Freedom of Information Act 2000 (Section 50)
Environmental Information Regulations 2004

Decision Notice

Date: 21 June 2010

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

Summary

The complainant requested from the Cabinet Office any documentation emanating from, or sent to, the Office of the Prime Minister between 1997 and 2001 that made reference to the Michael Stone case, in any context. The Cabinet Office confirmed it held some information falling within the request but refused to disclose the information under the exemption at section 35(1)(b) (ministerial communications). In submissions to the Commissioner, the Cabinet Office also placed reliance upon section 35(1)(a) (formulation or development of government policy) and section 40(2) (personal information). The Commissioner has found that section 35(1)(a) (and to a limited extent, section 35(1)(b)) is engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Commissioner also finds that the Cabinet Office breached section 17(1) in that it failed to provide an adequate refusal notice 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.

Background

2. Michael Stone was convicted in October 1998 of the murders of Dr Lin Russell and her daughter, Megan Russell, and of the attempted murder of Megan's elder sister, Josie Russell on 9 July 1996. Stone had previously been diagnosed with a severe personality disorder and was considered dangerous, but as his condition was untreatable he could not be detained under the provisions of the then Mental Health Act 1983. The case highlighted the need for a review of mental health legislation and attracted wide press and media coverage at the time. The Mental Health Act 2007 amended the existing legislation, replacing the four previous categories of mental disorder with a single definition. One effect of this change was to potentially bring a larger number of individuals within the provisions of the Mental Health Act 2007 and associated legislation, including many suffering from a personality disorder.

The Request

3. On 28 May 2008 the complainant wrote to the Cabinet Office requesting papers emanating from the Office of the Prime Minister referencing the case of Michael Stone in the context of discussions about the progress of the Mental Health Bill. This request was later clarified on 6 June 2008 as being for:

> 'Any documentation emanating from, or sent to, the Office of the Prime Minister in the period 1997 – 2001 that makes reference to the Michael Stone case, in any context'.

4. The Cabinet Office responded to the complainant on 19 June 2008. It confirmed that it did hold some information relevant to the request, but that that information was being withheld under section 35(1)(b) of the Act (Ministerial communications).

5. In its response, the Cabinet Office provided the following public interest factors both for and against disclosure of the information in order to justify why, on balance, the public interest favoured the withholding of the requested information.

6. In favour of disclosure, the Cabinet Office recognised that there was a public interest in understanding how Ministers arrived at conclusions and the preceding debate process. The Cabinet Office recognised that due to the decisions made by Ministers possibly significantly impacting

on the lives of citizens, there is a public interest in their deliberations being transparent. With particular regard to the drafting of the Mental Health Bill (which eventually became the Mental Health Act 2007), the Cabinet Office acknowledged that decisions made during the drafting of the Bill and ancillary discussions, would help inform those 'many individuals who have an interest in mental health issues'. Finally, the Cabinet Office noted that the trial and conviction of Michael Stone had been a high profile media story at the time the Bill was drafted.

7. The public interest factors which the Cabinet Office considered to favour the maintenance of the exemption were in Ministers being able to freely and frankly discuss the formulation of new policy, and exchange views on available options and understand all possible implications with complete candour. The Cabinet Office stated that, 'The Mental Health Bill was an emotive and difficult piece of legislation and it was therefore very important that discussions were honest, open and evaluated all the available facts'. The Cabinet Office informed the complainant that for advice and decisions to have real value, it is essential that Ministers have the freedom to express themselves in this way without fear that their options may come under future unnecessary public scrutiny.

8. The Cabinet Office also cited the convention of Cabinet collective responsibility as a public interest factor supporting the withholding of the information, stating 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 once a decision has been made'. It was emphasised by the Cabinet Office that this approach to government decision making is all the more important when considering new legislation or amendments to existing legislation, as in this case. Routine public disclosure of Ministerial discussions would risk inhibiting Ministers from being frank and candid with one another, and 'Therefore the quality of debate supporting the eventual collective decision will be diminished, leading to ill-informed and poorer decision making'.

9. On 20 June 2008, the complainant wrote to the Cabinet Office to request an internal review of its decision. The Cabinet Office notified the complainant of the outcome of its internal review on 16 July 2008, and confirmed that the original decision to withhold the information requested under section 35(1)(b) was upheld.

The Investigation

Scope of the case

10. On 27 September 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled.

11. The Commissioner is satisfied that the wording of the request is such as to catch any document in which Michael Stone is mentioned, rather than those in which he is the focus.

