

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 September 2014

Public Authority: The Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested a copy of the terms of reference of Sir Alex Allan's review into the ability and readiness of different government departments to make the transition from the 30 year rule to the 20 year rule. The Cabinet Office refused to provide the requested information on the basis of the exemption contained at section 22(1) of FOIA (information intended for future publication). The Commissioner has concluded that the exemption is not engaged.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of Sir Alex Allan's terms of reference.
3. 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 FOIA and may be dealt with as a contempt of court.

Request and response

4. On 7 February 2014 the complainant submitted a request to the Cabinet Office for a copy of the terms of reference of Sir Alex Allan's review into the ability and readiness of different government departments to make

the transition from the 30 year rule to the 20 year rule as set out in the Constitutional Reform and Governance Act 2010.¹

5. The Cabinet Office responded to the request on 10 March 2014 and confirmed that it held the requested information but that it considered it to be exempt from disclosure on the basis of section 22 of FOIA.
6. The complainant contacted the Cabinet Office on 17 April 2014 and asked for an internal review of this decision.
7. The Cabinet Office informed him of the outcome of the review on 6 June 2014; this upheld the application of section 22.

Scope of the case

8. The complainant contacted the Commissioner on 6 June 2014 in order to complain about the Cabinet Office's decision to withhold the requested information on the basis of section 22(1).

Reasons for decision

Section 22 – information intended for future publication

9. Section 22(1) of FOIA says that information is exempt if it at the time a public authority receives a request for it:
 - the public authority holds it with a view to its publication;
 - the public authority or another person intends to publish the information at some future date, whether determined or not; and
 - in all the circumstances it is reasonable to withhold the information prior to publication.
10. The Commissioner has considered each part of the exemption in turn.

¹ The Cabinet Office had announced that such a review was to take place in a statement given by the Foreign Secretary on 4 February 2014.

<https://www.gov.uk/government/speeches/statement-on-the-indian-operation-at-sri-harmandir-sahib-in-1984> - See the second to last paragraph of the Foreign Secretary's statement.

Does the Cabinet Office hold the information?

11. It is clear that the Cabinet Office holds a copy of Sir Alex Allan's terms of reference.

Did the Cabinet Office intend to publish the terms of reference at some future date when it received the request?

12. The Cabinet Office explained that it was usual for the terms of reference for such commissions to be published as part of any final published version of the report and this was indeed the position with the requested information in this case. As evidence of this intention the Commissioner was provided with a copy of the draft version of the report itself. This draft version includes a copy of the terms of reference.
13. In light of this the Commissioner is satisfied that at the point this request was submitted, the Cabinet Office had a settled intention to publish the terms of reference as part of the final report.

Is it reasonable in all the circumstances for the Cabinet Office to withhold the requested information prior to publication?

14. In considering whether it is reasonable to withhold information prior to publication the Commissioner considers that public authorities should take into account whether or not it is:
- Sensible,
 - In line with accepted practices, and
 - Fair to all concerned to withhold the information prior to publication.
15. More broadly, public authorities may need to consider whether the following points are relevant:
- Is it right to manage the availability of the information by planning and controlling its publication?
 - Is it necessary to avoid any advantage that would be obtained by the requester in obtaining the information prior to general publication?
 - Does the timetable properly require internal or limited consideration of the information prior to its public release?
 - Having made the decision to publish the information, are there real difficulties in extracting the information prior to publication?
 - Is this information that should be available through the publication scheme?
16. The Cabinet Office explained that the review was commissioned by the Prime Minister in response to the release of documents as part of the

Cabinet Secretary's investigation into the Indian Operation at Sri Harmandir Sahib in 1984.² Sir Alex Allan, the Prime Minister's Independent Adviser on Ministerial Standards, was appointed for a short period of time to conduct the review. The Cabinet Office explained that due to this short timescale the Cabinet Office did not publish the terms of reference as to do so would have diverted resources away from Sir Alex Allan's work, delaying the momentum of the review.

17. The Cabinet Office also added that in its view publication of the terms of reference, on their own, would add little in the way of substantive information that would be useful to the public. Rather, publication of the terms of reference, alongside the report itself would be more informative and provide context to the review's scope and goals. Thus disclosure of both the report and terms of reference at the same time would allow all interested parties to engage in a fully informed, open debate concerning the successes or shortcomings of individual departments. The Cabinet Office argued that this could not be achieved if part of the information was disclosed to a single individual prematurely.
18. Finally the Cabinet Office noted that the terms of reference were very closely reflected in the statement made by the Foreign Secretary on 4 February 2014 when he announced that the Sir Alex Allan had been asked to undertake the review in question.
19. Having considered the Cabinet Office's submissions, the Commissioner does not accept that, once the request for them had been received, it was reasonable in all of the circumstances to withhold the terms of reference of Sir Alex Allan's review pending the publication of the completed review itself. He has reached this decision for the following reasons:
20. Firstly, although the Cabinet Office has suggested that publication of the terms of reference would have diverted resources away from the review it has not explained how, or why, this would in fact be the case. In other words it has failed to clearly explain the actual harm to the review from early disclosure of the terms of reference. There is nothing inherent in the withheld information to suggest that any such harm would arise.

² On 13 January 2014 the Cabinet Secretary was asked by the Prime Minister to lead an urgent review into allegations of UK involvement in the Indian operation at Sri Harmandir Sahib, Amritsar in June 1984. His final report was published on 4 February 2014.

21. Secondly, the Commissioner notes that the content of the terms of reference are to some extent already in the public domain by virtue of the Foreign Secretary's statement. Thus it is difficult to see how publication of the actual terms of reference would have been likely to divert resources away from the review itself.
22. Thirdly, the Commissioner accepts that disclosure of the terms of reference, alongside the final version of the report, would of course prove to be more informative than simply publication of the terms of reference on their own. However, in the Commissioner's view the publication of the terms of reference, prior to the review being completed, would not in any way impact on the nature of the debate once the final report is published.
23. Furthermore, the Commissioner would dispute the Cabinet Office's suggestion that complying with this request would equate to disclosure of information to a 'single individual' given that a disclosure under FOIA is considered to be akin to placing information in the public domain. The point is reinforced in this case by the fact that the requester is a renowned investigative journalist for a major national newspaper. It is unlikely that the information has been requested for purely personal use. In any event, if there were no further disclosure beyond the individual requester, the arguments advanced (but not accepted) about the impact of wider disclosure fall away.
24. Finally, given the subject matter of the requested information – ie relating directly to issues of government transparency – the Commissioner cannot accept that it is a sensible suggestion to withhold the terms of reference until the final report is published, especially when in his view the 'premature' publication of such information would not, in any obvious or clear way, actually undermine the ongoing review itself.
25. Consequently, as the Commissioner does not accept that it is reasonable in all the circumstances of the request for the Cabinet Office to withhold the terms of reference prior to the publication of Sir Alex Allan's final report, he has concluded that section 22(1) is not engaged.
26. Although he has decided that the exemption is not engaged, the Commissioner notes that this is a qualified exemption, subject to the public interest test. Even if the exemption were engaged, the Commissioner considers that there to be a clear public interest in transparency in relation to the precise terms of reference of the review, whereas the public interest in delaying publication is negligible.

Right of appeal

27. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

28. 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.
29. 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
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF