

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 July 2014

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

Decision (including any steps ordered)

1. The complainant has requested a copy of a document entitled "Getting your Bill through the Lords". The Cabinet Office refused citing section 35(1)(b) (Ministerial Communications). It upheld this at internal review. However, during the Commissioner's investigation, it introduced reliance on section 35(1)(a) (Formulation and development of government policy) and section 40(2)(Unfair disclosure of personal data).
2. The Commissioner's decision is that the majority of the information should be disclosed. He has found the following:
 - Section 35(1)(a) was not engaged in relation to a small portion of the information. For the remaining information section 35(1)(a) was engaged and the public interest favours disclosure for the majority of this information. Section 35(1)(b) is not engaged for all the information
 - Section 40(2) is engaged for some, but not all, personal data in the document.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose all the information in the document entitled "Getting your Bill through the Lords" except for
 - the information identified in the Confidential Annex to this notice as having been properly withheld under section 35(1)(a); and

- the information identified in the main body of this Notice as having been properly withheld under section 40(2).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 2 December 2013, the complainant requested information of the following description produced by the Government Whips' office at the House of Lords:

"Please provide me with a copy – preferably electronically – of the document "Getting your Bill through the Lords" produced by the Lords Government Whips office".

6. On 10 December 2013, the Cabinet Office responded. It refused to provide the requested information. It cited the FOIA exemption at section 35(1)(b) (Ministerial Communications) as its basis for doing so. It directed the complainant to the website of the Parliamentary Counsel where related information which may also be of interest can be found¹.
7. The complainant requested an internal review on 14 December 2013. The Cabinet Office sent him the outcome of its internal review on 30 December 2013. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 6 January 2014 to complain about the way his request for information had been handled. He disputed that the information was exempt.
9. During the course of the Commissioner's investigation, the Cabinet Office introduced reliance on section 35(1)(a) (Formulation and development of government policy) in relation to all the requested

¹ <https://www.gov.uk/government/collections/the-office-of-the-parliamentary-counsel-guidance>.

document. It also introduced reliance on section 40(2) (Unfair disclosure of personal data) in relation to some of the information in the requested document).

10. The Commissioner has considered whether the Cabinet Office is entitled to rely on the exemptions it has cited as a basis for refusing to provide the information in the requested document.

Reasons for decision

Section 35(1)(a) – formulation and development of government policy

11. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation and development of government policy.
12. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
13. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
14. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
15. Furthermore, the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was confirmed by the Information Tribunal in *DfES v Information Commissioner & the*

Evening Standard (EA/2006/0006, 19 February 2007) at paragraph 75(v), and DWP v Information Commissioner (EA/2006/0040, 5 March 2007) at paragraph 56.

16. In describing these general principles, the Commissioner fully recognises that policymaking can take place in a variety of ways: there is no uniform process. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
17. Nevertheless, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.

The Cabinet Office's position

18. Among its other detailed submissions which make specific reference to the withheld information, the Cabinet Office said "The information engages the exemption because it describes the interactions required with the House of Lords in passing a Bill so relates to general considerations that apply to this part of the process of formulating and developing government policy, rather than because it relates to an individual example of policy development".

The complainant's position

19. In his request for internal review, the complainant (who, at this stage, had not been made aware of the Cabinet Office's reliance on section 35(1)(a)) said that the document must be a proforma document given to all departments. He disputed that it would be exempt and drew an analogy with the documents available on the Parliamentary Counsel's webpages which the Cabinet Office had drawn to his attention.

The Commissioner's position

20. Although there is no specific policy involved, the Commissioner has concluded that the definition in section 35(1)(a) does not preclude it

relating to the process of formulating and developing policy more generally (e.g. general policy methodology). Passing a Bill is clearly related to the process of formulation and development so it seems reasonable that a guide to this process is caught.