Chronology

12. Regrettably, due to a high caseload, the Commissioner only began his investigation on 14 October 2009, when he wrote to the Cabinet Office. The Commissioner requested copies of the information being withheld and further explanation regarding the application of the exemption and the public interest test.

13. The Cabinet Office responded on 13 January 2010. As well as providing further detail as to its reliance on section 35(1)(b), the Cabinet Office advised the Commissioner that two of the withheld documents were not in fact subject to section 35(1)(b), but rather were subject to the section 35(1)(a) exemption (formulation or development of government policy). In subsequent representations to the Commissioner, the Cabinet Office advised that upon reflection, and after considering the withheld information in the round, it considered that both section 35(1)(a) and section 35(1)(b) applied to all the withheld information, since all the documents concerned the formulation of government policy and related to communications between Ministers. In addition, the Cabinet Office advised that as some of the documents contained some personal data, they had latterly engaged the section 40(2) exemption.

Findings of fact

14. The Commissioner understands that Cabinet collective responsibility is a constitutional convention at Westminster 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. This doctrine also applies to all members of the government.

15. The withheld information relating to this request, copies of which were provided to the Commissioner by the Cabinet Office, consist of three policy documents, all of which date from late 1998. Document 1 is a minute from the Prime Minister's Private Secretary to his Political Secretary. Document 2 is a minute from the Prime Minister's Political Secretary to the Prime Minister. Document 3 is a letter from the then Secretary of State for Health, Frank Dobson, to the then Deputy Prime Minister, John Prescott.

Analysis

Exemptions

Section 35(1)(a) – Formulation or development of government policy
Section 35(1)(b) – Ministerial communications

16. Section 35 is a class based exemption which means that, in this case, so long as the information 'relates' to the formulation or development of government policy or ministerial communications, the exemption is engaged. Formulation of policy can be described as the early stages of the policy process where options are generated, risks are identified, consultation occurs, and recommendations or submissions are put to a minister. Development, on the other hand, will often go beyond this stage, and may include the processes involved in improving on or altering existing policy via piloting, monitoring, reviewing, analysing or recording the effects of existing policy. The Commissioner is satisfied that the information withheld from the complainant engages the exemption under section 35 of the Act and, in particular, subsections (1)(a) and (b), subject to one exception noted below. The Commissioner considers this to be the case for the following reasons.

17. As the Cabinet Office has confirmed, the policy in question was the formulation and development of government policy in respect of the Labour Government's mental health strategy and the modernisation of services for the mentally ill (the policy of the previous administration having been 'care in the community'). The documents all outline and discuss options/suggestions for aspects of the government's *proposed* mental health policy and the Commissioner is therefore satisfied that all the information comes within the ambit of section 35(1)(a).

18. With regard to section 35(1)(b), Document 3 is clearly a ministerial communication as it consists of a letter from the Secretary of State for Health to the Deputy Prime Minister. Although Document 2 is a minute to the Prime Minister from his Political Secretary (i.e. not a government

Minister), it does relay/refer to the views of certain members of the Cabinet. Either those Cabinet Ministers have asked the Political Secretary to relay their views to the Prime Minister, or the Political Secretary has sought their views and informed them that he would be reporting back to the Prime Minister. Consequently, this document relates to a ministerial communication and the Commissioner is therefore satisfied that section 35(1)(b) also applies to Document 2.

19. Document 1 consists of a minute to the Prime Minister's Political Secretary from his Private Secretary. In previous cases, the Information Tribunal has confirmed that the definition of Ministerial communications can be given a broad interpretation. Thus, in Scotland Office v Information Commissioner (EA/2007/0070), the Tribunal held that communications between a Private Secretary writing on behalf of his/her Minister and another Minister, constitute Ministerial communications. Similarly, in Scotland Office v Information Commissioner (EA/2007/0128), the Tribunal confirmed the status to be accorded to a letter written by one Private Secretary to another, stating that, 'Such letters would contain the views of the relevant Ministers and so would, in our opinion, properly fall to be considered under section 35(1)(b)'.

