

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 October 2011

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

Summary

The complainant requested copies of documents in relation to the takeover of Rowntree's chocolatiers by Nestle in 1988. The public authority withheld the relevant information on the basis of the exemptions at sections 35(1)(a) (formulation or development of government policy) and 35(1)(b) (Ministerial communications). The public authority also refused to confirm or deny whether the Cabinet discussed the takeover of Rowntree's by relying on the exemption at section 35(3). The Commissioner found that all of the exemptions had been correctly engaged, apart from one document, but decided that in all the circumstances of the case, the public interest in maintaining the exemptions did not outweigh the public interest in disclosure.

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. Rowntree's chocolatiers (Rowntree's) was a confectionary business based in York. In 1988 the company was the subject of a takeover bid between Nestle, a Swiss company and Jacobs Suchard, a European coffee and confectionary company. Nestle eventually won control but

the takeover was controversial partly because Nestle was effectively protected from similar takeover attempts under Swiss law.

The Request

3. On 14 October 2010 the complainant requested the following information:

'Copies of any and all documentation held by the cabinet office dated between 1 April 1988 and 1 August 1988 relating to the takeover of Rowntree chocolatiers. This should include but not limited to minutes of meetings, copies of letters sent/received by the then Prime Minister or other ministers, copies of any memos or speeches which were either drafted or issued, and copies of any decisions made.'
4. The public authority responded on 28 October 2010. It confirmed it held information relevant to the request (the disputed information) but withheld the disputed information on the basis of the exemptions at sections 35(1)(a) and 35(1)(b).
5. The public authority also informed the complainant that it could neither confirm nor deny that the Cabinet discussed the takeover of Rowntree's in 1988.
6. The complainant requested a review of the above decision on the same day (i.e. 28 October).
7. On 18 November 2010 the public authority wrote back with details of the outcome of the internal review. The original decision to withhold the disputed information on the basis of sections 35(1)(a) and 35(1)(b) was upheld. There was no specific mention of the decision to neither confirm nor deny that the Cabinet discussed the takeover of Rowntree's in 1988 but the review generally upheld the decision of 28 October.

The Investigation

Scope of the case

8. Although the complainant initially contacted the Commissioner on 23 November 2010, it was not until 4 February 2011 that he provided the documents required to progress the complaint for investigation. The complainant specifically asked the Commissioner to consider a number of general principles from the Information Tribunal's (the Tribunal)

decision in *The Cabinet Office v Information Commissioner* (EA/2010/0031). In the complainant's own words:

- a. 'The Tribunal ruled that while disclosure of cabinet minutes sooner than within 30 years would rarely be ordered, it could be done when disclosure "involves no apparent threat to the cohesive working of cabinet Government, whether now or in the future". I believe disclosing the information I have requested would pose no such threat.
- b. In relation to the above point, the Tribunal said "such circumstances may include the passage of time, whereby the ministers involved have left the public stage and they and their present and future successors know that such disclosure will not embarrass them during the critical phase of an active political career". The information I have requested is from 1988. It is a considerable time ago. None of the people who were in the Cabinet then is still active in Parliament, and therefore could not be embarrassed in such a way.
- c. The Tribunal said that where the issue in question has no "continuing significance" that may weaken to a slight degree the interest in [the] exemption. I would argue that the issue to which my request relates (the takeover of Rowntree's in 1988) happened 22 years ago, and while of interest to the people of York, it is not an issue of "continuing" significance.
- d. The Tribunal ruled that there was always a "significant public interest in reading the impartial record of what was transacted in Cabinet" and said that where the usual interest in maintaining confidentiality had been significantly weakened [sic], that interest may justify disclosure. I submit that in relation to my request, the public interest in [the] exemption has indeed been weakened, and disclosure is therefore justified.'

Chronology

9. On 8 March 2011 the Commissioner wrote to the complainant. He outlined the scope of the investigation and invited the complainant to comment if necessary. The complainant did not respond.
10. On 16 March 2011 the Commissioner wrote to the public authority. He requested copies of the disputed information and also invited submissions on the application of the relevant exemptions at section 35.
11. On 18 April 2011 the public authority provided the Commissioner with copies of the disputed information.

