribute knowledgeably to debate.
20. The Cabinet Office also acknowledged the age of the information, and noted that "some time" had passed since the Cabinet meetings in question.
21. The complainant also put forward a number of arguments in favour of disclosure. The complainant specifically drew the Commissioner's attention to the age of the information, as well as the amount of information that was publicly available in various books and memoirs. In addition the complainant asked the Commissioner to consider the variation in accounts about what had actually occurred at the Cabinet meeting of 9 January 1986, and the need to inform the public of the historically recorded facts.

Public interest arguments in favour of maintaining the exemption

22. The Cabinet Office argued to the Commissioner that the exemption at section 35 of the Act is designed to protect the way government ministers communicate with each other and conduct the business of government through the Cabinet system. The Cabinet Office drew the Commissioner's attention to the convention of collective responsibility, particularly in the context of the need to protect the

confidentiality of ministerial discussions for a substantial period of time. The Cabinet Office claimed that maintenance of this convention is fundamental to the continued effectiveness of Cabinet government, and that this continued effectiveness is therefore in the public interest.

23. The general principle of collective responsibility is outlined in the “Ministerial Code”:

“Collective responsibility 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.”

The Code goes on to state that “the internal process through which a decision has been made, or the level of committee by which it was taken should not be disclosed”.

24. The Cabinet Office has argued that disclosure of the discussions between ministers in Cabinet would have an adverse impact on collective responsibility, and would undermine ministers’ confidence in the convention. The Cabinet Office was of the opinion that ministers should be able to discuss important issues freely and frankly in private in the expectation that when decisions have been reached they will present a united front.
25. The Cabinet Office noted that the requested information would be subject to transfer to The National Archives for possible publication in 2017 under the “thirty year rule”¹, but argued that it would be inappropriate to disclose the information before this time. The Cabinet Office explained that the thirty year rule meant that information was protected for a substantial period of time which reflected “the time span of the active career of ministers and senior civil servants”. Premature disclosure of the requested information would harm the ability of ministers and senior officials to participate in full and uninhibited discussions, which were essential for good government.

The Commissioner’s view – Minutes

26. The Commissioner recognises that the Cabinet Office’s main argument for maintaining the exemption is that disclosure would undermine the convention of collective responsibility. The Commissioner recognises the constitutional significance of this convention, particularly in relation to matters of such political sensitivity and significance as the Westland affair. The Commissioner accepts therefore that the protection of this convention is a strong factor in favour of maintaining the exemption in this case.
27. However the Commissioner considers that the Cabinet Office’s analysis largely rests on generic arguments in relation to the public interest favouring maintaining the exemption, and in relation to the convention itself. The Commissioner is

¹Established by the Public Records Act 1958 as amended in 1967

mindful of the fact that the exemption at section 35 is not absolute, and may not therefore be used as a 'blanket' exemption in relation to a class of information. Consequently, although the Commissioner recognises the weight of these arguments, he is of the view that they should not be used in isolation to provide a decisive balance of the public interest. Rather, the analysis of the public interest must focus on the circumstances and context of the information in each case.

28. The Commissioner is assisted by the Information Tribunal's decision in *The Scotland Office v Information Commissioner (EA/2007/0070)*. In this case the Tribunal made it clear that the exemption at section 35 must not be treated as absolute, and that the weight to be accorded to collective responsibility must depend on the circumstances of the case.
29. In this particular case the Commissioner notes that the information was nearly 20 years old at the time of the request, and the sensitivity of the Westland issue has significantly reduced. However the Commissioner recognises that there is an established rule (the '30 year rule') that minutes of Cabinet meetings are not made public until 30 years after the date of the meeting. This rule reflects the point at which government records are transferred to The National Archives. The 30 year rule has been the subject of a recent review, but currently remains in effect as it did at the time of the complainant's request.
30. The Commissioner is mindful of the public interest in maintaining the confidentiality of Cabinet minutes under the well-established 30 year rule and the concern that premature release might have a "chilling effect" on discussion and debate among ministers in Cabinet. However he considers that the Cabinet Office has applied this factor generally and has failed to take proper account of the actual information requested and all the circumstances of the case. In the Commissioner's view, the need for protection of the official record has been significantly reduced as a result of the publication of the many differing accounts of this high-profile issue. The age of the information at the date of the request makes its disclosure unlikely to undermine current ministerial or government policies and it is recognised that political sensitivity of information usually diminishes with the passage of time.
31. Having considered the withheld information and the arguments against disclosure, the Commissioner is of the view that the arguments put forward are not so much that the content of the information merits protection but that the status of official minutes of Cabinet proceedings itself justifies non-disclosure. The Commissioner recognises and respects the arguments that have been advanced for the near-absolute exemption of Cabinet minutes, but believes that the unquestioning acceptance of those arguments irrespective of the circumstances of each case would be inconsistent with his responsibilities under the Act.
32. As noted above (paragraph 14) there is already a significant amount of information about this matter in the public domain as a result of various commentaries, memoirs and publications. The Commissioner does not accept that, in the circumstances of this case, disclosure of the relevant Cabinet minutes would undermine 'collective responsibility'. Indeed there is a powerful argument

that it would enhance the understanding of the information which currently is in the public domain. It is also the case that there exist several versions of events on that day (9 January 1986). The Commissioner considers that the release of this information would help to remove uncertainties and controversies over the historical events surrounding the public resignation of a senior government minister.

