

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 January 2015

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

Decision (including any steps ordered)

1. The complainant has requested two unpublished datasets mentioned on the data.gov.uk website. The Cabinet Office explained that it did not hold the first dataset in the format requested and refused to provide the second dataset citing section 43 (prejudice to commercial interests) as its basis for doing so. At internal review, it upheld its position with regard to the second one and introduced reliance on section 35 (formulation/development of government policy) in relation to the first dataset which it explained it now held in the format requested.
2. The Commissioner's decision is that the Cabinet Office is entitled to withhold the two datasets based on the exemptions it has cited.
3. No steps are required.

Request and response

4. On 21 October 2013 the complainant requested information of the following description:

"I am sending this request under the Freedom of Information Act to ask for copies of the following datasets which are listed on data.gov.uk as unpublished datasets:

1. <http://data.gov.uk/dataset/annual-skills-review>
2. <http://data.gov.uk/dataset/customer-service-help-desk-statistics>
3. <http://data.gov.uk/dataset/gps-benefits-and-savings-performance>

4. <http://data.gov.uk/dataset/govt-construction-strategy-performance-data>
5. <http://data.gov.uk/dataset/gps-operational-performance-metrics>
6. <http://data.gov.uk/dataset/gps-strategic-supplier-key-performance-information>
7. <http://data.gov.uk/dataset/hr-cost-to-serve>
8. <http://data.gov.uk/dataset/inefficiency-compensation>
5. After a protracted delay and following the Commissioner's intervention, the Cabinet Office responded on 13 January 2014.
6. As regards the information described in Request 1, it said that it did not hold it in the format described. It said that the data was being finalised and therefore was not ready for publication.
7. It argued that the information caught by Requests 2, 3 and 5 was accessible by other means (section 21 exemption) and provided weblinks to it.
8. As regards the information described in Request 4 and 6, it argued that this information was exempt under section 43(2) (prejudice to commercial interests).
9. It provided the information described in Request 7 but argued that the information described in request 8 was exempt under section 40(2) (unfair disclosure of personal data).
10. The complainant requested an internal review on 10 February 2014. He specifically asked the Cabinet Office to review its response to Request 1 and Request 6.
11. The Cabinet Office sent him the outcome of its internal review on 24 April 2014. It revised its position with respect to Request 1. It explained that it now held the dataset described in that request but that this information was exempt under section 35(1)(a) (formulation and development of government policy). It upheld its position with respect to Request 6.

Scope of the case

12. The complainant initially contacted the Commissioner to complain about the delayed response to his initial request. This was resolved informally, albeit after considerable delay as outlined above. On 15 May 2014, the

complainant contacted the Commissioner to complain about the Cabinet Office's use of exemptions in relation to his Requests 1 and 6.

Reasons for decision

13. The Commissioner notes that the Open Data website includes "unpublished datasets" such as the two requested in this case. In its internal review, the Cabinet Office explained the following to the complainant:

"You note that there has been no statement made [on data.gov.uk] as to whether (and if so, when) the data for the Annual Skills Review is intended for publication. There is no immediate intention to publish this information. If that had been the case, it would have been exempt under section 22 of the Act. In this respect, please note that the existence of given information is frequently made public, in accordance with the promotion of transparency and openness in public affairs and the work of government. The publication of this fact, however, does not necessarily entail any kind of undertaking that the content or the detail of this information will subsequently be published."

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

14. The Cabinet Office eventually relied on section 35(1)(a) in relation to the information described in Request 1.
15. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy.
16. 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.
17. 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.
18. 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.

19. 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.
20. 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.
21. 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

22. The Cabinet Office explained that the withheld information related to the government's Departmental Improvement Plans and Capabilities "which are concerned with improving the skill base of the Civil Service so that it can meet future needs". It explained that the dataset results from a review which will be completed on an annual basis. The current dataset (as requested in this case) forms part of the development of these policies. It said that the formulation and development of these policies is continuing. When the new dataset is created later in 2014 it will be

compared with the current dataset as part of the review. It also said that the requested dataset therefore “continues to inform the formulation and development of government policies on the future skills needs of the civil service”.