20. However, this case can be distinguished from those described above as Document 1 does not refer to any government Ministers or relay any Ministerial view(s). It is clear from the contents (and from those to whom it has been copied), that the document is an internal discussion about the proposed mental health strategy, but a discussion at adviser and secretarial level. The Cabinet Office have informed the Commissioner that although it is not obvious on the face of it, the document 'is part of the preparatory work leading up to the other two communications and therefore is embedded in the communications between ministers: it is defined by the communication between ministers and both sender and recipient understood that it would inform ministerial deliberations'. The Commissioner accepts that this may be so, but does not consider, for the reasons given above, that the suggested nexus is sufficient in this instance to say that the document relates to ministerial communications.

21. To conclude therefore, the Commissioner accepts that all three withheld documents fall within the ambit of section 35(1)(a), but only Documents 2 and 3 additionally fall within section 35(1)(b).

22. However, in order for the section 35 exemption to be maintained, in all the circumstances of the case, the public interest in maintaining the exemption must outweigh that in the disclosure of the information.

The Commissioner therefore proceeded to analyse the public interest in respect of the information withheld from the complainant.

Public interest arguments in favour of disclosing the requested information

23. In its letter to the complainant of 19 June 2008, the Cabinet Office recognised that there is a public interest in understanding how Ministers come to conclusions and the process of debate which precedes this. In submissions to the Commissioner, the Cabinet Office reinforced this awareness, acknowledging that, 'There is a strong public interest in understanding how government formulates policy and in ensuring that there is well-informed debate on important issues'. The Cabinet Office also fully accepted that, 'There is of course a place for public participation in the policy making process, and for public debate of policy options'. Having had sight of the withheld information, the Commissioner considers that disclosure would provide the public with an insight into which areas of its proposed mental health policy, the Government envisaged encountering particular challenges in making the case for change and reform.

24. The importance of transparency with regard to government deliberations and decisions was also noted by the Cabinet Office in its letter to the complainant, particularly in the case of decisions which may have a significant impact on the lives of citizens. The Commissioner considers that this public interest factor has especially strong relevance and applicability to the present case, given the scope and potential of the mental health legislation reforms to affect many thousands of mental health patients, their carers and families. The issue of transparency is particularly pertinent to the complainant's request, since the Michael Stone case was widely perceived as having had a significant influence upon the Labour Government's decision to make significant reforms to the existing legislation (The Mental Health Act 1983), and even to have acted as a catalyst for some of the changes made. Disclosure of this information would provide a sense of how aware the Government was of the potential scope and impact of its reforms, in terms of the number of individuals affected by mental health concerns.

25. As the Cabinet Office correctly noted in its letter to the complainant, 'The trial and conviction of Michael Stone was a high profile media story at the time this Bill (Mental Health Bill) was drafted'. The Stone case has continued to attract media attention and remains in the public eye, largely due to an unsuccessful appeal against his conviction by Stone in 2005 and by the remarkable recovery of Josie Russell which

has been periodically covered by the media in the years since Stone's conviction.

26. The Cabinet Office acknowledged, in its letter to the complainant, the public interest in 'information detailing decisions made regarding the drafting of the Mental Health Bill and ancillary discussions would help inform those many individuals who have an interest in mental health issues'. Given the controversy that was created by the lengthy and difficult passage of the Mental Health Bill (particularly with regard to its proposals to detain individuals with severe mental health problems who had not committed any crimes), the Commissioner considers that this is another strong public interest argument in favour of disclosing the requested information. Some professionals in the mental health field may regard the Mental Health Bill as being synonymous with the Michael Stone case, and would be naturally interested in knowing what bearing, if any, the case had on the Government's mental health reforms and thinking at the time. The Commissioner notes that disclosure of the information might provide the public with an indication as to what influence the Stone case had upon Government thinking with regard to the formulation and development of its mental health policy, particularly with regard to the definition of those suffering from a personality disorder.

27. The above public interest is heightened by the fact that the Mental Health Act 2007, which amended the 1983 Act and received Royal Assent in July 2007 (nearly a year prior to the complainant's request), is now in force and it therefore follows that any mental health professionals or commentators in the field, would have a keen interest in gaining an insight into the government's deliberations and discussions whilst the policy was being formulated and developed.

28. In FS50152189, which dealt with a request to the Cabinet Office for similar information to that involved in the present case (specifically, Cabinet meeting minutes where reform of mental health legislation was either on the agenda or discussed between 1998 and 2006), the Commissioner noted that, 'Disclosure may also re-assure the public that the process of reforming mental health legislation in this period was well managed and effective and thus increase public confidence in the Government's ability to manage the amendments to significant pieces of legislation'. He went on to observe that, 'The Mental Health Bill is a significant piece of legislation with the potential to have an impact on all members of society; it forms not just part of Department of Health policy but is also part of the Home Office's policies to protect the public from those with mental health issues who pose a risk to others. Given the wide ranging and significant impact the legislation has the potential to have, it could be argued that it is in the public

interest that the public's understanding of this legislation and surrounding issues is as full as possible'. This public interest factor has equal bearing on the present case.

