

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 December 2016

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for copies of briefings prepared for The Parliamentary Secretary, Cabinet Office in advance of Parliamentary debates relating to the introduction of individual electoral registration by the last Coalition Government.
2. The Commissioner's decision is that the public authority was not entitled to rely on the exemption contained at section 35(1)(a) FOIA.
3. The Commissioner also finds the public authority in breach of the procedural requirement in section 10(1) FOIA.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
5. 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. The complainant submitted a request for information to the public authority on 21 April 2016 in the following terms:

"I am interested in assessments of the risks involved in the change to individual electoral registration.

In this respect, I should like to see the briefing prepared for:

- i. the Parliamentary Secretary Cabinet Office for the Second Reading in the House of Commons of the Electoral Registration and Administration Bill on 23 May 2012.
 - ii. the Parliamentary Secretary Cabinet Office for the Electoral Registration and Administration Act 2013 (Transitional Provisions) Order 2015 – Motion to annul [House of Lords] on 27 October 2015."
7. The public authority issued its response to the request on 20 June 2016. It advised the complainant that it held the information requested. It further advised that it considered *some* of the information requested exempt from disclosure on the basis of the exemption contained at section 35(1)(a) FOIA. The public authority also informed the complainant that the substance of pre-prepared speeches which form part of the information within the scope of his request predominantly reflect what was said during Parliamentary debates relating to the Electoral and Administration Bill and on the transitional provisions in the 2013 Act. It provided the complainant with links to the full transcripts of the debates on Hansard.¹
8. The complainant requested an internal review on 21 June 2016.

The public authority wrote back to the complainant on 13 July 2016 with details of the outcome of the internal review. It upheld the original

¹ <https://hansard.digiminster.com/Commons/2012-05-23/debates/12052368000001/ElectoralRegistrationAndAdministrationBill?highlight=electoral%20registration%20administration%20bill#contribution-12052368000411>

[https://hansard.digiminster.com/Lords/2015-10-27/debates/15102747000445/ElectoralRegistrationAndAdministrationAct2013\(TransitionalProvisions\)Order2015](https://hansard.digiminster.com/Lords/2015-10-27/debates/15102747000445/ElectoralRegistrationAndAdministrationAct2013(TransitionalProvisions)Order2015)

decision. The review however clarified that the exemption at section 35(1)(a) was applied to all the requested information, not just some of the information as was originally stated.

Scope of the case

9. The complainant contacted the Commissioner on 18 July 2016 in order to complain about the public authority's decision to rely on the exemption at section 35(1)(a) to withhold the information requested. He provided the Commissioner with submissions to support his view that the information requested ought to have been disclosed and the Commissioner has referred to these submissions at the relevant parts of her analysis below.
10. During the course of her investigation, the Commissioner asked the public authority to consider whether any information could be released to the complainant pursuant to the requirement in section 35(2)(a) FOIA.² The public authority subsequently disclosed some statistical information to the complainant but did not explicitly state to the Commissioner that the information had been disclosed pursuant to section 35(2)(a).
11. Consequently the scope of the investigation was limited to determining whether the public authority was entitled to rely on the exemption at section 35(1)(a) to withhold the requested information that has not been disclosed to the complainant (the withheld information).

Reasons for decision

Background

12. The Electoral Registration and Administration Bill 2012 was introduced by the Coalition Government in May 2012 in order to provide for the introduction of compulsory individual electoral registration (IER) for those wishing to vote by post or by proxy in 2014, and compulsory IER for all registrations by 2015. The IER replaced the old system of household registration whereby the "head of the household" was

² Section 35(2)(a) states that once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of decision is not to be regarded as relating to the formulation or development of government policy.

required to register all residents of the household who are eligible to vote. The Bill was enacted on 31 January 2013 as the Electoral Registration and Administration Act 2013.