12. On 20 May 2011 the public authority made detailed representations to the Commissioner on the application of the exemptions at sections 35(1)(a), 35(1)(b), and 35(3).
13. On 23 May 2011 the Commissioner asked the public authority to clarify the status of 3 documents referred to in one of the letters which constitute the disputed information. The documents in question had not been included in the bundle of disputed information provided to the Commissioner on 16 March 2011.
14. On 2 June 2011 the public authority responded. It explained that one of the documents, an excerpt from the Financial Times had been disclosed to the complainant. The second document, an excerpt from a speech by Sir Geoffrey Howe was also going to be made available to the complainant. However, the third document which is included in the list of disputed information below was withheld from disclosure.
15. The excerpt from Sir Geoffrey Howe's speech was disclosed to the complainant on 23 June 2011.

Analysis

Exemptions

16. The full text of the statutory provisions referred to in this part of the Notice can be found in the legal annex.

Disputed Information

17. The disputed information consists of the documents numbered items i – v in the confidential annex to be disclosed to the public authority only.

Section 35(1)(a)

18. The public authority submitted that the exemption at section 35(1)(a) applies to all of the disputed information.
19. Information is exempt from disclosure on the basis of section 35(1)(a) if it relates to the formulation or development of government policy. The public authority argued that the terms 'relates to', 'formulation' and 'development of policy' in the exemption should be given a broad

interpretation.¹ The exemption therefore covers a wide range of information connected with the elaboration of government policy including immediate factual background material.

20. There is no precise definition of the term 'government policy' but it is generally accepted that it refers to a process by which governments translate their political vision into programmes and actions to deliver outcomes. The term also suggests that it requires Ministerial approval or represents the collective view of Ministers and applies across government. Government policy could be generated from a number of sources including ideas from Ministers, as a result of significant incidents, and manifesto commitments.
21. The Commissioner agrees with the public authority that because the exemption covers a class of information, the terms 'relates to' can safely be given a broad interpretation. In the Commissioner's opinion, 'formulation' suggests the early stages of government policy generation. 'Development' on the other hand implies a review of existing policy which may result in alterations.
22. The disputed information consists of exchanges between officials and Ministers in relation to the proposed takeover of Rowntree's by Nestle in 1988. Broadly speaking, it is a confirmation of the government's position at the time in relation to mergers and takeovers including those involving British founded companies. The Commissioner finds that the disputed information relates to the development of government policy regarding the acquisition of companies whether through mergers or takeovers and he is therefore persuaded that the exemption at section 35(1)(a) was engaged.

Public Interest Test

23. The exemptions at sections 35 are qualified. Therefore, the Commissioner must also decide whether in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(a) outweighed the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

24. The public authority recognised the general public interest in openness.

¹ The public authority pointed that this was also the Tribunal's view in *DfES v The Information Commissioner & The Evening Standard (EA/2006/0006)* at paragraphs 53 and 54

25. The public authority also recognised that the decisions Ministers make may have a significant impact on the lives of citizens and there is a public interest in their deliberations being transparent.
26. The public authority further noted that openness in government may increase public trust in and engagement with the government and has a beneficial effect on the overall quality of government.
27. The public authority further acknowledged the public interest in citizens being well informed about the role of the government in the economy and the factors which influence the development of industrial policy.
28. According to the public authority, there is also a public interest in knowing how a previous government handled the acquisition of a major company but pointed out that mere public curiosity about the acquisition should be distinguished from the public interest in the matter.

Public interest arguments in favour of maintaining the exemption

29. Against the public interest arguments in disclosure, the public authority argued that government policy on mergers and acquisitions continues to be sensitive and remains as controversial as it was in the late 1980s. According to the public authority, the disclosure of information about how the government took decisions on mergers and acquisitions in the recent past would invite judgements about whether these procedures were appropriate and could lead to attempts to regulate future decision-making in this area. Ultimately, it argued, this could lead to Ministers and their advisers becoming accountable for their discussions rather than their decisions.
30. The public authority pointed out that if Ministers and their advisers have to constantly 'look over their shoulders' for what the public reaction would be, there would be an unwarranted concern with the presentation rather than the content of policy. It argued that in the long term, the tendency would be to restrict considerations to options that can be presented as reasonable by the standards of the time, and to exclude from consideration other options that might prove unacceptable to vocal interest groups. It submitted that this was particularly true in relation to industrial policy on which Ministers' deliberations are certain to be judged by the subjective standards of local and regional interest groups rather than by the objective standard of the wider public interest.