21. That said, there is a small portion of information which is, in the Commissioner's view, wholly unrelated to the formulation and development of government. This information relates to facilities available at the Palace of Westminster. The Commissioner has described this information in more detail in a Confidential Annex to this decision notice. The Commissioner does not agree that any of the exemptions cited by the Cabinet Office apply to this information because it is so trivial in nature and bears no relation whatsoever to the formulation and development of government policy, nor does it constitute a ministerial communication such that section 35(1)(b) could be engaged.
22. There is also a portion of information to which the Cabinet Office has applied section 40(2); the names and contact details of certain individuals. The Commissioner will consider the application of section 40(2) later in this notice.
23. The Commissioner has therefore concluded that, apart from a small and trivial section relating to facilities at the Palace of Westminster and a small section of personal data, the requested information is exempt under section 35(1)(a). However, section 35(1)(a) is a qualified exemption, subject to a balance of public interest test under section 2. This means that even if the information in question is exempt, it must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest in maintaining the exemption

24. For obvious reasons, the complainant did not submit any arguments in support of maintaining the exemption, nor did the Commissioner require him to do so.
25. The Cabinet Office set out the following points in favour of maintaining the exemption:
 - there is presumption of confidentiality which allows Ministers and their advisers to discuss policy freely and frankly and in depth. There is a strong public interest in preserving this presumption of confidentiality.
 - the above extends to the protection of techniques the government uses to manage parliamentary business including the management of Bills in the House of Lords.

- by keeping this process confidential, the government can be flexible in its discussions with legislators in both Houses of Parliament.
- disclosure would make it more difficult to use effectively the processes described in the withheld information thus slowing down the legislative process which is contrary to the public interest.

Public interest in favour of disclosure

26. The Cabinet Office set out the following points in favour of disclosure:

- there is a general public interest in openness in public affairs.
- there is also a specific public interest in public understanding of the arrangements for the formulation and development of Government policies.
- there is also a public interest in wider understanding of the management of Government's business in both Houses of Parliament and in the House of Lords in particular.

Balance of public interest arguments

27. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of a key Tribunal Decision involving the application of the section 35(1)(a) exemption. In that case, the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest: firstly the timing of the request and secondly the content of the requested information itself.²
28. The Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.

² *DFES v Information Commissioner and Evening Standard (EA/2006/0006)*

The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.

29. The Commissioner has concluded that the timing of the request, in fact, has little bearing on this particular case. The information in the document is currently in use but it relates to the creation of policy generally rather than a particular policy. In some parts, it relates to the management of bills in a coalition government and this point will be addressed later in this notice.
30. Turning to the content of the information itself, the Commissioner would describe it as being, for the most part, purely practical and, indeed factual. The Commissioner notes that section 35(4) states:

“In making any determination required by section 2(1)(b) or (2)(b) [the balance of public interest] 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.”
31. With this in mind, the Commissioner thinks that the Cabinet Office has not given sufficient weight to the public interest in increasing the public's understanding of the management of government business with particular reference to the House of Lords.
32. The House of Lords is not an elected body but plays an important role in the UK's legislative process. The Commissioner notes that a considerable amount of detail about how the House of Lords operates is already in the public domain on the website of the UK parliament.³ The focus of the withheld information is described in the title of the document in which it is contained - "Getting your Bill through House of Lords". The Commissioner thinks that there is a compelling public interest in improving public understanding of the practicalities of the parliamentary process as described on the UK parliament website which would be served by disclosure in this case. The withheld information is a guide which adds practical illustration to the more limited formal procedural detail currently online.
33. The Commissioner acknowledges the importance of maintaining confidentiality which can enhance the efficient operation of the processes described in the withheld information. However, he does not

³ <http://www.publications.parliament.uk/pa/ld/ldcomp/compso2013/2013co02.htm>

consider that the processes or strategies are unique to the current coalition government (save in one respect referred to below). Similarly, the Commissioner does not think that they are unfamiliar to, for example, the Opposition, such that they require particular protection.

