

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 March 2021

Public Authority: Ministry of Housing, Communities and Local Government

Address: Fry Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested the minutes of the government's Windrush Commemorative Committee (WCC) and evidence of settlers' arrival from the Caribbean in the 1950s/60s at Waterloo Station. The Ministry of Housing, Communities and Local Government (MHCLG) withheld the minutes citing section 35(1)a – information relating to the formulation of government policy. It said it did not hold information concerning settlers' arrivals at Waterloo Station
2. The Commissioner's decision is that the MHCLG correctly engaged section 35(1)a for the minutes of WCC meetings held between June 2018 and June 2019. However, the public interest in disclosure outweighs the public interest in maintaining the exemption. For the minutes from meetings after 22 June 2019 until the time of the request, the exemption is not engaged. She also finds that on the balance of probability, the Ministry does not hold information about settlers' arrivals at London Waterloo Station.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the nine sets of minutes from the WCC produced from June 2018 until the date of the request.

4. 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 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 8 April 2020 the complainant wrote to the Ministry for Housing and Local Government (MHCLG) and requested information in the following terms:

'Copies of the Minutes of all the Windrush Commemoration Committee meetings held since it was set up by the former Prime Minister Theresa May in June 2018.

Copies of the empirical evidence that London Waterloo Station was the place at which most Caribbean settlers arrived during the 1950s and 1960s. It should be noted that Victoria and London Paddington stations were also places at which ten of Caribbean people arrived.'

6. On 11 May 2020 the MHCLG responded. It refused to provide the requested information for question 1, citing section 35(1)a of the FOIA – formulation or development of government policy, and said it did not hold any information relating to question 2 of the request.
7. The complainant requested an internal review on the same date. The MHCLG sent the outcome of its internal review on 10 July 2020, upholding its application of section 35(1)a.

Scope of the case

8. The complainant contacted the Commissioner on 23 June and 2 July 2020 to complain that the Ministry had failed to respond to his request for an internal review. The Ministry finally responded on 10 July 2020.
9. The Windrush Commemoration Committee (WCC) was established in 2018 by the then Prime Minister Teresa May to consider how best to create a permanent, fitting tribute to the Windrush generation and their descendants. The complainant does not consider that at the time of the request, section 35(1)a applied as decisions about what and where the tribute should be had already been made by the Committee, and in any event it was in the public interest to disclose the information.
10. The Commissioner therefore considers the scope of the case to be whether the MHCLG can rely on section 35(1)a to withhold the information. She also sought to identify if any information was held for question 2 of the request.

Reasons for decision

11. Section 35 is designed to protect good government. It states:

'(1) Information held by a government department or by the Welsh Assembly Government 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 for the provision of such advice, or

(d) the operation of any Ministerial private office'

12. Section 35 is a class-based exemption. This means that if the withheld information falls within one of the four sub-sections, the exemption is engaged. However, it is also a qualified exemption, meaning that if engaged it is then subject to the public interest test.

13. The Ministry has applied section 35(1)a – the formulation or development of government policy – to the withheld information, which comprises nine sets of minutes from the WCC. The purpose of section 35(1)a is to protect the integrity of the policy making process by preventing disclosures that would undermine this process. Essentially it safeguards a space to consider policy options in private.

14. The FOIA does not define 'government policy', but the Collins dictionary describes policy as '*a set of ideas or plans that is used as a basis for making decisions, especially in politics, economics, or business.*' The Government's Digital Service makes reference to an ICO commissioned report¹ produced in 2009 where policy is defined as '*a course or general plan of action to be adopted by government, party, person etc. (OED)*' and '*the process by which governments translate their political vision into programmes and actions to deliver "outcomes", desired changes in the real world. (Modernising Government White Paper, 1999)*'. The Government's Digital Service suggests another: '*statements of the*

¹ https://www.ucl.ac.uk/constitution-unit/sites/constitution-unit/files/ICO_-_FOI_and_Policy.pdf

*government's position, intent or action*². In general terms, therefore, government policy can be seen as a government specified plan to achieve a particular outcome or change. It can be high level or involve more detailed proposals to achieve the outcome or change. The question to determine is whether the minutes of the meetings relate to the formulation or development of government policy.

