

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 15 June 2009

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

Summary

The complainant requested the minutes and supporting documents relating to the last Cabinet meetings of Margaret Thatcher and John Major. The Cabinet Office stated that the requested information was exempt under sections 35(1) (a) and (b) and section 27(1) (c) and that the public interest favoured maintaining the exemptions. The Commissioner has investigated and has found that the exemptions at section 27 and 35 are both engaged. He also found in respect of the material held under each exemption that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant has advised that on 20 February 2006 he made the following request for information to the Cabinet Office:

"Please disclose under the terms of the Freedom of Information Act the minutes and / or other documents relating to the very last cabinet meetings chaired by (a) Margaret Thatcher and (b) John Major."

2. The Cabinet Office responded on 7 March 2006 confirming that it held information relevant to the request but that it was being withheld under section 35 of the Act.

In balancing the public interest the Cabinet Office found that the public interest lay in maintaining the exemption.

3. On 7 March 2006 the complainant requested an internal review of the decision to withhold the requested information.
4. The Cabinet Office conducted an internal review and communicated its findings to the complainant on 10 April 2006. The Cabinet Office upheld the decision to withhold the requested information under section 35 of the Act.

The Investigation

Scope of the case

5. On 25 April 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the application of section 35 to the requested information.

Chronology

6. Regrettably, due to the volume of complaints at the Commissioner's office, there was a delay of more than a year before the investigation into the complaint began. On 29 June 2007 the Commissioner began his investigation by writing to the Cabinet Office. In his letter the Commissioner asked the Cabinet Office for further explanation regarding the application of the exemption and for a copy of the information being withheld.
7. The Cabinet Office responded on 19 July 2007. The Cabinet Office explained that due to the sensitivity of the requested information it would be preferable for the Commissioner to view the information at the Cabinet Office. The Cabinet Office provided further explanation regarding the application of section 35(1) (a) (b) to the minutes and also explained that in addition to the minutes of the meetings a memorandum was considered at both meetings falling within the scope of the request for 'the minutes and / or other documents'. The Cabinet Office explained that section 35(1) (a) and (b) also applied to both memoranda and in addition, the memorandum considered by the Margaret Thatcher cabinet meeting was also exempt by virtue of section 26 (prejudice to defence).
8. The Commissioner wrote again on 7 August 2007 asking the Cabinet Office to supply a list of the subjects discussed at both Cabinet meetings and to elaborate on the public interest arguments considering the specific information contained within the minutes.
9. The Cabinet Office responded on 24 August 2007 providing the Commissioner with a list of the subjects under discussion at both cabinet meetings. The Cabinet Office provided more information on the application of the public interest test.

10. The Commissioner wrote on 19 September 2007 to arrange a viewing of the withheld information and on 11 October 2007 the Commissioner viewed the information at the Cabinet Office.
11. The Commissioner wrote to the Cabinet Office on 12 November 2007 explaining his initial view on the application of section 35 and inviting the Cabinet Office to make further representations on the arguments so far considered.
12. The Cabinet Office responded on 3 December 2007 explaining to the Commissioner that it still believed that section 35(1) (b) applied to all the information being withheld. However, on further consideration of the minutes the Cabinet Office also wished to apply section 26 and 27 (prejudice to international relations) to some of the information.

Findings of fact

13. The complainant's request is for the minutes of the last Cabinet meetings chaired by Margaret Thatcher and John Major and any supporting documents. The meetings took place on 22 November 1990 and 20 March 1997 respectively.
14. The information being withheld consists of:
 - The minutes of the last meeting of Margaret Thatcher's Cabinet and the last meeting of John Major's Cabinet. These are being withheld under section 35(1) (b) in their entirety. In addition the Cabinet Office are withholding some information under section 35(1) (a), 27(1) (c) and 27(2).
 - A memorandum attached to the minutes of Margaret Thatcher's last Cabinet meeting. This is being withheld under section 35(1) (a) and (b), 27(1) (c) and 27(2) and section 26.
 - A memorandum attached to the minutes of the John Major's last Cabinet meeting. This is being withheld under section 35(1) (a) and (b).