The Commissioner's view – Notebooks

33. The Commissioner considers it important to distinguish between the actual minutes of the Cabinet meeting, and the entry in the Cabinet Secretary's notebook of the meeting of 9 January 1986. The Commissioner is mindful of the Information Tribunal's decision in *Cabinet Office v Information Commissioner and Dr Lamb* (EA2008/0029). In that case the Tribunal agreed with the Commissioner that the disclosure of the Cabinet Secretary's notebooks would be likely to have a greater impact on debates within Cabinet, and the manner in which a record of them was maintained, than in the case of the minutes themselves. The Tribunal further commented on the Cabinet Secretary's handwritten notes of a Cabinet meeting:

"... the manner in which an individual takes contemporaneous notes is likely to be idiosyncratic and could well give a false impression as to the weight and importance that should be attributed to a particular part of the debate or the tone in which the points of discussion were expressed."

34. The Commissioner agrees with the Tribunal that this does not prevent disclosure of any Cabinet Secretaries' notebooks, and whether it is a strong argument in favour of maintaining the exemption will depend on the circumstances of the case. Having considered the withheld information in this case, in particular comparing the handwritten notes with the formal minutes, the Commissioner is satisfied that disclosure would not enhance the public's understanding of the discussion, nor would it achieve greater transparency than disclosure of the formal minutes. Were the handwritten notes to reveal something of significance which was not recorded in the formal minute, the Commissioner might take a different view. Each case, however, must be considered on its own particular merits.

Conclusion

35. In light of the above, the Commissioner finds that the public interest in maintaining the exemption in this case does not outweigh the public interest in disclosing the official minutes (only) of the Cabinet meeting held on 9 January 1986 which relate to Westland plc. In respect of the minutes of the meetings held on 12 and 19 December 1985 and 23 January 1986, which themselves do not give rise to the same public interest issues in favour of disclosure and which have not been discussed at any length in prior publications, the Commissioner finds that the public interest in maintaining the exemption does outweigh that in disclosing the information. In respect of all the relevant handwritten notes in the Cabinet Secretary's notebook, the Commissioner finds that the public interest in maintaining the exemption again outweighs that in disclosing the information.

Procedural requirements

Section 1(1)(b): duty to provide information

36. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out above the Commissioner is of the view that some of the requested information ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the Cabinet Office failed to comply with section 1(1)(b) of the Act.

Section 10(1): time for compliance

37. Section 10 of the Act states that a public authority must comply with section 1(1) promptly, and in any event not later than twenty working days after the request has been received.
38. As the Commissioner is of the view that the Cabinet Office wrongly withheld some information from the complainant, it follows that the Cabinet Office failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that the Cabinet Office failed to comply with section 10(1) in relation to this information.

The Decision

39. The Commissioner's decision is that the Cabinet Office correctly withheld some information (certain Cabinet minutes and the Cabinet Secretary's handwritten notes) in reliance on the exemption under section 35(1)(b) of the Act. However the Commissioner has also decided that the Cabinet Office wrongly withheld some information (the relevant Cabinet minutes of 9 January 1986) in reliance on the exemption under section 35(1)(b) of the Act, thereby breaching section 1(1)(b).
40. The Cabinet Office failed to communicate this information to the applicant within the time limit set out at section 10(1).

Steps Required

41. The Commissioner requires the public authority to disclose to the complainant within thirty five days of the date of this Notice the full official minutes of the meeting of the Cabinet held on 9 January 1986 which relate to Westland plc.

Other matters

42. The Commissioner very much regrets the inordinate delay in issuing this Decision Notice. In part this has been due to different members of his staff having conduct of this matter, as on two occasions those having conduct of the case have left his office. There has also been a significant backlog of complaints about requests for information refused under the Act at the Commissioner's office, although at the time of issuing this Decision Notice the number of long-outstanding complaints has appreciably reduced.
43. Although it does not form part of this Decision Notice the Commissioner has considered the time taken by the Cabinet Office to conduct an internal review. The Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. There may be a small number of cases which involve exceptional circumstances where it may be reasonable to take longer, but in no case should the total time taken exceed 40 working days.
44. The Commissioner notes that the Cabinet Office took four months to conduct an internal review. This clearly exceeds the timescale recommended above. However the Commissioner acknowledges that this took place in 2005, in the earlier days of access rights under the Act, and expects that steps have been taken to prevent future delays of this nature.

Failure to comply

45. Failure to comply with the steps described above 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.

Right of Appeal

46. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 22nd of December 2009

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex: Relevant statutory obligations

1. **Section 1(1)** provides that:

- (1) Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.

2. **Section 2(2)** provides that –

In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information

3. **Section 10(1)** provides that:

(1) ... a public authority must comply with section (1)(1) promptly and in any event not later than the twentieth working day following the date of receipt.

4. **Section 35(1)** provides 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,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(5) provides that –

In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."