34. That said, the Commissioner acknowledges that there are parts of information which have been correctly withheld under section 35(1)(a). These are listed in a Confidential Annex to this Notice. This information relates to the following areas:
 - specific matters concerning the management of bills during a coalition government which, in the Commissioner's view, require a safe space for communication to relevant parties; and
 - contact and log-in information which assist practitioners in managing the progress of a Bill through the House of Lords.
35. In the case of the first set of information, the Commissioner agrees that there is a public interest in preserving confidentiality in respect of that information which relates to the management of the bill process for a coalition government, while that government is in power.
36. In the case of the second set of information, the Commissioner accepts that the exemption at section 35(1)(a) can be read widely enough to include this sort of information. In context, it provides important contact detail which facilitates the progress of a Bill through the House of Lords. However, there can be little public interest in providing public access to, for example, login details in use at the House of Lords, even if these are changed regularly for security reasons.

Section 35(1)(a)- Conclusion

37. The Commissioner has concluded that the majority of the withheld information engages section 35(1)(a) but that the public interest favours disclosure of this information.
38. The Commissioner has concluded that, of the information which engages section 35(1)(a), a small portion has been properly withheld. The public interest in maintaining section 35(1)(a) in respect of this information outweighs the public interest in disclosure. This information is identified in a Confidential Annex to this Notice.
39. The Commissioner has concluded that there is a portion of the withheld information which is not exempt under section 35(1)(a). It is also identified in a Confidential Annex to this notice.

Section 35(1)(b)

40. This exemption covers information, held by a government department, that relates to ministerial communications. The Commissioner has found that the document isn't a ministerial communication and it does not relate to ministerial communications. The exemption refers to communications between ministers – the Commissioner would accept that this does not mean exclusively between ministers (e.g. other recipients could be included). However, a ministerial communication has to be from a minister and explicitly directed to a minister (or ministers) for it to be classed as "between" ministers. The document in question is a general guide, seemingly for ministers and officials (e.g. Bill Managers), with a forward from a minister and a senior official at the start. In the Commissioner's view the document is not a communication from a minister (e.g. the Chief Whip) to other ministers in terms of how it is directed.
41. The Commissioner has concluded that the withheld information is not exempt under section 35(1)(b).

Section 40(2) – Unfair disclosure of personal data

42. As noted above, the Cabinet Office has identified a small amount of information which is, in its view, exempt under section 40. It argued that this information is personal data. It said that disclosure of the personal data was not "necessary in order to meet the requirements of the request and would not be warranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subjects. It will be evident that the disclosure of these details would prejudice the ability of these officials to carry out their duties".
43. The information at issue here is the names and contact details of officials and special advisers set out in the requested information.
44. The relevant provisions of section 40 are section 40(2) and section 40(3)(a)(i).
45. However, they can readily be summarised as follows: the relevant exemption in section 40 is engaged where disclosure under FOIA of requested information would breach any of the eight data protection principles of the Data Protection Act (DPA).⁴

⁴ <http://www.legislation.gov.uk/ukpga/1998/29/contents>

46. The data protection principles of the DPA only apply to personal data. Personal data is information which relates to a living and identifiable individual and is biographically significant about them.
47. The first data protection principle requires personal data to be processed fairly and lawfully and in accordance with at least one of the conditions for processing listed in Schedule 2 of the DPA. This means, in summary, that if disclosure under FOIA would be unfair, unlawful *or* would not be in accordance with any relevant conditions, that disclosure would contravene the first data protection principle. The information in question would, therefore, be exempt under the personal data exemption.
48. In considering the fairness of disclosure the Commissioner has taken into account the following factors:
 - The expectations of the individuals
 - The possible consequences of disclosure
 - Whether the legitimate interests of the public are sufficient to justify any negative impact on the rights and freedoms of the data subjects
49. This analysis also takes into account the factors which underpin the most relevant condition in Schedule 2 of the DPA, namely condition 6.
50. When considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to take a proportionate approach. This means that it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

Is the information personal data?