23. It said that the government’s policies on the future skills needs of the Civil Service do not yet have a completion date. The improvements that the government determines to be necessary “will take time to embed and are expected to take several years to complete”.

Section 35(1)(a) – is the exemption engaged?

24. The Commissioner is satisfied with the Cabinet Office’s explanation as to why the withheld information relates to a policy or range of policies that are currently being formulated and developed on the subject of skills needs in the Civil Service. Its explanation is supported by a government statement of February 2014 published on the gov.uk website.¹
25. The Commissioner is therefore satisfied that the information falls within the class of information described in section 35(1)(a).

Section 35(1)(a) – balance of public interest

26. By virtue of section 2, section 35(1)(a) is subject to a balance of public interest test. This means that the Cabinet Office can only rely on this exemption as a basis for withholding the information described in Request 1 if the public interest in doing so outweighs the public interest in disclosure.

The complainant’s arguments for disclosure

27. The complainant took issue in particular with the Cabinet Office’s argument that disclosure “could create an inaccurate picture of the direction in which the policy is going”. The complainant said that this was unjustified because, in his view, “an inaccurate picture could easily be prevented by releasing whatever additional contextual information would be needed to do so”.
28. For obvious reasons, the complainant did not submit any arguments in favour of maintaining the exemption, nor did the Commissioner ask him to.

¹ <https://www.gov.uk/government/policies/creating-an-exceptional-civil-service-less-bureaucratic-and-more-skilled-digital-and-unified>

The Cabinet Office's arguments for disclosure

29. The Cabinet Office identified the following points in favour of disclosure:

- There is a public interest in openness in government – it contributes to greater public understanding of policy development.
- Transparency increases public trust in and engagement with the government.
- There is a public interest in transparency of government work in developing skills in the Civil Service.
- There is a public interest in increasing understanding the current capability and future requirements of the Civil Service not least because of the public interest in accountability of public funds.

The Cabinet Office's arguments for maintaining the exemption

30. The Cabinet Office's arguments for maintaining the exemption can be summarised as follows:

- There is a public interest in maintaining a safe space to discuss the underlying data and the extent to which it should shape policy options.
- The policies to which the information relates are not yet fully formulated and disclosure would be a distraction affecting the outcome of any discussions on the subject.
- Releasing standalone data like this means it could be taken out of context, misunderstood and misrepresented which would undermine the government's ability to implement policies related to skills development in the Civil Service. It referred to this as the "capabilities agenda".

31. While it recognised the public interest in transparency, it gave particular weight to the public interest in maintaining a safe space for discussions in order to shape policy options.

Section 35(1)(a) – the Commissioner's position

32. More information about the government's policies for Civil Service reform is available online. A key feature of the reform is the Capabilities Plan which is described as follows:

"A capabilities plan for the civil service was published with the stated aim of creating a more skilled, unified organisation that provides value

for the taxpayer. The plan identified 4 priority areas for development across the civil service:

- leading and managing change
- commercial skills and behaviours
- delivering successful projects and programmes
- and redesigning services and delivering them digitally".²

33. The Annual Skills Review is described "a light-touch assessment to be carried out by departments, supported by Civil Service Learning. It will help to identify new and emerging requirements. After its first year, it will also provide a baseline to help to gauge progress in closing skills gaps" (Meeting the Challenge of Change – page 17 (See Note 2)).
34. In June 2014, an update on this topic was published which included further commentary on some of the outcomes of the Annual Skills Review 2013.³ In its internal review letter dated 24 April 2014 (therefore prior to the publication of the update), the Cabinet Office had explained to the complainant that the dataset would be used to inform this update.
35. In the Commissioner's view, there is a compelling public interest in increasing the public's understanding of civil service reform, including any data that is going to be used to inform policy development.
36. However, he agrees with the Cabinet Office that there is a stronger public interest in maintaining the exemption while the policy or policies on skills development within the Civil Service are still being formulated and developed. He accepts that the public interest in protecting the safe space in which these policies are discussed is stronger than the public interest in disclosure at this time.
37. The Commissioner is not convinced by the Cabinet Office's arguments as to the risk of disclosure out of context. There is nothing in the FOIA which prevents a public authority from providing supporting information to assist in understanding the context in which requested information stands. He accepts, however, that there is a risk of creating a distraction from the task in hand, namely formulating and developing a policy on skills development in the Civil Service. This could arise where disclosure