15. The term 'relates to' in the exemption can be interpreted broadly. The Ministry has explained that the WCC was established by Teresa May in June 2018 to consider how best to create a permanent, fitting tribute to the Windrush generation and their descendants. The Committee would be chaired by Baroness Floella Benjamin. The Ministry considers that the policy in question is the Government's commitment to establish a 'physical monument' to commemorate the Windrush generation.
16. The Commissioner is only just persuaded that the tribute can be considered a 'policy' and only because the definitions of policy above are so broad. It would be more accurate to describe the policy as the Government's plan to commemorate the Windrush generation, of which the permanent tribute forms only a part. The development of the tribute aligns better with implementation of the policy, rather than a policy in its own right (see below for the point at which the Commissioner considers the policy process to end in the context of this request). Nonetheless, having accepted the Ministry's explanation of the tribute as a 'policy', the next issue for the Commissioner to consider is whether the minutes of the WCC are concerned with formulation and development of that policy, with its implementation, or both.
17. The Commissioner has produced guidance³ on the use of section 35(1)a, where policy formulation, development and implementation is explored in detail. Broadly speaking, she *'understands the term 'formulation' of policy to refer to the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs, and recommendations or submissions are put to a minister who then decides which options should be translated into political action.'*

² <https://qds.blog.gov.uk/2012/02/03/government-policy-a-spotters-guide/>

³ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

18. At the point that the Committee was formed, no decision had yet been made as to what the tribute would be, simply a commitment made by the Government to establishing one. It stated⁴:

'the cross-party and community-led group will explore a range of options for commemorating the Windrush generation and honouring their legacy. Options could include a museum exhibition, a naming ceremony or a Windrush statue in an area of the UK which has particular links to Caribbean history.'

19. The most obvious policy process involves turning a White Paper into legislation. In this scenario, it can be easier to distinguish between the formulation of the policy through the White Paper and associated processes, culminating in legislation, after which the process moves to implementation. For the 'policy' in this request though, the demarcation between formulation and implementation is not so obvious, in which case a public announcement of the decision is likely to mark the end of the policy formulation process.
20. On Windrush Day in June 2019, the former Prime Minister announced that on the advice of the WCC, a permanent physical monument commemorating the Windrush generation would be erected at London's Waterloo train station. The Committee had met six times at this point.
21. At the time the request was made, the Committee had met a further three times since the June 2019 announcement. The Ministry has argued that the policy in question is still in development as the monument has not yet been completed and decisions are still being made concerning design and delivery. It maintains that ministerial decisions will still need to be made about the project, informed by the work of the Committee, and therefore the policy is still in formulation. Live policy decisions will continue to be made until the monument is unveiled.
22. The Commissioner is not persuaded by these arguments. Whilst ministerial approval can be an indicator that a policy is still in development, it is not an absolute. Ministers make decisions on a daily

⁴ <https://www.gov.uk/government/news/pm-announces-committee-to-ensure-fitting-legacy-for-windrush-generation>

basis that are concerned with the administration or implementation of policies; ministerial involvement in itself does make that a policy decision. The Commissioner considers that, between the establishment of the Committee in June 2018 to determine *what* the fitting tribute would be, and the announcement a year later that it had advised the building of a monument at Waterloo Station, the work of the Committee and therefore the minutes related to the formulation of the tribute 'policy'. This is because the Committee's role up until this point focused on generating and analysing options, considering risks and presenting the favoured option for ministerial approval. However, once the announcement of the monument, as opposed to a tribute, had been made, and the location identified, the policy for where and what that tribute would be was finalised. The Commissioner considers that decisions about design are too far removed from the concept of policy formulation, and that this now moves to implementing the decision to erect a monument. She therefore concludes that for the six sets of minutes produced between June 2018 and June 2019 section 35(1)a is engaged, but that the three sets produced after June 2019 up until the time of the request are not information relating to the development or formulation of government policy. Any subsequent ministerial involvement is likely to be due to the high profile nature of Windrush, in particular the Windrush Compensation Scheme, and not because it is a policy decision.

23. Having determined that only the minutes between June 2018 and June 2019 are covered by the exemption, the Commissioner now turns to considering the public interest test.
24. Public interest arguments under section 35 must focus on the specific subsection, so in this case the formulation / development of government policy. The key public interest argument for this subsection centres on preserving a 'safe space' to debate lives policy issues away from external pressure and interference. Related to this is the 'chilling effect' that may be caused by disclosure – public authorities sometimes argue that future free and frank discussions would be inhibited by the prospect of disclosure under FOIA.
25. The Ministry believes that release of the minutes would impact on the private space in which officials are able to assess and discuss information that would inform ministerial advice and associated policy decisions. Release of the minutes would disrupt evaluation processes and affect ongoing decisions.
26. It goes on to emphasise the importance of being able to engage with third-party stakeholders to gauge views and that there was an

expectation of confidentiality at these meetings. Releasing them now might affect future engagement and cooperation, negatively impacting on information that could be provided to ministers. It would also divert the focus of meetings, potentially causing ill-informed judgments by the public and result in attention being paid to dealing with this rather than the task at hand.

