

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2014

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

Decision (including any steps ordered)

1. The complainant requested information concerning contact between the Cabinet Secretary, Sir Jeremy Heywood, and representatives of all private sector companies and lobbying groups for a two week period in January 2013. The Cabinet Office withheld the information falling within the scope of the request on the basis of the exemptions provided by the following sections of FOIA: 29(1)(a) and (b) (the economy); 36(2)(b)(i) and (ii) and 36(2)(c) (effective conduct of public affairs); 43(2) (commercial interests) and 40(2) (personal data).
2. The Commissioner has concluded that all of the requested information is exempt from disclosure on the basis of sections 29(1)(a) and (b) and that in all the circumstances of the case the public interest in maintaining these exemptions outweighs the public interest in disclosure. However, he has also concluded that the Cabinet Office breached section 17(3) by failing to complete its consideration of the public interest within a reasonable time period and section 17(1) by failing to specify in its refusal notice exemptions upon which it later relied.

Request and response

3. The complainant wrote to the Cabinet Office on 31 January 2013 and submitted the following request:

'I would like to make a Freedom of Information request to see a record of all the telephone calls, emails and meetings between the Cabinet Secretary Jeremy Heywood and all representatives of private sector

companies and lobbying groups between Monday 14 January and Monday 28 January. I would also like to see written records of those contacts where they exist.'

4. The Cabinet Office contacted the complainant on 28 February 2013, and again on 16 April 2013, in order to explain that it considered the information to be exempt from disclosure on the basis of section 27 (international relations) of FOIA but it needed further time to consider the balance of the public interest test.
5. The Cabinet Office informed the complainant of the outcome of its deliberations on 15 May 2013. The Cabinet Office concluded that the requested information was exempt from disclosure on the basis of the following sections of FOIA: 29(1)(a) and (b) (the economy); 36(2)(b) (effective conduct to public affairs)¹; 43(2) (commercial interests) and 40(2) (personal data).
6. The complainant contacted the Cabinet Office on 28 May 2013 in order to ask for an internal review of the decision to withhold the information he requested and also to complain about the length of time it took the Cabinet Office to respond to the request.
7. The Cabinet Office informed him of the outcome of the internal review on 7 June 2013. The review upheld the application of exemptions as set out in the refusal notice of 15 May. The Cabinet Office also apologised for the length of time it took to respond to the request but noted that such delays were due to the sensitivity of material requested and general time pressures on the individuals who needed to consider the request.

Scope of the case

8. The complainant contacted the Commissioner on 24 June 2013 in order to complain about the Cabinet Office's handling of his request. His grounds of complaint mirrored those set out in the internal review. That is to say, he disputed the decision to withhold the information he requested and was dissatisfied with the Cabinet Office's delays in responding to the request.

¹ In correspondence with the Commissioner the Cabinet Office clarified that it was seeking to rely on the exemptions provided by the following sub-sections of section 36: 36(2)(b)(i); 36(2)(b)(ii) and 36(2)(c).

Reasons for decision

Section 29 – the economy

9. The Cabinet Office argued that all of the information falling within the scope of the request was exempt from disclosure on the basis of sections 29(1)(a) and (b). These exemptions state that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice –

(a) the economic interests of the United Kingdom or of any part of the United Kingdom, or

(b) the financial interests of any administration in the United Kingdom, as defined by section 28(2).'

10. In order for a prejudice based exemption, such those provided by section 29(1), to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner takes the view that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority.

The Cabinet Office's position

11. The Cabinet Office provided the Commissioner with detailed submissions to support its position that sections 29(1)(a) and (b) were engaged. The

Commissioner has summarised these submissions below, omitting the parts of the submissions which refer directly to the content of the withheld information itself.