29. Finally, given the age of the information with which this request is concerned (10 years at the time of the complainant's request), a public interest argument can be made that any sensitivity or confidentiality attaching to the documents, would have diminished appreciably with the passage of time, so making the case for disclosure stronger than any arguments against the release of the information.

Public interest arguments in favour of maintaining the exemption

30. In its letter to the complainant of 19th June 2008 and subsequent submissions to the Commissioner, the Cabinet Office has made a number of arguments in favour of maintaining the section 35 exemption, some of which are more persuasive than others. The Commissioner will comment upon each in turn.

31. In its letter to the complainant of 19 June 2008, the Cabinet Office explained that, 'It is also very much in the public interest that Ministers are able to discuss the formulation of new policy freely and frankly, are able to exchange views on available options and understand all possible implications with complete candour. For advice and decisions to have real value, it is essential that Ministers have the freedom to express themselves in this way without fear that their opinions may come under future unnecessary public scrutiny'. In submissions to the Commissioner, the Cabinet Office reaffirmed this view, stating that, 'Ministers must have the freedom to communicate and to express their views frankly and fully without the fear of being exposed to premature disclosure of their views'.

32. The above contention made by the Cabinet Office is the 'safe space' argument, that there is a public interest in civil servants and ministers being able to formulate policy and debate 'live' issues in Cabinet away from external scrutiny. This principle applies to the convention of Collective Cabinet responsibility, which is intrinsically linked to policy formulation, and has been recognised and accepted by both The Commissioner and the Information Tribunal (the Tribunal).

33. In Scotland Office v the Information Commissioner (EA/2007/0070), the Tribunal noted the 'importance of preserving confidentiality of policy discussion in the interest of good government', and in Department for Education and Skills v the Information Commissioner and The Evening Standard (EA/2006/0006), the Tribunal similarly recognised that, 'Ministers and officials are entitled to time and space,

in some instances, considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy'.

34. However, whilst acknowledging the authenticity of the argument, the Tribunal has made clear that there are limits to its effect. In Scotland Office v the Information Commissioner (EA/2007/0128), the Tribunal cautioned that, 'Information created during this (policy) process cannot be regarded per se as exempt from disclosure, otherwise such information would have been protected in FOIA under an absolute exemption'. The public interest in the 'safe space' was held by the Tribunal in DBERR v the Information Commissioner and Friends of the Earth (EA/2007/0072), as being, 'strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public'.

35. The Commissioner concurs with the above view and recognises that there may be cases where the public interest in disclosure is sufficient to outweigh this important consideration. In the present case, the Commissioner has already noted that there are compelling public interest factors which favour disclosure of the information. In order to assess the weight that should be given to the 'safe space' argument when applied to policy formulation/development, it is necessary to consider the actual policy in contention here, namely, the Labour Government's mental health strategy and modernisation of services for the mentally ill, and the content of the withheld information itself.

36. The Commissioner accepts, as the Cabinet Office has submitted, that the enactment of legislation does not necessarily mark the end of the process of policy development. For example, even after a policy has been announced or a piece of legislation enacted, there may be a host of smaller policy decisions required before a workable policy can be produced. Whilst these policy issues are live, the information relating to them will remain sensitive. However, the enactment of legislation is a strong indicator that the policy formulation and development process has come to an end and evidence would need to be shown to rebut this presumption. The Mental Health Act 2007 received Royal Assent on 19 July of that year, with many of its provisions becoming operational in late 2008. In order for these steps to have been taken, it naturally follows that a policy must have been decided upon (legislation would not be enacted in a climate of uncertainty or deliberation with regard to the policy concerned), even if that policy was not yet entirely complete. In the High Court case of Office of Government Commerce v the Information Commissioner [2008] EWHC 638 (Admin), Mr Justice

Burnton (referring to the Government's introduction of an identity cards Bill), observed that, 'I accept that the Bill was an enabling measure, which left questions of Government policy yet to be decided. Nonetheless, an important policy had been decided, namely to introduce the enabling measure, and as a result I see no error of law in finding that the importance of preserving the safe space had diminished'. The fact that the present case concerns an Act (as at the time of the complainant's request), and not a more embryonic Bill, would reinforce the rationale provided by Mr Justice Burnton.

