Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **23 May 2016**

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

Complainant: **Gabriel Webber**
Address:

Decision (including any steps ordered)

1. The complainant has requested Public Duty Costs Allowance (PDCA) guidance from the Cabinet Office. This request was subject to considerable delay as detailed in this Notice and in a previous decision notice which specifically addressed the timeliness of the Cabinet Office's initial handling of the request. Eventually, the Cabinet Office relied on exemptions in section 36 of the FOIA (prejudice to the effective conduct of public affairs) as its basis for refusing to provide the requested information. It upheld this position at internal review. However, during the course of the Commissioner's investigation, it withdrew reliance on these exemptions and disclosed the information to the complainant. The complainant subsequently noticed that the information was freely available online and drew this to the Commissioner's attention.

2. The Commissioner's decision is that that the Cabinet Office should have provided the information described in the request to the complainant upon request and contravened the requirements of section 1(1)(b) in failing to do so.

3. No steps are required because the information has now been disclosed.

Request and response

4. On 31 October 2014, the complainant requested information of the following description:

   "Please provide me with an electronic copy guidance, policy notes, and procedures to guide staff in the payment of claims made to former Prime Ministers under the Public Duty Costs Allowance. This should include but not be limited to information on precisely what costs are eligible to be reimbursed, time limits for the fulfilment of claims and the nature of proof necessary."

5. On 18 March 2015, the Commissioner issued a decision notice (ref FS50566237) which required the Cabinet Office to respond (the "first decision notice").[1] The Commissioner notes that the Cabinet Office's initial response to the first decision notice was to write to the complainant and tell him that it needed further time to consider the balance of public interest in relation to section 36.[2] The first decision notice found against the Cabinet Office for its unreasonable extension of the time it said it needed to consider the balance of public interest in relation to section 35. While it was technically permissible for the Cabinet Office to rely on section 10(3) when responding to the complainant following the first decision notice (that is, to extend the time for reply in order to consider the balance of public interest test), it was, in the Commissioner's view, poor practice in this case given the length of time it had already had to consider the request. It was also extremely unhelpful to the complainant who, it transpired, had further delays to endure.

6. In any event, on 4 June 2015, the Cabinet Office responded.

7. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

   - section 36(2)(b)(i);

   - section 36(2)(b)(ii); and

   - section 36(2)(c).

[1] https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1043591/fs_50566237.pdf

[2] Time extension to consider the public interest is permitted under section 10(3) of the FOIA.

8. The complainant requested an internal review on 4 June 2015. He specifically raised concerns about the timeliness of the Cabinet Office's handling of his request, the failure to provide advice and assistance by responding to chasing emails that he had sent and the Cabinet Office's consideration of the balance of public interest in relation to the exemptions at section 36 that it had cited.

9. There was yet another delay on the Cabinet Office's part in providing this internal review during which time the complainant contacted the Commissioner on 4 August 2015 (see Other Matters).

10. The Cabinet Office sent him the outcome of its internal review on 7 September 2015. The Cabinet Office explained that the delay had arisen as a result of an "administrative oversight". It upheld its original position in its internal review regarding the use of exemptions.

Scope of the case

11. As noted above, the complainant contacted the Commissioner on 4 August 2015 to complain about the way his request for information had been handled. His primary concern related to the Cabinet Office's use of exemptions although he also raised concerns about the protracted delays he had experienced.

12. During the course of the Commissioner's investigation, the Cabinet Office withdrew reliance on any exemptions and undertook to disclose the withheld information.

13. Once the complainant received the requested information, he noticed a marked similarity to other information that was already freely available online. Given that the Commissioner has already issued a finding on the timeliness of the Cabinet Office's initial response (see Note 1), the Commissioner is unable to do so again although he has noted further delays (see Other Matters). The Commissioner has therefore considered whether the Cabinet Office has contravened the requirements of section 1(1)(b) of the FOIA in failing to provide the information upon request.

Reasons for decision

14. Section 1(1) provides that -

"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."

15. The duty to confirm that requested information is held (section 1(1)(a) refers) and the duty to disclose such information (section 1(1)(b) refers) are both subject to exemptions. The Cabinet Office relied on exemptions at section 36 (prejudice to the effective conduct of public affairs) as its basis for refusing to comply with section 1(1)(b), having eventually confirmed that it held information within the scope of the request. As noted above, it withdrew reliance on these exemptions during the course of the Commissioner's investigation and disclosed the information to the complainant.