13. Under the Transition arrangement in the 2013 Act, registered voters whose details could be verified from the government's database were automatically transferred to the new system. The remainder were initially required to prove their identity by December 2016 in order to remain on the electoral register. However, this was subsequently brought forward by the government to December 2015³ despite the Electoral Commission's recommendation that the original cut off period should remain in place.⁴

Section 35(1)(a)

14. Section 35(1)(a) states:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy."

15. The Commissioner has inspected the withheld information and is satisfied that it relates to the development of policy on electoral registration, specifically the transition from household registration to IER. She has therefore concluded that the withheld information engages the exemption at section 35(1)(a).

Public interest test

16. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore also considered whether in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

³ <https://www.gov.uk/government/speeches/individual-electoral-registration-ending-the-transition>

⁴ [https://hansard.digiminster.com/Lords/2015-10-27/debates/15102747000445/ElectoralRegistrationAndAdministrationAct2013\(TransitionalProvisions\)Order2015](https://hansard.digiminster.com/Lords/2015-10-27/debates/15102747000445/ElectoralRegistrationAndAdministrationAct2013(TransitionalProvisions)Order2015)

http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/190464/IER-June-report.pdf

Public interest arguments in favour of disclosing the withheld information

17. The public authority acknowledged that there was a general public interest in openness in government, and recognised that this would increase trust in and engagement with the government. It noted that the decisions government takes may have a significant impact on the lives of citizens and therefore recognised the public interest in deliberations leading up to decisions being transparent.
18. The complainant stressed that he has always considered individual registration a desirable change because it introduces greater autonomy and accuracy into the system of registration. However, he argues that this needs to be balanced against the damage it does to the completeness of the electoral register. He submitted that the Electoral Commission, in its latest assessment (ie as at July 2016 when the complaint was submitted), suggested that nearly 7 million eligible voters could not vote because they were not on the register and there had been a decline in those numbers by only 1% between June 2014 and December 2015.
19. He pointed out that the accuracy and completeness of the electoral register and how it is maintained directly affects the ability of citizens to participate in elections and consequently the outcome of those elections. The issue he argued is therefore one of fundamental importance to the UK's democratic arrangements. He also submitted that there is "widespread belief that the government was motivated, at least in part, by considerations of partisan advantage" in introducing IER. The complainant argues that despite this, the government has refused to answer specific questions which address such suspicions, in particular, how they have balanced the priorities of accuracy and completeness in the register. Therefore, under these circumstances, it is in the public interest for there to be greater transparency in the "government's reasons for making the changes in the particular way they did."

Public interest arguments in favour of maintaining the exemption

20. The public authority has argued there is a strong public interest in maintaining the exemption because Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications. It further argued that if such briefings were routinely made public or revealed prematurely while they were still subject to discussion, there is a risk that officials may feel inhibited from being frank and candid with Ministers. Consequently, the quality of debate and advice would decline leading to less informed and poor decisions.

21. With regards to the timing of the request, the public authority submitted that electoral registration is an on-going policy issue and the government is currently developing and delivering a programme of change to electoral registration in Great Britain. It submitted that Parliamentary interest in "registration issues" is continuous as demonstrated by regular questions, debates and reports. It provided the Commissioner with links to recent related Parliamentary questions and debates.⁵ It argued that the withheld information is relevant to planned changes to legislation and is linked to politically sensitive issues such as the Boundary Review, and electoral fraud. Therefore, while it is the case that the briefings relate to debates that have occurred, the issues discussed in the debate are still live.
22. The public authority further submitted that disclosing the withheld information would be prejudicial to the operation of Parliamentary scrutiny. It argued that the precedent of releasing briefing material for debates would create a situation whereby government Ministers would have their briefing material subject to the prospect of disclosure while the opposition would not be subject to the same prospect. Ministers would as a result be less informed before participating in Parliamentary debates than would be the case without the concern that such information would be released. This would fundamentally affect the balance of the debate process to the detriment of the effective scrutiny of the executive by Parliament.
23. The public authority also argued that, given that the substance of the speeches within the scope of the request had been released, there was very little public interest in disclosing draft versions compared to the potential prejudice that would result. It argued that disclosure could lead to inferences being drawn as to why certain elements were not part of the final versions.