Analysis

Exemption: Section 27 'International Relations'

15. Section 27 (1)(c) states that information is exempt information if its disclosure under the Act would, or would be likely to; prejudice the interests of the United Kingdom abroad.
16. 27(2) states that information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.
17. The Cabinet Office explained that it considers that the information is exempt under section 27(1)(c) and section 27(2). In support of its application of both exemptions the Cabinet Office explained that the conclusions reveal candid assessments of other nations, both allies and others. The Cabinet Office also

explained that within the minutes there are instances which reveal the views of foreign powers that have been provided to Her Majesty's Government with an expectation of confidentiality. The Commissioner has viewed the information and accepts that the information does reveal views of foreign powers and accepts that these views have been provided with an expectation of confidentiality. The Commissioner therefore accepts that section 27(2) is engaged. Section 27(1)(c) is a prejudice based exemption and for this to be engaged the Cabinet Office must demonstrate how the information would, or would be likely, to prejudice the interests of the United Kingdom abroad.

18. The Commissioner has considered the Tribunal decision EA/2005/005 *John Connor Press Associates vs. The Information Commissioner*. The Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (paragraph 15). This was further expanded in the Tribunal decision *Hogan vs. the Information Commissioner EA/2005/0026 and Bexley vs. the Information Commissioner EA/2006/0060*.
19. In these cases the Tribunal considered what was meant by "would be likely to prejudice" and when a prejudice based exemption might apply. The Tribunal found that 'prejudice must be real, actual and of substance', it went on to explain that there are two alternative ways in which disclosure can be said to prejudice and that one of these must be shown. Where prejudice 'would be likely to occur' the likelihood need not be more probable than not, though it should be real and significant; where prejudice 'would' occur, the change should be greater – more probable than not.
20. Having viewed the information to which the Cabinet Office has applied section 27(1) (c) the Commissioner is satisfied that disclosure would be likely to prejudice the interests of the United Kingdom abroad. The Commissioner accepts that release of the high level opinions and candid assessments of the other nations, contained within the minutes of both Cabinet meetings and the memorandum attached to the minutes of the Margaret Thatcher Cabinet meeting, could well prejudice the government's relations with those countries, relations between the UK and other states and the interests of the UK abroad. The topics discussed to which section 27 is applied still have relevance today. The recorded information not only reflects the UK's approach to certain situations and the options considered for potential action, but also reveal the views of foreign states to their own and other states' positions.
21. The Commissioner recognises that disclosure of the requested information could prejudice the government's ability to have candid discussions and exchanges with the international community, thereby prejudicing the interests of the UK abroad.

Public Interest Test

22. Section 27 is a qualified exemption and the Commissioner must therefore consider if the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information.

23. The Cabinet Office recognised that there is a public interest in understanding how Britain conducts its foreign policies and in promoting better informed public discussion of the United Kingdom's relations with other nations. However, the Cabinet Office also recognised that there is a public interest in Her Majesty's Government being able to pursue its national interests. This is more likely to be successful if it retains the trust of its international partners by respecting their confidences by not releasing high level opinions and candid assessments which may cause them offence.
24. In relation to the memorandum attached to the minutes of Margaret Thatcher's last Cabinet meetings, the Cabinet Office acknowledged that there is a general public interest in greater transparency in how Government operates and in members of the public being able to understand important issues faced by the nation. However, the Cabinet Office concluded that there is a strong public interest in the government not disclosing information which could prejudice international relations.
25. The Commissioner has considered the arguments both for and against maintaining the exemption in this case. The Commissioner recognises that there is a strong public interest in promoting public awareness of the issues discussed at Cabinet meetings in relation to the topics considered exempt under section 27. However; he does not believe that this outweighs the importance of leading politicians in the United Kingdom and abroad being able to exchange and consider honestly and candidly their respective views of international affairs. It is important that the Cabinet can be open, frank and candid when discussing issues of international significance with the knowledge that these honest assessments will remain private. Whilst the Commissioner has considered the passage of time elapsed since the meetings took place, he accepts that the topics discussed remain sensitive and the candid analysis of other states could cause significant damage to international relations. This would clearly not be in the public interest.
26. The Commissioner therefore finds that sections 27(1) (c) and section 27(2) are engaged and that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
27. The memorandum considered by Margaret Thatcher's Cabinet was withheld under section 26 in addition to section 27. As the Commissioner has found that section 27 is engaged in respect of this information and the public interest balance lies in maintaining that exemption, he has not gone onto consider the application of section 26.

Exemption: Section 35 'Formulation or Development of Government Policy'

28. Section 35(1) (b) provides that information held by government departments is exempt information if it relates to ministerial communications. Section 35(5) defines 'ministerial communications' as any communication between a Minister of the Crown and,

"includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern

Ireland Assembly, and proceedings of the Executive Committee of the National Assembly for Wales.”