37. In submissions to the Commissioner, the Cabinet Office has advised that, 'The [Mental Health] Act, in common with most modern legislation, creates powers to further legislate in the form of regulations and imposes duties on Ministers. In the case of this Act, the main burden falls on the shoulders of the Home Secretary on whom the Act confers quasi-judicial functions in individual cases. In these cases, in which the Home Secretary is required to rule on the liberty of persons, the Act requires that he or she interprets the evidence in light of the finished Act'. The delegated duties to which the Cabinet Office here refers, relate to the *implementation* of policy and not its development. The policy as to how the Government should manage the mentally ill has been decided by virtue of the Mental Health Act 2007 and associated legislation (such as the Mental Capacity Act 2005). How that policy plays out in individual cases is a matter of implementation and therefore outside the scope of section 35(1)(a).

38. As the Cabinet Office correctly asserts, 'most modern legislation' confers delegated powers and duties, and if policy development were to be regarded as overlapping into policy implementation to such an unlimited extent, practically every policy involving legislation would be subsumed within section 35(1)(a). The Commissioner therefore considers that the policy in question moved beyond the formulation and development stage sometime prior to the complainant's request. Consequently, the public interest in maintaining a safe space for the purposes of policy formulation and development, is considerably diminished, but does not of course vanish entirely.

39. It has been suggested by the Cabinet Office that one feature of the information (specifically the letter from the Secretary of State for Health to the Deputy Prime Minister) which indicates that 'this policy extends beyond the drafting and enactment of legislation', is the fact that it makes reference to the previous Government's policy approach of care in the community programmes. The Cabinet Office question how, 'From this point of view, it is hard to see how the formulation and development of government policy in this sensitive and complex area can reasonably be regarded as having been concluded short of the end

of the Labour administration'. The argument advanced here, essentially that policy development is a continuing cyclical process, (what has been termed the 'seamless web' argument), has not been accepted by either the Commissioner or the Tribunal (DfES v the Information Commissioner and The Evening Standard – EA/2006/0006).

40. It is not the change of government that signals the end of the policy development process, but rather the fact that the care in the community policy was clearly different in nature and intent to the policy which succeeded it. The Commissioner would readily accept that mental health, like many areas requiring intensive Government regulation, is likely to always retain a significant degree of sensitivity and complexity. However, it would clearly be contrary to common sense and the purpose of the FOIA, if this fact were to be used as a blanket means of avoiding disclosure in such areas across the board. Mental health issues, although sensitive by their very nature, are not automatically exempt from the Act and each case would need to be considered, as in this instance, on its own facts and circumstances.

41. The Cabinet Office have also raised the safe space argument in the context of the convention of Cabinet Collective responsibility (as described in paragraph 14 above). The Commissioner recognises the validity and importance of Collective Cabinet responsibility in that it allows the Government to not only engage in free and frank debate in order to reach a collective position, but to also present a united front after a decision has been made. There is a public interest in the Government being able to present a united front, since this prevents valuable Government time from being spent publicly debating and defending views that have only ever been individual views, rather than Government positions, and in commentating on the meaning and implications of a divided Cabinet.

42. In Scotland Office v the Information Commissioner (EA/2007/0128), the Tribunal made clear that the probative force of the factors favouring the maintenance of the convention for some types of information 'will almost always be strong and that 'very cogent and compelling reasons for disclosure would need to be advanced before the balance tips in favour of disclosure in those situations'. As outlined previously and commented upon in relation to the policy development aspect of section 35(1)(a), the Commissioner considers that there are robust reasons in favour of disclosure in this case. This being the case, those factors which have a bearing on, and relevance to, the specific information in this case, need to be examined.

43. Although the convention of collective responsibility may extend beyond immediate members of the Cabinet, the public interest in protecting

the convention is likely to be stronger in relation to information that reveals the workings of the Cabinet itself, rather than information further removed from the Cabinet. The information in the present case lends itself more to the latter of these two types. It is not, for example, minutes of the Cabinet or Cabinet Committee (contrast with FS50165372 and FS50100665). Nevertheless, as noted, some of the information divulges the views of certain Cabinet Ministers, and Document 3 is a letter from one member of the Cabinet to another. The Commissioner agrees with the Cabinet Office's contention that collective Cabinet responsibility applies to all three documents.