Balance of the public interest arguments

24. The Commissioner considers that there is a strong public interest in disclosing the withheld information in view of the concerns raised regarding the completeness of the electoral register following the decision to bring forward the cut off period for transition. She shares the

⁵ <https://hansard.parliament.uk/commons/2016-09-07/debates/16090720000014/BoundaryCommission>

<https://hansard.parliament.uk/Commons/2016-06-29/debates/16062973000002/AutomaticRegistrationUKElections>

view that it is fundamentally important to the democratic process to have an electoral register that is as complete as possible.

25. Furthermore, given the significant number of people affected by the change from household registrations to IER and the view in some quarters that if not implemented properly, the new system of registration could disenfranchise a sizeable part of the population, disclosure of the withheld information would further inform the debate regarding the merits or otherwise of the new system and the pace of its implementation. Clearly Parliament has already considered the merits or otherwise of IER hence the enactment of the 2013 Act. However, given the competing priorities of accuracy and completeness and the significant impact either could have on the electoral process or the perception of it, there is a strong public interest in the government being open and transparent about how it addressed related concerns during internal deliberations leading up to the introduction of IER.
26. In the Commissioner's view, the enactment of a policy will more often than not signal the end of the policy formulation or development process. She considers that 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. She does not accept that there is inevitably a continuous process or seamless web of policy review and development.
27. Consequently, she has attached very little weight to the suggestion that the development of policy in relation to IER is still on-going. Clearly, it remains relevant to discussions about the cut off period for transition, electoral fraud and the ongoing review of Parliamentary constituencies by the Boundary Commission. However, the public authority has not been clear regarding the basis upon which it considers that the policy development process in relation to IER is still live in view of these related matters. In any event, the Commissioner considers that the ongoing boundary review actually increases the weight of the public interest in disclosing the withheld information given the importance of the electoral register to any proposed boundary changes. Similarly, the on-going debates concerning the cut off period for transition illustrate why there is a strong public interest in disclosing information which will inform these discussions. The withheld information relates specifically to the introduction of IER, which has now been enacted and its implementation well advanced.
28. In the circumstances the Commissioner has attached very little weight to the view that disclosure could result in a chilling effect on free and frank discussions given that the withheld information relates to a policy which is at a very advanced stage of implementation. She should emphasise that she is not dismissive of the view that IER is relevant to

the matters briefly touched upon – ie – the transition period, boundary review and electoral fraud. However, in the absence of specific submissions from the public authority on how the withheld information or any part of it relates to these matters in the context of policy formulation or development, she is not prepared to accept that disclosure of the withheld information which clearly relates to the introduction of IER which has now concluded could have a chilling effect on free and frank discussions more widely. The Commissioner is very mindful of some of the wider implications of IER. However, to describe these on-going discussions on matters which could be affected by IER as relating to the development of government policy on electoral registration implies that the process is continuous and seemingly endless.

29. The Commissioner does not consider that disclosure of the withheld information in the particular circumstances of this case would set a precedent for routine disclosure of briefing materials prepared for Ministers pursuant to Parliamentary debates. She is well aware of the damaging impact that disclosure of briefing materials prepared for Ministers in advance of Parliamentary debates could ultimately have on effective Parliamentary scrutiny.
30. In terms of the draft versions of the speeches, the public authority is clearly able to provide additional information to inform the disclosure of information it considers could lead to inaccurate inferences being drawn.
31. Having carefully considered the arguments from both sides, the Commissioner has concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the withheld information.

Procedural breach

32. A public authority is required to respond to an applicant's request for information promptly and in any event no later than 20 working days following the request, by virtue of the provision in section 10(1) FOIA.
33. The Commissioner therefore finds the public authority in breach of section 10(1) for taking more than 20 working days to respond to the complainant's request.

Right of appeal

34. 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

35. 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.
36. 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