12. Firstly, the Cabinet Office argued that disclosure would undermine the government's working relationship with the individuals in question and the companies they represent. More broadly, it explained that the government relies on maintaining a good relationship with British and overseas investors in the UK. The nature of such relationships encourages investors to share concerns with the government and provides the government with valuable information about business sentiment, the wider economic environment and conditions in the financial markets. In order to be effective such relationships must be long term. Such relationships also depend upon mutual trust and business leaders must feel free to communicate freely and frankly with government. Disclosure of the withheld information would undermine the foundations of trust and would discourage these, and other businesses, from sharing information and their opinions with the government in the future. The Cabinet Office argued that this would impair the government's ability to promote and protect the British economy by developing appropriate policies to secure a stable macroeconomic framework and to foster UK economic growth and productivity. This would prejudice the economic interests of the UK, as well as national, regional and local economic interests in the UK.
13. Secondly, the Cabinet Office argued that disclosure of the withheld information would imply that businesses could not rely on their communications with senior officials remaining confidential. This would damage the government's reputation for encouraging business. The Cabinet Office argued that investors take these tangible factors into account when making long term investment decisions of the sort on which the prosperity and well-being of the UK's citizens depends. The reputational damage arising from disclosure of this information would make some investors less likely to proceed with projects where the balance of advantage between an investment in Britain and elsewhere depends on these intangible considerations. Undermining business confidence in this way would make it more difficult for the government to ensure adequate oversight of the economy and to formulate policies that will ensure the economic and fiscal health of the UK.
14. Thirdly, disclosure of the information would reveal information that was at the time (and continues to be) commercially sensitive. Disclosure of the information would damage the commercial interests of the business in question, a point with the Cabinet Office elaborated on in its submissions regarding section 43. However, it argued that the effects of disclosure on the individual businesses would also have a direct effect in damaging the economy; it would upset the normal operation of market

forces and artificially weaken the competitive position of the companies in question whilst strengthening that of their competitors.

15. With regard to the threshold of likelihood upon which the Cabinet Office was relying, ie 'would' or 'would be likely to', it acknowledged that these presented distinct grounds upon which this exemption might be engaged. However, the Cabinet Office suggested that it was not necessary to make such a distinction for the purposes of the Commissioner's investigation and it was entitled to conclude that the exemptions were engaged regardless as to whether disclosure 'would' have a prejudicial effect or 'would be likely to' have a prejudicial effect. It suggested that the engagement of the exemptions was only open to challenge if the lower threshold was not reached.

The Commissioner's position

16. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential harm envisaged by the Cabinet Office as a result of disclosure of the withheld information fits within the scope of both sections 29(1)(a) and (b).
17. With regard to the second criterion, the Commissioner is satisfied that there is clear causal link between disclosure of the withheld information and prejudice to the economic and financial interests of the UK for each of the three reasons set about by the Cabinet Office. Moreover, the nature of the prejudice envisaged is clearly of substance.
18. Turning to the third criterion, the Commissioner accepts that the likelihood of prejudice occurring to the UK's economic and financial interests is clearly more than hypothetical; rather there is a real and significant risk of prejudice occurring. The Commissioner has reached this conclusion in light of the fact that the Cabinet Office has identified a number of separate reasons, rather than simply one reason, why the disclosure could harm the interests which the exemptions provided at section 29(1) are designed to protect. Furthermore, the Commissioner considers each of the three arguments summarised above to be both rational and convincingly argued, in particular the first reason. With regard to this particular line of argument, in the Commissioner's opinion it is clearly reasonable to argue that the disclosure of candid views shared in confidence with senior government officials would be likely to lead to the risk of such information not being shared in the future. Moreover, the Commissioner considers that the Cabinet Office has made a compelling case for directly linking a lack of such candid conversations to prejudice to the economic and financial interests of the UK given the key role such discussions play in forming government's economic and financial policies. The Commissioner would add that having examined the content of the withheld information itself, it is without doubt that

these discussions were entered into on the clear expectation of confidentiality and moreover contain free and frank comments of the nature suggested by the Cabinet Office.

19. Therefore, the Commissioner is satisfied that the exemptions provided by sections 29(1)(a) and (b) are engaged on the basis of the lower limb of likelihood, i.e. that prejudice would be likely to occur.
20. Finally, the Commissioner agrees with the Cabinet Office's suggestion that the exemptions are only open to challenge if the lower threshold of would be likely is not met. However, the reason the Commissioner asks public authorities to clarify which limb they are intending to rely on is because in the Commissioner's view is relevant to the balance of the public interest test. In short, if a public authority can establish that prejudice would happen, the argument for maintaining the exemption carries greater weight than if they had only established that prejudice would be likely to happen. Indeed, although in this case the Cabinet Office only sought to argue that the lower threshold of 'would be likely' was met, in the Commissioner's view it could have convincingly argued that the higher threshold of 'would' prejudice was met.

Public interest test

21. Section 29 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining each exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

22. The Cabinet Office recognised that there was a general public interest in openness of government and acknowledged that transparency may contribute to greater public understanding of, and participation in, public affairs. The Cabinet Office explained that it understood that there is a strong public interest in understanding how businesses communicate with government, including the role that senior civil servants play in these communications. The Cabinet Office also noted that there was a general public interest in understanding how interaction between officials can help the government to develop policies to encourage economic growth.