44. In Scotland Office v the Information Commissioner (EA/2007/0070), the Tribunal provided a non-exhaustive list of those factors which would be relevant when it came to assessing the public interest in any given case. 'Factors such as the context of the information, whether it deals with issues that are still 'live', the extent of public interest and debate in those issues, the specific views of different Ministers it reveals, the extent to which the Ministers are identified, whether those Ministers are still in office or in politics, as well as the wider political context'.

45. Taking each of the above in turn, the Commissioner considers that whilst mental health issues are still 'live', in the sense that they are always likely to be a catalyst for comment and source of sensitivity, the particular policy with which the requested information is concerned (i.e. the Mental Health Bill and now Act), is no longer 'live' in the sense that it is being developed or deliberated upon by Government. Almost a decade had passed between the creation of the information and the request by the complainant; and the Commissioner is satisfied that the policy had moved beyond the development stage and into the area of implementation by the time the Mental Health Act 2007 came into effect.

46. The extent of public debate and interest in the issue of the creation of the Mental Health Bill and the possible influence of the Michael Stone case has already been noted and need not be repeated at this point. Having had sight of the withheld information, the Commissioner notes that to a limited extent, the views of identifiable Ministers are revealed, and that those Ministers were still serving in the Labour Government at the time of the complainant's request (albeit in different positions). At the time of the Commissioner's decision, a new Government has taken office and so the politicians referred to in the documents are no longer members of the Government, but the Cabinet Office response to the request must be judged by the context and background of May/June 2008, when the complainant made his request for the information.

47. In its submissions to the Commissioner, the Cabinet Office have mounted a more persuasive public interest argument for the maintenance of the section 35 exemption (in accordance with the convention of Collective Cabinet Responsibility), than the arguments analysed above. The Cabinet Office have submitted that disclosure in this specific case, 'would undermine the system of Parliamentary accountability by introducing doubt about whether Parliament had adequately considered the aspects of Mental Health policy discussed in this very early stage of the government's consideration of it. Parliament has recently determined the direction of mental health policy in light of the proposals of the executive. This policy is still in the process of bedding in. To disclose some of the aspects that were discussed between ministers in the course of preparing their collective case for Parliament's consideration could only weaken and undermine this process of the embedding of the new law and the policy it is designed to support'.

48. Clearly, the scenario envisaged above would not be in the public interest, and the Commissioner has given careful consideration to whether there is a real risk that disclosure could cause damage of the type described above.

49. Although the Commissioner is unable to disclose the detailed contents of the withheld information, he can confirm that the tone and style used in the documentation (particularly Document 1), is of an informal, frank and unguarded nature; unguarded because at the time the information was created, planned changes to public access to information had yet to come into fruition (FOIA 2000) and public access to such high level information was considerably more restricted than it was in 2008. The prevailing culture in 1998 was not as transparent or open as it has been in recent years, with less expectation on the part of authors of information that their documents/correspondence etc might be released into the public domain.

Balance of the public interest arguments

50. In considering the balance of the respective public interest arguments, the Commissioner is mindful that the need for a safe space and the convention of Cabinet Collective responsibility, are only two arguments (albeit important ones) to be taken into account in the overall public interest test, and that his final decision needs to take account of all the factors argued in favour of maintaining the exemption, and all the factors that favour disclosure.

51. As the Commissioner has previously detailed, there are cogent and compelling public interest factors which favour disclosure of the withheld information in this case. The Commissioner considers that the disclosure of the information would serve these factors to a real and significant degree. The inception and development of the Mental Health Bill was (as the Cabinet Office correctly note) 'an emotive and difficult piece of legislation'. Associations with the Michael Stone case within the public consciousness and the belief/perception in some quarters that this notorious case had a catalytic and influential effect upon the Labour Government's policy of mental health reform, only accentuate the strong public interest in any information which might show a connection between the Stone case and Government discussion of the Bill.

52. Although the Commissioner is entirely satisfied that all three withheld documents fall within the ambit of section 35(1)(a), with two of them also being caught by section 35(1)(b), he also considers, for the reasons given, that the public interest in maintaining this exemption is somewhat diminished by the fact that the Mental Health Act 2007 was in force at the time of the request, and the policy which the Act enshrines had moved beyond the development stage and into the area of implementation.