29. The scope of the exemption covers not only the formal minutes of Cabinet meetings, committees of the Cabinet and the two Executive Committees but also includes information relating to timing, agendas, memoranda and other tabled papers.
30. Section 35(1) (a) provides that information held by government departments is exempt if it relates to the formulation or development of government policy.
31. Section 35 is a class based exemption. This means that there is no need to consider whether any prejudice would be caused by the disclosure of the requested information. To engage the exemption, the information in question must simply fall within the definition of ministerial communications.
32. The Commissioner finds that the minutes of the two Cabinet meetings and the memorandum considered by the two meetings fall within the definition of 'ministerial communications' and are therefore exempt by virtue of Section 35 (1) (b).
33. The Cabinet Office have also stated that some parts of the information, where the Cabinet is discussing on-going policy considerations, is exempt under section 35(1) (a).
34. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
35. The Commissioner, having viewed the requested information is satisfied that, in addition to section 35(1)(b), section 35(1) (a) is engaged to the parts of the minutes which relate to policy considerations.

Public Interest Test

36. Section 35 is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore consider where the balance of public interest lies and decide if the public interest in maintaining the exemption outweighs the public interest in disclosure.
37. The Cabinet Office has acknowledged that there is a public interest in disclosing information which would enable: greater transparency in how Government operates; the public to assess the quality of debate between ministers and the quality of decision making; improved capability for the public to contribute knowledgeably to debate. It has also acknowledged the special historic interest in

the withheld information being the records of the last Cabinet meetings of these administrations.

38. The Cabinet Office argued that the exemptions at section 35(1) (a) and (b) are designed to protect the way in which government ministers communicate with each other and conduct the business of government through the cabinet system. The Cabinet Office explained that this protection is outlined in the convention of 'collective responsibility' (the convention) and that the maintenance of this convention is fundamental to the continued effectiveness of cabinet government and that this continued effectiveness is therefore in the public interest.
39. The general principle of collective responsibility is outlined in the 'Ministerial Code':

"Collective responsibility requires that Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and Ministerial Committees, including in correspondence should be maintained."

The Code goes on to state that 'the internal process through which a decision has been made, or the level of committee by which it was taken should not be disclosed'.

40. The Cabinet Office state that disclosure of discussions between ministers in Cabinet would undermine this and that ministers should be able to discuss freely and frankly in private in the expectation that when decisions have been reached they will present a united front.
41. The Cabinet Office argue that in order to safeguard the convention of collective responsibility it must be consistently applied and therefore if it were only information which revealed disagreement between ministers that was withheld it would become clear that where information is withheld there must have been disagreement.
42. The harm caused by disclosure of cabinet minutes and papers, the Cabinet Office argue, would be twofold: specific relating to the subject under discussion; and general relating to damage to the convention of collective responsibility. If ministers cannot be confident that their discussions will be protected they may seek to have important discussions outside of the confines of meetings or encourage discussions to be less than fully recorded. This, they argue, would be contrary to the principles of good government and therefore not in the public interest.
43. The Commissioner recognises that the Cabinet Office's main arguments for maintaining the exemption is that disclosure could undermine the convention of collective responsibility. The Commissioner also accepts that disclosure would, to some degree, erode this convention and in making a determination as to where the public interest lies he must weigh the public interest in maintaining the convention against certain criteria.

44. In weighing up these factors, the Commissioner has had regard to the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006). The Information Tribunal stated that *'The timing of a request is of paramount importance'*. It decided that while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the *'threat of lurid headlines depicting that which has been merely broached as agreed policy'*. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a *'parliamentary statement announcing the policy...will normally mark the end of the process of formulation'*.
45. In this case the information is 17 and 10 years old and the sensitivity of the topics discussed, excluding those found to be exempt under section 27, has been considerably reduced. The policies discussed and the minutes themselves relate to historic policies and positions of parties which may have shifted considerably, particularly with a change of government.
46. However, the Commissioner also recognises that there is an established rule ("the 30 year rule") that the minutes of Cabinet meetings are not made public until a period of 30 years has elapsed since the date of the meeting. Although this rule is currently under review and a recommendation has been made that the period for routinely keeping government information secret should be reduced, it currently remains in effect, albeit that it does not and cannot preclude statutory disclosure under the Act.
47. The Commissioner has also considered the findings of the Information Tribunal in relation to the notion of collective responsibility in case *FoE v Information Commissioner and the Export Credit Guarantee Department* (EA/2006/0073). In considering the public interest the Tribunal found that:
- "There is and can be no immutable rule in terms of reliance upon the collective ministerial responsibility and/or the individual accountability of ministers to Parliament. The Tribunal refutes any suggestion that those notions, either singly or together represent some form of trump card in favour of maintaining the particular exception."*
48. In relation to the timing of the request the Tribunal endorsed the approach taken in the DfES case in that the timing of the request is of paramount importance. The Tribunal concluded that:
- "there can be no suggestion that collective responsibility for the in principle decision of support in March 2004 could be said to have been undermined by disclosure in response to the request since again the responsibility had already been discharged some two years previously."*