Public interest arguments in favour of maintaining the exemptions

23. The Cabinet Office argued that it was very strongly in the public interest that the government is able to hear the views of business leaders, firstly so that it can respond to concerns of business but also because such leaders are well informed about economic conditions. Such views are particularly valuable given that economic conditions change so rapidly and assist government in taking necessary measures to maintain economic growth, an aim which is clearly in the public interest. The Cabinet Office argued that this public interest is most obvious in times of economic stress but in order for the government to rely on the expertise of business leaders in difficult circumstances, it is important that these channels of communication remain open in times of economic stability. The Cabinet Office argued that the flow of information between government and financial and business leaders is essential if government is to keep in touch with developments in the economy and craft appropriate financial and economic policies. There was therefore a compelling public interest in business leaders being able to communicate with government in confidence.
24. In the particular circumstances of this case, the Cabinet Office argued that the public interest arguments in favour of maintaining the exemption attracted particular weight given the fact that the information was of a very recent provenance. Disclosure of such recent information would do significant and lasting damage to the presumption that businesses can share information and ideas with government in confidence. This would deter all those who might have occasion to discuss economic affairs with government from doing so.

Balance of the public interest test

25. The Commissioner agrees that there is significant public interest in disclosing information which allows the public to understand how businesses communicate with government. In the Commissioner's view, this is because of the undoubted influence that these business leaders can potentially have on the formulation and development of government economic policy. Furthermore, in the Commissioner's opinion such scrutiny can help to ensure that a particular relationship does not become unduly influential or dependent. In the particular circumstances of this case, disclosure of the withheld information would certainly provide the public with an insight into the nature of these relationships, albeit a relatively limited one given the short period of time which the request covers.
26. However, in the Commissioner's view, the public interest arguments in favour of maintaining the exemptions are particularly compelling. Firstly, this is because of the value that the government places on such

conversations in respect of developing policy, and moreover the various - and significant - prejudicial consequences to the economic and financial interests to the UK if information of this nature was disclosed. Secondly, in the specific circumstances of this case, the Commissioner agrees with the Cabinet Office that the public interest in maintaining the exemptions attracts particular weight given the provenance of the information. This is because disclosure of the requested information at the point the request was submitted would have resulted in disclosure of information concerning the Cabinet Secretary's contacts within the last two weeks. It is because of the very recent provenance of the information, and because of the relatively limited extent to which disclosure of this particular information would serve an identifiable public interest in disclosure, that the Commissioner has concluded that the public interest clearly favours maintaining each exemption. In light of his decision regarding sections 29(1)(a) and (b), the Commissioner has not gone to consider the Cabinet Office's reliance on the other exemptions.

Section 17 – refusal notice

27. Section 17(1) of FOIA requires a public authority to issue a refusal notice to a requestor stating the exemptions it is seeking to rely on, and if not clear, an explanation as why such exemptions apply. This notice must usually be issued within 20 working days of the request. However, if a public authority is relying on a qualified exemption then it can, by virtue of section 17(3), take an additional period of time that is reasonable in the circumstances to consider the balance of the public interest test.
28. In the Commissioner's opinion in most case cases 20 working days should be an adequate period of time in which to consider the balance of the public interest test and even in complex cases the time taken should not exceed 40 working days.
29. In the circumstances of this case the request was submitted on 31 January 2013 and the Cabinet Office did not inform the complainant of the outcome of its public interest considerations until 15 May 2013, ie a period of 72 working days. In the Commissioner's opinion this was an unreasonable period of time and therefore the Cabinet Office breached section 17(3) of FOIA.
30. Furthermore, in its initial refusal notice of 28 February 2013 the Cabinet Office explained that it considered the exemption provided by section 27 to apply and it needed further time to consider the balance of the public interest test in relation to that exemption. However, in its communication of 15 May 2013 no mention was made of the section 27 exemption and instead the complainant was informed that the Cabinet

Office was relying on the exemptions provided by sections 29(1)(a) and (b), 36(2)(b), 43(2) and 40(2) of FOIA. The Commissioner has found that by failing to issue a refusal notice within 20 working days of the date of the request which cited these particular exemptions the Cabinet Office also breached section 17(1) of FOIA.

Right of appeal

31. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
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