Balance of the public interest arguments

31. The Commissioner agrees with all of the public interest factors submitted by the public authority in favour of disclosure. He gives

these factors significant weight, also noting the significant public interest in knowing the nature of the discussions between Ministers and advisers regarding the proposed takeover, concerning a proposed acquisition of a major British company by a bigger foreign competitor. He also accepts the argument of the complainant that the matter remains of significant interest to the population of York.

32. Having considered the age of the information, the content of the information and the context the Commissioner is not persuaded by the argument that it would lead to Ministers excluding from their considerations, options in relation to industrial policy which might be unpalatable to vocal interest groups. He is also not persuaded by the argument that disclosing the information could lead to unreasonable attempts to intervene in future decision-making in relation to the acquisition of British companies by foreign companies.
33. The disputed information was at least 22 years old at the time of the request and as far as the Commissioner is aware, nearly all of the officials and members of the government directly involved at the time are no longer active in frontline politics or the civil service. This aspect is explained further in the confidential annex. In any event, he is not persuaded that 22 years later, present or future members of the government would be deterred from putting across their position robustly in relation to similar issues resulting from a proposed takeover or merger of a British owned company by a foreign company. The Commissioner also acknowledged the approach taken to the age of the information in his decision notice (FS50350458) on the information the Cabinet Office held about the Hillsborough disaster:

"The passage of time since the recording of the information in question is a key factor here. This information was 20 years old at the time of the request and, as the complainant has noted, the current Government is implementing a reduction of the current 30-year period before government papers are released to 20 years. Although this is not directly relevant here as section 62(1) of the Act continues to define an historical record as 30 or more years old and section 63(1) specifically provides that section 35 continues to be available for relevant information up to 30 years old, the Commissioner takes into account the recognition that there is a diminishing case for withholding information over 20 years old." (paragraph 38)

34. The Commissioner accepts it is reasonable to suggest that issues relating to the takeovers and mergers of British companies by foreign companies remain of continuing political significance. Nevertheless, as far as he can see, disclosing the disputed information would not be detrimental to present or future policy development in relation to

takeovers and mergers. He is not persuaded that as a result of the disclosure of the disputed information, present or future Ministers and their advisers would reasonably feel the need to be less robust in considering options regarding a similar proposed takeover or merger of a British owned company. In the Commissioner's view, the public is entitled to expect that their elected officials will conduct a detailed scrutiny of any such proposed mergers or takeovers without fear that their views could one day be made public, and in this case at a much later date.

35. In view of the above, the Commissioner finds that in all the circumstances of the case, the public interest in maintaining the exemption did not outweigh the public interest in disclosure.

Section 35(1)(b)

36. The public authority submitted that it also considered the disputed information in the documents marked ii – v exempt from disclosure on the basis of section 35(1)(b).
37. Information is exempt on the basis of section 35(1)(b) if it relates to ministerial communications. By virtue of section 35(5), 'Ministerial communications' include any communications between Ministers of the Crown. The Commissioner has already noted that 'relates to' can safely be given a broad interpretation so information considered exempt under section 35(1)(b) will include communications between a Private Secretary writing on behalf of the Prime Minister and Cabinet Ministers' Private Secretaries.
38. The Commissioner therefore finds that the disputed information in the document marked ii, iv and v falls under section 35(1)(b).
39. He however finds that the disputed information in the document marked item iii does not fall under section 35(1)(b) for reasons explained in the confidential annex. To explain his reasoning in the main body of this notice would result in the disclosure of part of the disputed information marked item iii and would therefore defeat the intention of the exemption. It is however sufficient to point out that, in the Commissioner's opinion, the disputed information does not relate to ministerial communications within the meaning of section 35 of the Act.

Public Interest Test

40. The Commissioner next considered whether in all the circumstances of the case the public interest in maintaining the exemption in relation to the disputed information marked ii, iv and v outweighed the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

41. The public authority submitted that the public interest in disclosure previously pointed out under 35(1)(a) equally apply to section 35(1)(b).