27. The Ministry's arguments are made on the premise that the policy is still in development. However, as determined above, the Commissioner considers that the policy development ended at the point the government announced that the tribute would be a monument, and sited at Waterloo Station. Whilst theoretically the disclosure could result in adverse publicity, the Commissioner is not convinced by this and in any event the policy aspect has been completed, and so the 'safe space' arguments are redundant. The Committee's work is now concerned with implementation of the decision. That work may have other challenges, as expressed by the Ministry, but they are not concerned with policy formulation or development.
28. Having determined that the 'safe space' requirements of the Committee are no longer relevant as policy formulation is complete, the Commissioner considers the 'chilling effect' arguments around disclosure. The request was made in April 2020, 10 months after the announcement about the monument. Again, chilling effects will be stronger when the issue is still live, or at least very recent. As the Committee is still meeting, the Commissioner hears these concerns, but does not share them. In *Scotland Office v Information Commissioner (EA/2007/0128, 5 August 2008)*⁵ the Tribunal noted:

'In relation to the suggestion that officials would no longer feel able to express themselves in a frank and candid way, with a resulting adverse impact on the quality of debate and of advice tendered, Mr. Henderson identified the impact on candour as having two effects; civil servants being less keen to record their views on paper and more ambiguity in the language they used.

There is, unsurprisingly, no evidence that since FOIA has come into force, or since DFES, that this has been the case. We share

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i201/ScotlandOffice1.pdf>

the scepticism expressed by other Panels of this Tribunal as to the extent of the "chilling" effects predicted in relation to the impact of disclosure in relation to internal governmental deliberations.'

29. The complainant considers that there is a strong public interest in disclosure of the information as he does not consider that there was adequate engagement or consultation with the Caribbean Community, particularly regarding the siting of the monument. He is the Director of a charity that supports heritage projects and initiatives that highlight African and Caribbean contributions to UK life. The Ministry recognises the interest of the Caribbean Community in the Windrush monument and says it provides public updates on the WCC.
30. It is not for the Commissioner to determine whether the Caribbean Community was adequately consulted about the monument and its location. However, as the body charged with determining this, she does consider that the WCC, and any associated information, is the primary body to demonstrate what was discussed and taken into account when deciding what form and location the tribute should take. She does not accept that the safe space arguments put forward by the Ministry are relevant as the policy formulation aspect of the WCC ended when the then Prime Minister made her announcement in June 2019 that the tribute would be a monument located at Waterloo Station. Neither does she give weight to the chilling effect arguments, as the request was made ten months after this announcement. Concerns that the public would make ill-informed judgments based on the documents is more likely to raise concern about their accuracy or quality, and contrary to the Ministry's position, disclosure should facilitate better informed judgements based on minutes that record robust discussion and decisions.
31. Given the recent and ongoing profile of the Windrush scandal, which forms a backdrop to the tribute announcement, the Commissioner considers that wider transparency and accountability are important factors in this case. Combined with the weakness of chilling effect and safe space arguments above, she concludes that in the specifics of this case, the public interest in disclosure outweighs the public interest maintaining the exemption.

Section 1 – information held / not held

32. Section 1 of the FOIA states:

'(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him'

33. For question 2 regarding empirical evidence about the arrival of Caribbean people at London Waterloo in the 1950s and 60s versus other stations, the Ministry said it did not hold the requested information. The Commissioner asked the Ministry a number of search related questions to ascertain what steps were taken to find any information falling within scope of the question.
34. The Ministry explained that the WCC had considered photographs and reports demonstrating the arrival of Caribbean migrants arriving at Waterloo Station but that there was no assessment of numbers in relation to other stations. Had any information been held in the past, this would have transferred to the National Archives or retained under a Lord Chancellor's Instrument. However, in all likelihood it believes no information was ever held by the department as neither it, nor its predecessors, had responsibility for migrants from the Caribbean. The Ministry also consulted with records management and policy colleagues who were confident that no information was held.
35. The Commissioner has no reason to doubt the Ministry's responses to her search questions and concludes that on the balance of probability, no information is held falling within the scope of question 2.

Right of appeal

36. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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

Andrew White
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