² <https://www.gov.uk/government/publications/civil-service-capabilities-plan>

³

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/332915/The_Capabilities_Plan_2014_Annual_Refresh_v0e.pdf (e.g., page 19)

of the requested dataset results in the government having to provide a "running commentary" on its decision making around this topic.

Section 35 - conclusion

38. The Commissioner has concluded that the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosure. In reaching this view he has given particular weight to the fact that the policy to which the information relates is still being developed. The update to the Skills Review had not been published at the time of the request and the requested information was still being used to prepare that update. As noted above, the update does not constitute a finalised policy and the policy of skills development in the Civil Service is still, of itself, being developed.

Section 43(2)

39. The Cabinet Office applied this exemption to the dataset caught by Request 6.

40. Section 43(2) provides that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

41. To engage the section 43(2) exemption it is necessary for the public authority to demonstrate that a disclosure of the information would, or would be likely to, cause some relevant prejudice.

42. In this case the Cabinet Office argues that disclosure of the information 'would' cause prejudice to the commercial interests of the companies referred to in the dataset and to Crown Commercial Services ("CCS") (an executive agency sponsored by the Cabinet Office)⁴ that arranges contracts with central government. However, the Cabinet Office also used the expression "would be likely" in some of its other arguments. The Commissioner has therefore considered whether the lower threshold of likelihood "would be likely" applies in this case.

43. The Cabinet Office provided the following background explanation to the complainant about the information:

"The procurement process aims to create a level playing field for suppliers to compete for government and wider public sector business.

⁴ <http://ccs.cabinetoffice.gov.uk/>

Disclosing names of suppliers and their performance, will allow customers to favour the higher performing suppliers outright, and approach them without issuing call-offs from our agreements.

As section 43(2) is a qualified exemption, we have considered whether the public interest in withholding the information outweighs the public interest in disclosing the information and we are satisfied that it does. Although we recognise that there is a general public interest in disclosure and the fact that openness in government may increase public trust in and engagement with the government; there is also a public interest in withholding the information to ensure that the competitive nature of the further competition process is maintained in order to create savings for the public sector and to retain competition within the market generally. Taking into account all of the circumstances of the case, we have determined that the balance of the public interest favours withholding this information.”

44. The Cabinet Office provided detailed arguments to the Commissioner which elaborate on the above arguments and which make specific reference to the withheld information. It explained how disclosure could give rise to detriment to both the companies referred to in the dataset and to CCS where it invited commercial tenders in the future. Regrettably, the Commissioner is unable to set out the detail of the Cabinet Office’s arguments on the face of this notice without revealing the detail of the withheld dataset.
45. The Cabinet Office was unable to provide the Commissioner with specific written evidence from the third parties concerned to evidence an explicit objection to disclosure. However, it explained that it had discussed the question of disclosure with them early in their relationship and they had expressed objection.
46. Having considered the Cabinet Office’s arguments and having viewed the information in question, the Commissioner is satisfied that disclosure would be likely to give rise to relevant prejudice. More detail about the Commissioner’s reasoning is set out in a Confidential Annex to this notice. He has given particular emphasis to the fact that the information includes detail about current supplier performance.

The public interest test

47. By virtue of section 2, section 43(2) is subject to a balance of public interest test. As with section 35 above, this means that the Cabinet Office can only rely on section 43(2) as a basis for withholding the requested information if the public interest in doing so outweighs the public interest in disclosure.

The complainant's arguments

48. In requesting an internal review, the complainant said (in response to the refusal notice):

"If I understand your argument correctly, it is as follows: If public procurement officials are better informed about the performance of government suppliers, they will use this information to award contracts to top performers when really value for money demands that they should issue call-offs. In other words they need to be kept in the dark, because if exposed to the truth they would seize the opportunity to take lazy and wasteful decisions.