51. The Commissioner is satisfied that information showing where a living and identifiable individual works and how they can be contacted there is information which relates to them and is biographically significant about them. The Commissioner is satisfied that, in the context of this case, the names, job titles and contact details of individuals that is provided in the withheld information relates to those individuals and is biographically significant about them. As such, it is personal data which is subject to the provisions of the DPA.

52. The Commissioner has considered the personal data in two groups, the individuals' names and job titles and the individuals' contact details. He has subdivided the first group into "officials' names" and "special advisers' names".

Would disclosure of the officials' names and job titles be unfair?

53. The Commissioner's guidance on personal information states that it is important to draw a distinction between the information which senior staff should expect to have disclosed about them and what junior staff should expect to be disclosed. The rationale for this is that the more senior a person is the more likely it is that they will be have greater responsibility for public affairs as part of their role, including decision making.⁵
54. The Commissioner has concluded that none of the officials who are named in the document would expect the disclosure of their names and that this expectation is reasonable, given the relatively junior roles that they fulfil. As such, disclosure of their names, in the circumstances of this case, would be unfair. However, he is satisfied that their job titles without names is not their personal data. They cannot be identified from the job titles. The provisions of the DPA therefore do not apply and the information cannot be exempt under section 40(2).

Would disclosure of special advisers' names and job titles be unfair?

55. By contrast, the Commissioner thinks that special advisers can reasonably expect their names to be disclosed in this case. Special advisers have a key role in the work of UK parliamentarians. As such, they should expect their connection to a particular matter to be clear. The disclosure of their names and job titles, in the circumstances of this case, would therefore be fair. The Commissioner has also concluded that the legitimate interests of the public in knowing where special advisers are working are also sufficient to justify any negative impact on the rights and freedoms of the special advisers that disclosure might have. He has reached this view in the light of the special advisers' unique role.

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[http://www.ico.gov.uk/for_organisations/freedom_of_information/information_request/~media/documents/library/Data_Protection/Detailed_specialist_guides/PUBLIC_AUTHORITY_STAFF_INFO_V2.ashx&src=IE-Address](http://www.ico.gov.uk/for_organisations/freedom_of_information/information_request/~/media/documents/library/Data_Protection/Detailed_specialist_guides/PUBLIC_AUTHORITY_STAFF_INFO_V2.ashx&src=IE-Address)

He also notes that the names, roles and salaries of special advisers are regularly published online.⁶

Would the disclosure of any contact details be unfair?

56. The Cabinet Office has argued that disclosure of any contact details would be unwarranted because it would prejudice the ability of the individual concerned to carry out their work. The Commissioner thinks that this argument lends itself more closely to the exemption at section 36 – prejudice to the effective conduct of public affairs. However, he accepts that although the officials and the special advisers in question have a role which relates to public affairs, they are not public facing such that they are required regularly to interact with the public. They would therefore have a reasonable expectation that their contact details would not be disclosed. Disclosure of their contact details would, in any event, add very little to the information which, in the Commissioner's view, should be disclosed in this case.

Section 40(2) – Conclusion

57. The Commissioner agrees with the Cabinet Office that the contact details of all the individuals named in the withheld information are exempt under section 40(2). Disclosure of the contact details would be unfair and in contravention of the first data protection principle of the DPA. The Commissioner also agrees that the names of officials are exempt under section 40(2) for the same reason, but not their job titles. Their job titles should therefore be disclosed.
58. He has also concluded that it would not contravene any of the data protection principles of the DPA to disclose the names of special advisers identified in the withheld information. The names of the special advisers are therefore not exempt under section 40(2) and should be disclosed.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/253081/SP_AD_list_Live_UPDATE.pdf

Right of appeal

59. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

60. 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.
61. 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

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