

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2016

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested information relating to the Airports Commission. The Cabinet Office refused to provide this citing section 35(1)(a) and section 40(2) as its basis for doing so. These exemptions relate to the formulation and development of government policy and the unfair disclosure of personal data. It upheld this position at internal review.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on these exemptions as its basis for refusing to provide the requested information.
3. No steps are required.

Request and response

4. On 9 September 2015, the complainant requested information of the following description:

"I would like to make a request for information under the Freedom of Information Act.

I would like all records of proposals and discussions, both within the Cabinet Office/Number 10 and between the Cabinet Office/Number 10 and the Treasury, the Department for Transport and Sir Howard Davies concerning:

- 1) the proposed task and terms of reference for what became known as the Airports Commission, including the issues it was expected to take into account, up to the publication of the final terms of reference on 2 November 2012.
 - 2) the selection of members for what became known as the Airports Commission, including Sir Howard Davies, up to the announcement of its membership on 2 November 2012."
5. On 14 October 2015, the Cabinet Office responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
- section 35(1)(a) (formulation/development of government policy)
 - section 40(2) (unfair disclosure of personal data)
6. The complainant requested an internal review on 15 October 2015. The Cabinet Office sent him the outcome of its internal review on 18 November 2015. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 3 December 2015 to complain about the way his request for information had been handled. He disputed the balance of public interest struck by the Cabinet Office.
8. During the course of the Commissioner's investigation, the Cabinet Office sought to rely on provisions of section 36 where the Commissioner found that section 35 was not engaged.
9. The Commissioner has therefore considered the exemptions cited by the Cabinet Office in support of its position.

Reasons for decision

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

10. The Cabinet Office argued that most of the withheld information was exempt from disclosure on the basis of section 35(1)(a) of FOIA. This exemption states 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'

11. 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.
12. 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.
13. 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.
14. 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.
15. The Cabinet Office argued that the government policy to which the information relates is the policy on the make-up of and terms of reference for the Airports Commission. It explained that the "Airports Commission was established to inform government policy about the expansion of aviation capacity and that information relating to its work and establishment (including appointments and terms of reference) relates to policy development and clearly falls within the scope of the exemption."

16. As the Commissioner's guidance on this exemption explains, a variety of different processes can encompass government policy making.¹ In the particular circumstances of this case the Commissioner is persuaded that the information in question is an example of policy development. In reaching this view he has had particular regard to the three bullet points listed above.
17. The Commissioner is therefore satisfied that the information is exempt from disclosure on the basis of section 35(1)(a) of FOIA.

Public interest test

18. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

19. The Cabinet Office acknowledged to the Commissioner that there was a public interest in transparency and accountability. It had explained in its letter of refusal to the complainant that

"In addition, the terms of reference and the priorities for the Commission are publicly available at:
<https://www.gov.uk/government/organisations/airports-commission>, which decreases the public interest in disclosure of information relating to the development of this information"

20. The complainant was sceptical about what he considered to be generic arguments from the Cabinet Office and said:

"The only observation relevant to the specific information is that the final terms of reference etc are in the public domain. There is no logic in arguing that this decreases the public interest in the development of this information. It might equally be argued that the publication of the final terms of reference etc diminishes the negative impact of publishing information relating to its development".

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

Public interest arguments in favour of maintaining the exemption

21. The Cabinet Office stressed the importance of maintaining a “safe space” for policy development. It explained that the government’s response to the Commission’s findings had yet to be published and so the matter remained live. A safe space for discussion ensures greater candour which, in turn, enhances policy development.
22. With specific reference to the withheld information, it illustrated the importance of maintaining a safe space in which the membership of the Commission and its proposed terms of reference were discussed.
23. It also stressed that the development of aviation policy related to a subject of national importance. This, in its view, strengthened the public interest in protecting the safe space in which it is discussed.

Balance of the public interest test

24. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments made in a key Information Tribunal decision involving the application of the section 35(1)(a). 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 test: firstly the timing of the request and secondly the content of the requested information itself.²
25. At the time of the request, the government had yet to publish its response to the Airport Commission. The Commissioner notes that there has already been a considerable amount of information put into the public domain about the deliberations of the Commission itself.³ However, he does not consider that this undermines the Cabinet Office’s position in this case. He accepts the link between the information and the development of government policy on aviation matters and he also accepts that this policy was in development at the time of the request because the government’s response to the Commission’s report has yet to be published.
26. In the Commissioner’s view, it is strongly in the public interest to protect the safe space in which policy is being developed while that matter is still live. This is particularly the case with respect to the development of

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

³ <https://www.gov.uk/government/publications/airports-commission-documents-and-data>

a national aviation policy, the impact of which is likely to be wide and long-lasting. The Commissioner recognises that the complainant is seeking information which relates to the early stages of the policy development process and, at the time of the request, policy development was at a later stage. The information relates not simply to policy making in respect of the make-up and terms of reference of the Commission, but also to the much broader policy development on aviation matters, eg, the location of a further airport runway. It is important to protect the safe space in which that policy is developed.