53. The Commissioner wishes to emphasise that given the public interest factors favouring disclosure, he considers that any countervailing public interest arguments contending that the exemption should be maintained would need to carry due weight and gravity and be convincing in their application to the information in question. In the Commissioner's view, not all of the arguments advanced by the Cabinet Office have satisfied this requirement. For example, the Commissioner has not been persuaded that the public interest in protecting the safe space required for Minsters to engage in frank and candid debate and *reach* a collective position, carries significant weight in this specific case, since at the time the complainant made his request for the information it is clear that the essential decision with regard to the Government's mental health policy had been decided (as indicated by the enactment of the Mental Health Act 2007).

54. In terms of Collective Cabinet responsibility, the Commissioner considers that there is a separate public interest (from the safe space argument noted above) in allowing the Cabinet to promote and defend an agreed position without revealing divergent individual views. Collective Cabinet responsibility still strongly applies after a decision has been taken as the Government will still need to defend agreed policy. Any harm to the convention could undermine its effectiveness and confidence in it. Whilst not wishing to underestimate the

importance of such public interest factors such as transparency and accountability, it would not be in the public interest for FOI disclosures to undermine confidence in the Government of the day to the extent that it is unable to devote sufficient attention to the process and business of governing.

55. As the Cabinet Office have correctly highlighted, the policy in question here (The Mental Health Act 2007), is still in the process of bedding in. In the Commissioner's opinion, the policy could accurately be described as being at an early stage of implementation. The importance of this policy cannot be overstated, given its scope and potential to affect thousands of individuals, mainly of whom are some of the most vulnerable members of society. The Commissioner is also mindful that the Mental Health Act 2007 was the product of nearly ten years of arduous and controversial debate, consultation and agreement. Set against this background, it would clearly not be in the public interest for the policy to be undermined or set-back by the premature disclosure of information.

56. In HM Treasury v the Information Commissioner (EA/2007/0001), the Tribunal confirmed that 'the primary focus should be on the particular interest which the exemption is designed to protect', but also advised that, 'Whether there may be significant and indirect and wider consequences from the particular disclosure, must be considered case by case'. Applying this approach to this case, the Commissioner considers that disclosure of the withheld information would be highly likely to have significant and wide consequences. These consequences would be largely negative in nature, and are foreshadowed by the information itself. There is a not inconsiderable risk that a concentration of public interest upon what was clearly (as ascertained from a reading of the documents by the Commissioner), the most embryonic and informal discussion of mental health policy, might paint a distorted and inaccurate picture of what was being intended by the changes to mental health legislation as a whole.

57. The Commissioner considers that there is a very real danger that the attention and comment which the information would inevitably attract in the media, could significantly distract (to a disproportionate degree) the attention of those individuals responsible for the administering of the Mental Health Act and its associated legislation, resulting in renewed uncertainty and detriment to the many individuals which the legislation was actually designed to help. The Act has yet to become firmly established, and remains, in the Commissioner's view, vulnerable to the disclosure of information relating to policy formulation and development, which would lend itself to exaggeration, misrepresentation (accidental or otherwise) and sensationalism.

58. The Commissioner considers that disclosure of the information would have compelled the Cabinet of the Labour Government in the period post-dating the request in May/June 2008, and after enactment of the Mental Health Act, to rehearse arguments around what were the more controversial elements of that Act and the deliberations which took place prior to its enactment. This would have been a disproportionate and undesirable distraction from the process and business of governing. However, it is important to note that were he of the view that the withheld information (placed within the context of its creation) justified or necessitated such action or upheaval, these consequences would not have deterred him from ordering disclosure on public interest grounds. Such circumstances would include those in which disclosure would be in the public interest to expose Government wrongdoing or serious ineptitude. However, having had sight of the withheld information, the Commissioner is satisfied that this is not the case in this instance.

59. Whilst the Commissioner considers that disclosure of the withheld information would inform, to some extent, the public interest in whether the Michael Stone case had any bearing or influence on the formation of the Mental Health Bill, he is satisfied that this important public interest (and the other public interest factors cited in favour of disclosure), is not equal to the public interest factors favouring the maintenance of the section 35 exemption.

60. It will be appreciated that in this case, much of the strength of the public interest arguments in favour of maintaining the exemption revolve around the question of timing. Consequently, it is reasonable to conclude that the Commissioner's decision with regard to the balance of the public interest test, *might* be different, should he have occasion to consider a similar such request at some point in the future. In this respect the Commissioner would echo the words of the Tribunal in EA/2008/0024 and EA/2008/0029, where they stated with regard to the information withheld in that particular case, 'On the facts of this case we are unable to identify a fixed point after which any risk of disclosure will evaporate or be largely reduced, although any impact on future behaviour of Ministers may be expected to be greater the shorter the period of time between the Cabinet discussion in question and the public disclosure'.