16. When this happens, the Commissioner normally asks the complainant to withdraw their complaint as the matter has been informally resolved. The complainant did not wish to withdraw his complaint. In such cases, the Commissioner would normally issue a decision notice that recorded that there had been a breach of the timeliness requirements of the FOIA. However, the Commissioner has already done so earlier in the life of this request (see Note 1). That said, once he had read the disclosure, the complainant drew another related matter to the Commissioner's attention.

17. The complainant remarked on the marked similarity between the information that had now been disclosed to him and other information that was already in the public domain:

http://data.parliament.uk/DepositedPapers/Files/DEP2012-1257/document2012-07-19-120539.pdf

http://data.parliament.uk/DepositedPapers/Files/DEP2014-0347/PDCA_Guidance_Note_070314.doc

18. The first document is from July 2012 and the second is from March 2014 (seven months before the request in this case was made).

19. Having compared the information available via the above links and the PDCA guidance disclosed to the complainant, the Commissioner can see no material difference between them.

20. Given that the information withheld in this case was, in fact, readily available online, the Commissioner has concluded that the Cabinet Office should have provided it to the complainant upon request. Had there been a material difference between that which had been disclosed and that which had been withheld, the Commissioner would have taken this into account when considering this point.

21. Had the Cabinet Office, at any stage, explained that the fact the information was virtually unchanged was, of itself, sensitive and therefore an exemption was applicable, the Commissioner would also have considered this point further. The Cabinet Office did not offer this argument although it had ample opportunity to do so.

22. The Commissioner accepts that the Cabinet Office may have been in the process of redrafting the guidance at the time of the request (although it never offered this as an explanation). If that were the case, it should have directed the complainant to the publicly available information that was the most recent and, presumably, still operational at the time of his request.

23. Given that the requested information appears to be both innocuous and readily available, the Commissioner is satisfied that the Cabinet Office should have provided it to the complainant when he submitted his request in October 2014. Alternatively, it could easily have directed him to the most recent version of the guidance which was publically available and could have explained, if applicable, that it was currently working on a revised draft.

24. The Commissioner therefore finds that the Cabinet Office was in breach of section 1(1)(b) of the FOIA in failing to provide the information upon request to the complainant.

25. Given that the Cabinet Office has now disclosed the information, no steps are required.

26. As noted above, the Commissioner has already issued a finding as to delay in the Cabinet Office's handling of this request in the first decision notice. He is therefore unable to do so a second time. However, in the Other Matters section of this notice, the Commissioner has also set out further delays at the Cabinet Office in respect of this request. These delays are not, of themselves, a breach of the FOIA. However, they are a lamentable representation of poor practice both in terms of the Cabinet Office's handling of the internal review request and in terms of the Cabinet Office's engagement with the Commissioner.

Other matters

Delay at internal review

27. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.

28. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but the maximum time taken should normally be 40 working days.

29. In this case, the request for an internal review was made on 4 June 2015. The response to that request was issued on 4 September 2015, following the Commissioner's intervention. The Commissioner notes that in this case, the time taken to respond to the request for internal review was 66 working days.

30. The Commissioner finds that this delay is unacceptable, particularly in the context of the Cabinet Office's failure to respond in time to the initial request.

Engagement delays

31. During the course of the Commissioner's investigation, the Cabinet Office also failed to respond in a timely manner to the Commissioner's enquiries about its use of exemptions in this case. The Commissioner served an Information Notice under section 51 of the FOIA on 8 February 2016 to obtain the Cabinet Office's full and final response to his detailed letter of enquiry and to obtain a copy of the information withheld in this case. The Cabinet Office failed to meet the deadline for response set in the Information Notice.

32. It is the Commissioner's normal practice to seek to resolve informally any failure to respond to an Information Notice on time. When the Cabinet Office failed to provide a response to the Information Notice, the Commissioner emailed it on 10 March 2016. The Cabinet Office contacted the Commissioner's office by return to advise that it was withdrawing reliance on exemptions and was now proposing to make a disclosure to the complainant. It explained that there would be a further short delay while it finalised this.

33. After a further exchange of correspondence and of telephone calls, the Cabinet Office finally disclosed the withheld information to the complainant on 28 April 2016.

34. The Commissioner is extremely disappointed that he had to issue an Information Notice to the Cabinet Office in order to obtain a response to his enquiries so that progress could be made on this case. An Information Notice is a formal instrument and, where a public authority

fails to comply with its terms, the Commissioner may make written certification of this to the High Court and the matter may be treated as contempt of court. While the Commissioner is keen to resolve such engagement delays informally, and seeks to do so on every occasion, he remains ready to consider formal action if required.

35. Naturally, the Commissioner is pleased that the Cabinet Office reconsidered its position and withdrew reliance on exemptions in this case. However, he remains concerned about the delays that arose at every stage of the Cabinet Office's handling of this request.