Public interest arguments in favour of maintaining the exemption

42. In addition to the public interests already identified under section 35(1)(a), the public authority argued that there is a very strong public interest in protecting the confidentiality of all aspects of communications between Ministers in order to protect the convention of Cabinet Collective responsibility.
43. The Commissioner is satisfied that the disputed information in the documents marked ii, iv and v is caught by the convention of Cabinet Collective responsibility. The information relates to discussions between Ministers on the proposed takeover of Rowntree's by Nestle.
44. The public authority helpfully outlined the generally recognised and accepted arguments in support of the convention of Cabinet Collective responsibility including the duty imposed on ministers in part 1 section 1.5 of the Ministerial Code. The Commissioner has chosen not to reproduce these arguments in this Notice but he is satisfied that they apply with equal force in this case. The principle of collective responsibility extends beyond Cabinet discussions and includes exchanges between Ministers.

Balance of the public interest arguments

45. The Commissioner however agrees with the complainant that the disclosure of the disputed information in the documents marked ii, iv and v would pose no apparent threat to the cohesive working of Cabinet government, now or in the future. As the Commissioner has already pointed out, the disputed information is 22 years old and nearly all of the Ministers directly involved have left the public stage or are no longer actively involved in frontline politics.
46. The Commissioner recognises the significant public interest in the convention on Cabinet Collective responsibility and its importance in government decision making. However, the threat to the convention should be determined by the circumstances of each case. In the Commissioner's opinion, the threat to the convention is significantly weakened by the circumstances of the case, specifically the age and nature of the disputed information. In his opinion, the nature of the exchanges as well as the passage of time had considerably reduced the

need to protect the information for the purposes of maintaining the convention.

47. The Commissioner finds that in all the circumstances of the case, the public interest in maintaining the exemption did not outweigh the public interest in disclosing the disputed information in the documents marked ii, iv and v.

Section 35(3)

48. The public authority also submitted that, in reliance on section 35(3) of the Act, it could neither confirm nor deny that the Cabinet discussed the takeover of Rowntree's in 1988.
49. Under section 35(3), a public authority is excluded from the duty to confirm or deny it holds information which, if it were held by the public authority would be exempt by virtue of any of the provisions of section 35(1).
50. The public authority argued that the confirmation or denial that the cabinet discussed the Rowntree's takeover will amount to disclosing the subject of cabinet discussions and therefore undermine the convention of Cabinet Collective responsibility.
51. The Commissioner finds that the public authority correctly relied on the exemption at section 35(3).

Public Interest Test

52. The Commissioner must next decide whether in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to neither confirm nor deny the Cabinet discussed the takeover of Rowntree's by Nestle in 1988 outweighed the public interest in disclosure.
53. The public authority relied on the public interest arguments it had previously relied on in withholding information on the basis of sections 35(1)(a) and 35(1)(b).
54. For the same reasons the Commissioner found the public interest was in favour of disclosing the relevant information withheld on the basis of sections 35(1)(a) and 35(1)(b), he finds that the public interest in maintaining the exemption at section 35(3) did not outweigh the public interest in confirming or denying the information was held.

Procedural requirements

55. By virtue of sections 1(1)(b) and 10(1), a public authority is required to provide an applicant with the information requested within 20 working days.
56. The Commissioner therefore finds the public authority in breach of sections 1(1)(b) and 10(1) for failing to disclose the disputed information at the time it was requested.
57. By virtue of sections 1(1)(a) and 10(1) a public authority is required to respond to a request by either confirming or denying it holds the information within 20 working days.
58. The Commissioner also finds the public authority in breach of sections 1(1)(a) and 10(1) for failing to confirm or deny whether the cabinet discussed the takeover of Rowntree's in 1988.

The Decision

59. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

60. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - Disclose the information in documents marked i, ii, iii, iv and v.
 - Confirm or deny whether the Cabinet discussed the takeover of Rowntree's chocolatiers in 1988.
61. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

62. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

63. 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: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

64. 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.

65. 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 3rd day of October 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
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SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

"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."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), 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."

Formulation of Government Policy

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 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-

- (e) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(f) 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 were 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-

(g) between Ministers of the Crown,

(h) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or

(i) 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."