49. The Information Tribunal has also placed significant weight on considering the information itself. Having viewed the information the Commissioner notes that much of the information is factual relating, for example, to the employment situation at the time of the meeting. The Commissioner notes that the content of the minutes themselves do not offer much insight into any discussions by ministers which would, as suggested by the Cabinet Office, undermine the convention.
50. The Commissioner does, however, acknowledge the importance of the convention of collective Cabinet responsibility and the potential for it to be undermined by the routine early disclosure of the minutes of Cabinet meetings. In an earlier Decision Notice issued to the Cabinet Office relating to the minutes of Cabinet meetings at which the legality of the (then) potential war with Iraq was considered (FS50165372) the Commissioner emphasised the importance of the subject-matter of the deliberations as a persuasive factor in favour of disclosure. The Commissioner's decision in that case was upheld by the Information Tribunal (EA/2008/0024 & 0029). The majority view of the Tribunal recognised (paragraph 79) that "there is undoubtedly a strong argument in favour of maintaining the section 35 exemption in respect of Cabinet discussions." In that case, however, they went on (paragraph 80) to stress that it was "the coincidence of all the identified factors being applied to the particular information in question that generates the impetus for disclosure."
51. In this case the Commissioner's view is that the public interest in disclosure arises not so much from the issues which were under discussion as from the fact that these happened to be the last meetings chaired by the Prime Minister of the day. Whilst that does merit serious consideration as a public interest factor in favour of disclosure, the Commissioner does not consider it should be given as much weight as that to be afforded to the disclosure of information which concerns a decision of very great national and international importance.
52. The Commissioner has weighed these competing factors and rejects the blanket approach taken by the Cabinet Office which is that disclosure of the minutes, regardless of content, is not in the public interest as it would undermine the convention of collective responsibility. Whilst the convention and its maintenance is one of the public interest factors to be considered, and it is a convention that the Commissioner places much weight upon, it is only one element of the public interest test, albeit an important one. The Commissioner takes the view that the content and subject-matter of the minutes should be considered in respect of each specific request.
53. Nevertheless, in all the circumstances of this case, the Commissioner does not consider the public interest in disclosure of the information withheld under section 35(2) to be greater than or equal to that in maintaining the exemption. The Cabinet Office was therefore justified in withholding the information requested because the public interest in maintaining the exemption outweighs the public interest in disclosure.

The Decision

54. The Commissioner's decision is that the public authority dealt with the request in accordance with the requirements of the Act.

Right of Appeal

55. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 15th day of June 2009

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

International Relations

Section 27(1) provides that –

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

- (a) relations between the United Kingdom and any other State,
- (b) relations between the United Kingdom and any international organisation or international court,
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad.”

Section 27(2) provides that –

“Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(3) provides that –

“For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held.”

Section 27(4) provides that –

“The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a)-

- (a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1), or
- (b) would involve the disclosure of any information (whether or not already recorded) which is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.”

Section 27(5) provides that –

“In this section-

"international court" means any international court which is not an international organisation and which is established-

- (a) by a resolution of an international organisation of which the United Kingdom is a member, or
- (b) by an international agreement to which the United Kingdom is a party;

"international organisation" means any international organisation whose members include any two or more States, or any organ of such an organisation;

"State" includes the government of any State and any organ of its government, and references to a State other than the United Kingdom include references to any territory outside the United Kingdom."

Formulation of Government Policy

Section 35(1) provides 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,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

"Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications."

Section 35(3) provides that –

"The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1)."

Section 35(4) provides that –

"In making any determination required by section 2(1)(b) or (2)(b) 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."

Section 35(5) provides that –

"In this section-

"government policy" includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the National Assembly for Wales;

"the Law Officers" means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications-

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between Assembly Secretaries, including the Assembly First Secretary, and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales;

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the National Assembly for Wales providing personal administrative support to the Assembly First Secretary or an Assembly Secretary;

"Northern Ireland junior Minister" means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998."