61. Applying the above rationale to the present matter, it may well be the case that the public interest factors currently favouring the maintenance of the section 35 exemption, could wane with the passage of time once the Mental Health Act 2007 (the culmination of the policy which the exemption has been engaged to protect here), has had

sufficient time to become entrenched and thus be better able to withstand the entirely valid and important public interest of robust scrutiny and historical analysis. Aside from the relatively short period of time since the Act was enacted, the Commissioner considers that there are other factors which suggest that the Act has not yet become entrenched. One such factor is that at the time that the Cabinet Office responded to the request, the deprivation of liberty safeguards (introduced by the Mental Capacity Act 2005 which closely interrelates with the Mental Health Act 2007), had yet to come into force (they eventually did so in April 2009). These safeguards were designed to close the loophole in the system that had allowed individuals like Michael Stone to remain at large and of possible threat to the public.

62. In conclusion, taking all the public interest factors into account, the Commissioner considers that the public interest balance in this particular case is weighed in favour of maintaining the section 35(1)(a) exemption. Given the strong public interest arguments in favour of disclosure of the information, this has not been an easy determination for the Commissioner to make. However, after careful consideration, the Commissioner has ultimately been persuaded, both by the content of the information and the key concern that disclosure would result in disproportionate distraction and rehearsal of argument by the Cabinet (and those members of the 2008 Government previously involved in the formulation and development of this policy), that the public interest would be best served by maintaining the exemption against disclosure. The Commissioner has reached a similar conclusion on the public interest test with regard to the maintenance of the section 35(1)(b) exemption, as far as this applies (see below).

63. As the Commissioner has found that the information was correctly withheld under section 35, he has not gone on to consider the application of the section 40(2) exemption in this matter.

The Decision

64. The Commissioner's decision is that the Cabinet Office were correct to withhold the three documents falling within the scope of the complainant's request on the basis of section 35(1)(a) and (with the exception of Document 1), section 35(1)(b).

65. However, the Commissioner finds that the Cabinet Office were in breach of section 17(1), in that it relied upon exemptions (section 35(1)(a) and section 40(2)), which were not stated to the complainant in response to his request.

Steps Required

66. The Commissioner requires no steps to be taken.

Other matters

67. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

> The internal review provided to the complainant by the Cabinet Office in its letter of 16 July 2008 was sparse in terms of content, providing little information or evidence of a thorough review. The Commissioner would direct the Cabinet Office's attention to Part VI of the Section 45 Code of Practice, particularly paragraph 39, which states that, 'The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue. Complaints procedures should be as clear and simple as possible. They should encourage a prompt determination of the complaint'.

Right of Appeal

68. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

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 sent.

Dated the 21st day of June 2010

Signed ……

Graham Smith
Deputy Commissioner

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

Legal Annex

Formulation and Development of Government Policy

Section 35(1) provides that –

'Information held by a government department or by the National Assembly for Wales is exempt information is 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 or the provision of such advice, or
(d) The operation of any Ministerial private office.

Section 35(2) provides that –

'Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded –

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
(b) for the purposes of subsection (1)(b), as relating to Ministerial communications'.

Section 35(3) provides that –

'The duty to confirm or deny does not arise in relation to information which is (or if it was held by the public authority would be) exempt information by virtue of subsection (1)'.

Section 35(4) provides that –

'In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking'.

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'.

Personal Information

Section 40(1) provides that –

'Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.'

Section 40(2) provides that –

'Any information to which a request for information relates is also exempt information if –

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

Section 40(3) provides that –

'The first condition is –

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of 'data' in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a

member of the public otherwise than under this Act would contravene –

(i) any of the data protection principles, or
(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities), were disregarded.

Section 40(4) provides that –

'The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998, the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

Section 40(5) provides that –

'The duty to confirm or deny –

(a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

Section 40(6) provides that –

'In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

Section 40(7) provides that –

'In this section –

‘the data protection principles’ means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

‘data subject’ has the meaning as in section 1(1) of that Act;
‘personal data’ has the same meaning as in section 1(1) of that Act.

Section 17(1) provides that –

‘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.’