I am surprised and disappointed that you appear to have such a low opinion of your colleagues. I would contend that better information would actually assist those involved in procurement, so that they are better placed to obtain value for money in all their decisions, including determining whether to issue a call-off or not. I therefore do not accept that there would be any prejudice to the commercial interests of GPS [Government Procurement Service – the previous incarnation of CCS]; or, even if there is some prejudice, I believe it would be so limited that it is easily outweighed by the public benefits of disclosure."

The Cabinet Office's arguments

49. The Cabinet Office acknowledged a public interest in disclosure and identified the following factors in favour of disclosure:

- There is a general public interest in the disclosure of information about the work of government.
- Openness in government may increase public trust in and engagement with government.
- There is a public interest in transparency of information that government holds about key suppliers.
- There is a public interest in publishing information about companies that supply goods and services to the government particularly with regard to the use of public funds.

50. It set out the following arguments in favour of maintaining the exemption:

- Disclosure would undermine the competitive nature of the market making it difficult to create savings for the public purse and

“ensuring a broad diversity of suppliers”. This is contrary to the public interest.

- Disclosure of commercially sensitive information contained in the dataset would damage the relationship between CCS and suppliers. This would reduce the government’s ability to “secure best value through a flourishing and competitive market.”
- Disclosure would not only reduce the number of companies willing to do business with government but would lead to “increase[d] bid prices as suppliers build in additional contingency costs. Both these factors would drive up costs to the taxpayer which would not be in the public interest”.

51. It made an additional argument which makes reference to the withheld information. This is included in a Confidential Annex to this notice.

The balance of public interest

52. Both the complainant and the Cabinet Office referred to the function of call-offs in public sector contracts. The complainant argued that disclosure would assist procurement officials in deciding whether or not to arrange call-offs which is in the public interest. The Cabinet Office appeared to argue that disclosure would disrupt the use of call-offs which is contrary to the public interest.

53. Call-offs are provided for in framework agreements between public sector organisations and their suppliers. A framework agreement is an umbrella agreement for a supplier or group of suppliers to provide specific services to a public sector organisation. Contracts to supply specific services are called-off within the lifetime of that framework agreement. The way a call-off will work in a specific case is generally set out as part of the terms and conditions of a framework agreement. A common example is a framework agreement on a construction project. More than one supplier can be party to a framework agreement. Thus, during the lifetime of an agreement, a customer might call-off a particular service to be supplied by a particular supplier or, in some cases, conduct a mini-tendering exercise between parties to a framework agreement for provision of a particular service. The framework is subject to EU procurement rules but a call-off within the framework agreement is not. This can therefore speed up the process of public sector procurement. The government has sought to make savings in public sector procurement by bring this activity under the auspices of CCS.

54. In its Model Call-Off Agreement, CCS defines a call-off contract as follows:

"a legally binding agreement (entered into pursuant to the provisions of the Framework Agreement) for the provision of the Goods and/or Services made between a Contracting Body and the Supplier"⁵

55. It explains how framework agreements work as follows:

"If a public sector organisation knows they are likely to need particular goods or services, but are unsure about exactly what they'll need or when, they may decide to set up a group of approved suppliers that they can use when necessary. This is called a 'framework agreement'.

The organisation will invite potential suppliers to put themselves forward for the framework and choose the one(s) most able to do the work. Once the framework is set up, individual contracts are made throughout the period of the agreement. If there's more than one possible supplier on the framework, a 'mini-competition' may be held to decide who gets the contract."⁶

56. In the Commissioner's view, the main public interest argument for disclosing the information is to provide greater transparency over how suppliers are performing on live contracts. The public would have information which would assist it in judging for itself whether particular suppliers provide value for money.

57. The complainant appears to argue that it is more difficult for procurement officials to achieve best value if they cannot see how various suppliers are performing across the public sector. The Commissioner does not see how procurement officials are disadvantaged at a local level by the current more centralised procurement process in the manner suggested by the complainant. The Commissioner accepts that the public does not get to see commentary of supplier performance if the information is withheld. However, he is not clear how local procurement officials are misdirected into contracts that do not give value for money as a consequence of non-disclosure, as the complainant appears to suggest.

58. On the other hand, the Commissioner agrees that there is a strong likelihood that disclosure would give rise to a risk of prejudice to the commercial interests of suppliers. There is also a likelihood of prejudice to CCS' commercial interests where it is less able to engage a high quality and range of suppliers to achieve best value for the public purse.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383877/Model_Call_Off_Agreement__non_ICT__Goods_and_or_Services__v4_1_website.docx

⁶ <https://www.gov.uk/tendering-for-public-sector-contracts/the-procurement-process>

59. The Commissioner has set out more detail about the reason for his decision as to the balance of public interest in a Confidential Annex to this notice.

Section 43(2) - conclusion

60. The Commissioner has concluded that the public interest in maintaining the exemption at section 43(2) outweighs the public interest in disclosure. In reaching this view, he has given particular weight to the fact that the information is relatively recent and relates to live contracts. He considers that there is a greater public interest in avoiding likely prejudice to suppliers that would arise as a consequence of disclosure in this case. He also considers there to be a greater public interest in avoiding prejudice to CCS' commercial interests which, in turn, could well have an adverse effect on the public purse.

Other matters

61. The Cabinet Office says it did not hold the information described in Request 1 at the time of the request (October 2013). The link which was on the gov.uk website (as set out in the request) at the time of that request had apparently been set up prematurely.
62. The Cabinet Office told the complainant in its refusal notice of January 2014 that it did not hold the information at the time of the request "in the format requested". In fact, it did not hold the information at all but was pulling it together to create the requested dataset. The Cabinet Office admitted to the Commissioner that it could have been clearer about this to the complainant. It attempted to rectify this at internal review.
63. The request and the Cabinet Office taking ownership of the information almost coincided in time, but apparently not such that would allow the Cabinet Office to comply with the 20 working day deadline imposed by the FOIA – it was apparently in a position to create the dataset shortly after that deadline (the Cabinet Office said "three or four weeks after the request"). The Cabinet Office waited until it held the information and then treated the request as if it held the information at the time the request was made. It issued a response that was outside the 20 working day deadline in order to focus on the substantive issue in the case – whether or not it was prepared to disclose the information described in the request.
64. The Commissioner accepts that, in principle, this is a reasonable and practical approach as long as the Cabinet Office only exceeded the time for compliance with the request by, say, two or three days and it kept

the complainant updated. Had it done so, the delay would have been regrettable but, in the circumstances, tolerable. However, the delay in providing a response was excessive and, given the absence of a clear explanation with updates to the complainant, extremely unhelpful to him. The Commissioner is not clear why it took the Cabinet Office such a long time to provide any response, even though it claims it had the information shortly after the 20 working day deadline.

65. The Cabinet Office had tried to assist the complainant by focussing on the substantive issue when it was in a position to do so. Unfortunately, its delayed handling of the request had the opposite effect to the one intended in that it drew attention to the unusual situation in which the Cabinet Office found itself with respect to the requested information. It also drew attention the overall problem of delayed handling of requests by the Cabinet Office in the period. At the beginning of January 2014, the Commissioner monitored formally the Cabinet Office's overall compliance with the timeliness requirements of the Act. The Commissioner had noted a pattern of excessive delay at the Cabinet Office in its request handling of which this case is just one example. Further information about formal monitoring of the Cabinet Office is available on the Commissioner's website.⁷
66. Regrettably, the Cabinet Office did not provide the Commissioner with a copy of the withheld information for either request. Instead, it insisted that he view it on a one-off basis at its offices. While this may have expedited the progress of his investigation, the Commissioner thinks that this is extremely unsatisfactory and would urge the Cabinet Office to be more co-operative in future regarding access to information. The Commissioner reserves the right to serve an Information Notice under section 51 to require the Cabinet Office formally to provide a copy of any information he needs to pursue his investigation.

⁷ http://ico.org.uk/what_we_cover/monitoring_compliance

Right of appeal

67. 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

68. 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.
69. 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
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