

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 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 the minutes (and related correspondence) of the Cabinet meeting in which the coalition government decided to veto the Commissioner's decision in 2011 ordering the Department of Health to publish the NHS risk register.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 35(1)(b) to withhold the information held within the scope of the request.
3. No steps are required.

Request and response

4. The complainant submitted a request for information to the public authority on 9 March 2016 in the following terms:

"I would like to see records of the cabinet meeting in which it was decided not to publish the NHS risk register on 8th May 2012?

<http://www.theguardian.com/society/2012/may/08/nhs-risk-register-publication-vetoed>

I would also like to see any correspondence on relating to this meeting involving the prime minister and/or andrew lansley?" [sic]

5. The public authority issued its response to the request on 7 April 2016. It advised the complainant that the authority held information within the scope of his request. It however explained that it considered the information held exempt from disclosure on the basis of the exemptions at sections 35(1)(a) and (b).
6. The complainant requested an internal review on 7 April 2016.
7. The public authority wrote back to the complainant on 9 May 2016 with details of the outcome of the internal review. The review upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 3 June 2016 in order to complain about the public authority's decision to rely on the exemptions at section 35(1)(a) and (b) to withhold the information held within the scope of his request. He provided the Commissioner with submissions in confidence to support his view that the withheld information was not exempt from disclosure under FOIA and although the Commissioner has not directly referred to his submissions in this notice, she has taken them into account in her analysis below.
9. During the course of the Commissioner's investigation, the public authority clarified to both the Commissioner and the complainant that it did not hold any correspondence involving the Prime Minister or Andrew Lansley relevant to the request.
10. The scope of the investigation was therefore restricted to the information held by the public authority. This comprises of records of a Cabinet meeting in so far as they relate to discussions regarding the exercise of the government's veto to overrule the publication of an NHS risk register which the Commissioner had ordered the Department of Health to disclose in 2011.

Reasons for decision

Background

11. As mentioned, the request relates to the coalition government's exercise of the government's veto as enshrined in section 53(2) FOIA to overrule

the Commissioner's decision in case FS50390786.¹ The Commissioner had ordered the Department of Health to publish the Transition Risk Register relating to the government's proposals for modernising the NHS under the Health and Social Care Bill. The decision was subsequently upheld by the First-Tier (Information Rights) Tribunal in case EA/2011/0286 & 0287.²

12. On 8 May 2012 the then Secretary of State for Health, Andrew Lansley MP, issued a certificate under section 53(2) FOIA overruling the Commissioner's decision and vetoing disclosure of the Transition Risk Register.

Section 35(1)(b)

13. The Commissioner has first considered whether the public authority was entitled to rely on the exemption at section 35(1)(b).

14. The exemption states:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to Ministerial communications"

15. Records of Cabinet meetings are specifically covered by this exemption by virtue of the provision in section 35(5) FOIA which describes the meaning of "Ministerial communications" for the purposes of FOIA.
16. The Commissioner is therefore satisfied that the withheld information which she has inspected engages the exemption at section 35(1)(b).

Public interest test

17. 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.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2011/673948/fs_50390786.pdf

²

http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i729/2012_04_05;%20DOH%20v%20IC%20%20Healey%20final%20decision.pdf

Public interest arguments in favour of disclosing the withheld information

18. The public authority acknowledged that there is a public interest in transparency about the exercise of the veto in section 53(2). It recognised that its use will always be significant and unusual and there is therefore a strong public interest in understanding the reasons for its employment in specific cases. In recognition of this strong public interest, successive governments have published a detailed statement of reasons explaining the veto's use when employed. The coalition government published such a statement when the veto was used to overrule the decision to disclose the NHS risk register.³ It argued that while there is a public interest in the release of any substantive information about the use of the veto in that case, the statement issued by the government is very comprehensive and in itself goes a long way in satisfying the public interest.

Public interest arguments in favour of maintaining the exemption

19. The public authority however considers that there are stronger public interest factors in maintaining the exemption in the circumstances of this case. It argued that given that the exercise of the veto is usually controversial, it is important that Ministers should feel free to discuss its use candidly without fear that their views could be disclosed prematurely. It further argued that there is a very strong likelihood that the discussions would have been inhibited by the thought of publication four years later.

20. The public authority pointed out that the withheld information is subject to the convention of collective responsibility for which there is a significant public interest in preserving. It noted that the withheld information is relatively recent and pointed out that even in cases where the information is much older and largely historic, the importance of maintaining collective responsibility has generally been given significant weight in assessing the balance of the public interest.

Balance of the public interest arguments

21. The Commissioner has considered the public authority's submissions summarised above as well as the complainant's which were provided to

³ <https://hansard.parliament.uk/Commons/2012-05-10/debates/12051029000007/HealthTransitionRiskRegister?highlight=NHS%20risk%20register#contribution-12051029000232>

her in confidence before making her decision on the balance of the public interest. Therefore, even though the Commissioner has not included a summary of the complainant's submissions on the balance of the public interest in this notice, she has considered them fully before making her decision.

22. The Commissioner shares the view there will always be a strong public interest in understanding the reasons for the exercise of the veto by the government under FOIA. The Commissioner has always been clear that the veto should only be used in exceptional cases. The previous Commissioner made clear in his statement to Parliament⁴ on the exercise of the veto in relation to the NHS risk register that he did not consider that case to be an exceptional one. Primarily because he did not consider that it met the criteria set out in the "Statement of HM Government Policy on use of the Executive Override under the Freedom of Information Act 2000 as it relates to information falling within the scope of section 35(1)(a)."
23. However, the public interest in this case relates to a different set of information to the NHS risk register. Therefore, although the Commissioner did not accept that disclosure of the register would damage Cabinet Government and the convention of collective responsibility, it does not necessarily follow that the same view must also apply to the withheld information in this case.
24. Collective responsibility is the longstanding convention that all Ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions. It is a central feature of the UK's constitutional system of government. Ministers may express their own views freely and frankly in Cabinet and committees and in private, but once the decision is made they are bound to uphold and promote that agreed position to Parliament and to the public. This principle is set out at paragraph 2.1 of the Ministerial Code (May 2010) as follows:

"The principle of collective responsibility, save where it is explicitly set aside, 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."

⁴ <https://ico.org.uk/media/about-the-ico/documents/1042385/ico-report-to-parliament-doh-transition-risk-register-hc77.pdf>

25. The withheld information is clearly subject to collective responsibility. The public interest in maintaining collective responsibility will always carry significant weight because of the fundamental importance of the general constitutional principle. The Commissioner considers that disclosure of the withheld information would undermine collective responsibility. Most of the individuals involved in the related discussions are still in government serving as Parliamentarians and in some cases, still serving as Ministers. Disclosing the withheld information which contains a fairly recent candid account of discussions at Cabinet level involving individuals who are part of the current government, some at the highest level, would clearly undermine the principle of collective responsibility. There is therefore a significant public interest in not disclosing the withheld information.
26. Generally the Commissioner considers that the public interest in preserving a safe space for officials and Ministers to discuss policy related matters will be strongest while the subject matter is still live. However, although the veto has since been issued, she considers that there remains a strong public interest in preserving the safe space necessary for Ministers to have candid discussions at Cabinet level meetings in order not to effectively undermine the rationale for maintaining collective responsibility.
27. The Commissioner does not consider that the withheld information would substantially add to the explanation given by the coalition government in support of its use of the veto to overrule the Commissioner's decision. However, while that should increase rather than decrease the public interest in disclosing it, this must be balanced against the significant public interest in the circumstances of this case in maintaining collective responsibility.
28. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Right of appeal

29. 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

30. 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.
31. 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
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