27. The Commissioner also recognises the complainant's point that the terms of reference (the primary subject of the complainant's request) are in the public domain. This feeds into the second point considered by the Tribunal regarding the need to consider the content of the information. The Commissioner agrees that weight can be attached to the point raised by the complainant in considering the balance of public interest. However, the Commissioner does not agree that it carries more weight when compared to the public interest in protecting the safe space in which live matters of national importance are discussed.
28. Therefore, in light of the above, the Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this view he has given particular weight to the timing of the request.

Section 40(2)

29. Section 40(2) applies where disclosure of personal data within the scope of the request (which is not the requester's personal data) would breach any of the data protection principles of the Data Protection Act 1998 ("DPA").⁴ The data protection principle most relevant here is the first data protection principle. This principle requires that personal data is processed fairly and lawfully and in accordance with certain conditions set out in Schedule 2 of the DPA. The most relevant condition is Condition 6. This addresses whether the processing in question (in this case, disclosure under FOIA) is necessary for the legitimate interests of one party (in this case, the public to whom information is disclosed under FOIA). This same processing can only take place where it does not cause unwarranted prejudice to the legitimate interests of the person the information is about (the subject of the personal data).

⁴ <http://www.legislation.gov.uk/ukpga/2000/36/section/40> and <http://www.legislation.gov.uk/ukpga/1998/29/schedule/1>

30. Just because information is personal data does not mean it would be unfair to disclose it under the FOIA. Section 40 does not automatically apply to all personal data within the scope of requested information.
31. Taking each stage in turn, the Commissioner first looked at whether the information in question was personal data. Personal data is information relating to a living, identifiable individual which is biographically significant about them.
32. The Cabinet Office identified each category of named individual. The categories reflect the information described in the request. These are named officials and other individuals.
33. The Commissioner is satisfied that the information in question is personal data. In the case of the named officials it indicates both their place of employment and the fact of their involvement with the matter covered by the request. In the case of other individuals, the information also indicates their connection to this matter.
34. The Commissioner then looked at whether disclosure would contravene the first data protection principle.
35. The Commissioner considers the fairness aspect of the first principle first. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
 - The reasonable expectations of the individual in terms of what would happen to their personal data,
 - The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed?
36. Even if a disclosure would fall outside of the expectations of the individual and would cause him or her detriment it may still be fair to disclose the information if it can be demonstrated that there is a pressing social need for the information to be disclosed.
37. The first point to note is that the withheld information includes the names of very senior civil servants. In the Commissioner's view, the only matter for consideration here is the disclosure of their names. All other information such as the content of their communications is exempt under section 35(1)(a) for the reasons given above. Disclosure of their names, while not, strictly speaking, unfair, is rendered meaningless in the circumstances of this case by the fact that all other information around their names eg the content and date of their communications, is exempt.

38. In respect of all the other personal data in question, the Commissioner is satisfied that disclosure would be outside the reasonable expectations of the individuals in question. There are three groups who would fall into this category: junior officials; those proposed but not eventually nominated for a role in the Airports Commissioner; other named individuals.
39. The junior officials named in the information do not have outward-facing roles and the Commissioner accepts that the disclosure of their personal data has no useful purpose in this context.
40. As regards the individuals named but not eventually nominated for a role in the Airports Commission, the Commissioner accepts that there is some legitimate interest in understanding who was considered but not appointed. However, he considers that it would be wholly unfair and outside the reasonable expectations of those individuals to disclose their names in this case. This is particularly so given that the matter was live at the time of the request as set out in the Commissioner's analysis of section 35 above. This, in the Commissioner's view, adds to the reasonableness of the individuals' expectations that the information would not be disclosed.
41. There are other individuals whose personal data appears in the withheld information. Again, the Commissioner agrees that it would be outside the reasonable expectations for the names of those individuals to be disclosed. As above, the fact that the information relates to a matter that was live at the time of the request adds weight to the reasonableness of those expectations.
42. The Commissioner accepts that there is a legitimate interest in knowing more about who has a substantive connection to the matter. However, while the matter remains live, he does not consider this overrides individuals' reasonable expectations that their personal data would not be disclosed. Once the matter has concluded these factors may be weighed differently.
43. The Commissioner has therefore concluded that disclosure of the information in question would contravene the first data protection principle. The Cabinet Office is therefore entitled to rely on section 40(2) in respect of the personal data to which it has applied this exemption.

Right of appeal

44. 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

45. 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.
46. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF