



Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 3 July 2006

Public Authority: The Cabinet Office

Address: 70 Whitehall
London
SW1 2AS

Complainant: Lord Avebury

Address: House of Lords
London
SW1A 0PW

Summary Decision and Action Required

The Commissioner's decision in this matter is that the public authority has not dealt with the complainant's request in accordance with Part I of the Act in that it has failed to comply with its obligations under section 1(1) and section 17 by not providing an adequate explanation of its grounds for the refusal of the Complainant's request.

The Commissioner requires that the Cabinet Office either release the information described in paragraph 5.19 of this Notice or provide an adequate explanation for its refusal.

1. Freedom of Information Act 2000 (the 'Act') – Application for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the Complainant's request for information made to the public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a complainant has made an application for a decision, unless:



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned,

the Commissioner is under a duty to make a decision.

- 1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

- 2.1 The Complainant has advised that on 15 April 2005 the following information was requested from the Cabinet Office in accordance with section 1 of the Act.

“The dates since 30 September 2002 on which the Prime Minister has met or had a telephone conversation with Rupert Murdoch or Richard Desmond.”

As the request was made on 15 April, the period covered by the request is 30 September 2002 to 15 April 2005.

- 2.2 On 19 May 2005, the Cabinet Office confirmed that the requested information was held by it but refused to communicate the information to the complainant. In its refusal letter, the Cabinet Office cited sections 36(2)(b)(i), (ii) and 36(2)(c).
- 2.3 A complaint about the refusal was made to the Commissioner on 27 July 2005.
- 2.4 At the advice of the Commissioner's office, the complainant requested an internal review of the refusal of the request. This was completed on 30 September 2005. The refusal of the request was confirmed.

3. Relevant Statutory Obligations under the Act

- 3.1 **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.”

- 3.2 **Section 2(2)** provides –



“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that-

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

3.3 Section 17 provides that –

“A public authority which... is to any extent relying:

- on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request, or
- on a claim that information is exempt information

must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

3.4 Section 36(2) provides –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act ...

(b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

4. Review of the case

4.1 The complainant submitted his complaint to the Commissioner on 27 July 2005.

4.2 The complaint was put to the Cabinet Office on 17 August 2005 which confirmed that the complainant had requested an internal review of the refusal of his request but that this had not yet been completed.



- 4.3 The review was completed on 30 September. The letter to the complainant from the Managing Director of the Cabinet Office confirmed reliance upon the exemptions cited in the original refusal notice, arguing that disclosure of the requested information would “undermine the Prime Minister’s ability to undertake such free and frank discussions in the future.” It was argued that information as to the timing of discussions might allow the content of discussions to be inferred and, in addition, that disclosure might increase the pressure on the Prime Minister’s diary by increasing the expectation that he would hold discussions with others.” It was argued that none of these things was in the public interest which, therefore, favoured the maintenance of the exemption cited.
- 4.4 Before the complaint was raised further with the Cabinet Office, the complainant was invited to put any specific arguments to the Commissioner as to why he thought the public interest favoured the disclosure of the requested information.
- 4.5 In response, the complainant provided the Commissioner with copies of a number of media reports and an extract from a book by John Pilger which discussed the issue of alleged influence exercised by Mr. Murdoch and Mr. Desmond.
- 4.6 Further contact was made with the Cabinet Office on 20 February 2006. In particular it was asked to provide evidence as to the identity of the “qualified person” who had given the opinion that disclosure of the requested information would or would be likely to prejudice the effective conduct of public affairs; an indication of whether the request was refused for the general reasons supplied thus far to the complainant or whether there were any specific sensitivities about the timing of the conversations between the Prime Minister, Mr. Murdoch and Mr. Desmond and, if so, for copies of the notes of those discussions.
- 4.7 In response, on 29 March 2006, the Cabinet Office indicated that the “qualified person” in this case had been David Miliband MP, who at the time had been Minister for the Cabinet Office. His Opinion had been given to his Private Secretary on 4 May 2005.
- 4.8 In addition to the grounds for refusal given previously, the Cabinet Office pointed out that in addition to his official role, the Prime Minister also has a number of others (for instance, he is the leader of the Labour Party). In addition calls made by or to him at Downing Street (or any other official residence) may be of a purely personal nature. Theoretically any single call might involve discussion of official, party political, personal or other “non-official” matters. It was argued that enforced disclosure of the timing of telephone calls would act as a disincentive to making an appropriate record of relevant calls and that this would damage the historical record, which was not in the public interest.
- 4.9 On 26 May 2006, the Commissioner issued a Draft Decision Notice to the Cabinet Office inviting comments upon the narrow question of whether it considered that any information included in the draft constituted exempt information whose



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

disclosure the Cabinet Office might wish to contest in an appeal to the Information Tribunal. The Cabinet Office was asked to provide a response by 5 June 2006. In the event it was agreed to allow the Cabinet Office until 9 June.

- 4.10 On 9 June, the Cabinet Office requested an opportunity to make representations to the Commissioner regarding the content of the draft notice. In the hope that this might obviate an appeal to the Tribunal, it was agreed to meet this request and on 21 June 2006 a meeting took place between the Deputy Commissioner, an Assistant Commissioner and representatives of the Cabinet Office.
- 4.11 At the meeting it was explained that, unlike other Ministers, the Prime Minister is effectively constantly "on duty". It was also explained that the pressures on his time were significantly greater than the pressure on other Ministers. As a consequence the Prime Minister's staff were involved in extremely detailed planning of his diary as it affected not only his official duties but also aspects of his private life and his role as Leader of the Labour party. There was a full discussion about the way in which telephone calls made by or to the Prime Minister are handled.
- 4.12 It was also explained that notes are taken by private secretaries or other officials of telephone discussions involving the Prime Minister acting in his official capacity, particularly where arrangements have been made in advance by officials.
- 4.13 The Cabinet Office also made a small number of suggestions regarding the drafting of the Notice both at the meeting and subsequently by letter. These have been taken fully into account.

5. The Commissioner's decision

- 5.1 The Commissioner's decision in this matter is that the Cabinet Office has satisfied section 1(1)(a) of the Act in that it has confirmed that it holds the requested information.
- 5.2 The Commissioner has been advised that notes of one of the telephone discussions covered by the request are held. Where no records are held, the Commissioner is satisfied that this indicates that any call or meeting was either of a non-official nature or, if of an official nature, was not considered to be sufficiently significant as to warrant an official note. In any event the Commissioner is satisfied that it is not possible to distinguish between official and non-official calls in any other way. The implications of this are discussed below in paragraph 5.8 and 5.10.
- 5.3 Where a record is held, the Commissioner recognises it may be possible to infer the content of a discussion from its date. It would then be necessary to approach the question of whether or not the information as to the date of the call is therefore exempt by reference to whether the information as to the content of the call is also exempt.



- 5.4 The Commissioner's approach has been to consider first whether the requested information was exempt by virtue of section 36 and then whether, if exempt, the public interest required the maintenance of the exemption. Finally the Commissioner has considered whether other exemptions may, in principle, be relevant.

Application of Section 36

- 5.5 Information is exempt information under section 36 if, "in the reasonable opinion of a qualified person," disclosure would or would be likely to result in any of the adverse affects identified in sub-section 36(2). In refusing the request, the Cabinet Office has identified the inhibition of the provision of free and frank advice, the inhibition of the free and frank exchange of views for the purposes of deliberation and other prejudice to the effective conduct of public affairs.
- 5.6 Section 36(5) provides that the qualified person for a government department in the charge of a Minister of the Crown means any Minister of the Crown. The Commissioner has been advised that the Minister in question was David Miliband MP.
- 5.7 The Commissioner has not been provided with any information as to the considerations taken by the qualified person in this particular case. However, the Commissioner is content to accept his opinion that release of the requested information would increase pressure on the Prime Minister's diary if it created the expectation, as suggested, that the Prime Minister would engage in discussions with a larger number of individuals. The Commissioner also accepts that on occasion it may be possible to infer the topic of a discussion from knowledge of its timing and that this may therefore have a negative impact upon the ability of the Prime Minister to engage in free and frank discussions with individuals of his choosing. The Commissioner is not required to take a view of whether or not the prejudice to the effective conduct of public affairs would be significant and he is content to accept the opinion of the qualified person in this case that some prejudice would arise.
- 5.8 The Commissioner has also considered the information provided to him by the Cabinet Office regarding non-official calls. He is satisfied that any disclosure of the dates of these calls which, as noted, may be of a personal or party political nature, would be prejudicial to the effective conduct of public affairs since it seems clear to the Commissioner that the routine disclosure of this information would result in fundamental changes to the established way in which calls to the Prime Minister are handled and in which the Prime Minister's time is managed.

The Public Interest Test



- 5.9 The exemption is subject to the public interest test. The Commissioner's general approach to the public interest was set out in Awareness Guidance No. 3. Among the factors which the Commissioner identifies as favouring disclosure of information are:
- “furthering the understanding of and participation in the public debate of issues of the day. This factor would come into play if disclosure would allow a more informed debate of issues under consideration by the Government or a local authority”
- and
- “promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.”
- 5.10 So far as the calls discussed in paragraphs 5.2 and 5.8 are concerned, that is those which are of a non-official nature or where no records of the content of a discussion is held, the Commissioner is satisfied that there would be considerable disruption to established ways of working without any clear public benefit. He is clear, in other words, that the public interest favours the maintenance of the exemption in those cases.
- 5.11 At the Commissioner's request, the complainant has provided an indication of why he considers that release of the requested information would serve the public interest. In summary, the complainant argues that there has been considerable public debate about the political influence wielded by both Mr Murdoch and Mr Desmond and their business associates. He argues that there is a strong public interest in understanding the nature and the extent of any such influence and that the release of the dates of any discussions will assist in that process. Implied in this argument is an acceptance of the argument advanced by the Cabinet Office that, on occasions it may be possible to infer something of the content of the discussions from their date. Although the Commissioner does not accept that the fact that these matters have been the subject of media comment and speculation of itself demonstrates where the public interest lies, he does accept that there is a general public interest in understanding the range of official exchanges and discussions in which the Prime Minister engages.
- 5.12 Although the Commissioner accepts that disclosure may have some impact upon the ability of the Prime Minister in the future to engage in free and frank discussions, on balance he considers that in this instance there is a stronger public interest in understanding more about the way in which government operates. The fact that inferences may be drawn as to the strength or significance of any meetings or discussions will be likely, in the Commissioner's view to promote public debate and understanding. The Commissioner is not convinced that disclosure of the information requested will prevent those seeking to influence the government from pressing their arguments by whatever legitimate means are open to them. By the same token, the Commissioner is not persuaded that the Prime Minister will automatically be inhibited from talking to whoever he considers to be appropriate



because of fear that the fact that any discussion which has taken place will be made public. On the contrary, the Commissioner is confident that the protection given in the Act for information whose disclosure might prejudice international relations, the formulation of government policy, the economy etc. provide the necessary safeguards.

- 5.13 The Cabinet Office argues that disclosure of the dates of meetings or telephone calls may increase the pressure on the Prime Minister's diary. The Commissioner accepts that this is an appreciable risk. However, he does not believe that it is an unacceptable one. Indeed, the Commissioner takes the view that is an inevitable consequence of increased and healthy public debate of issues of the day.

Availability of other exemptions

- 5.14 The Commissioner takes the view that, in this particular case, the public interest does not require the maintenance of the exemption provided by section 36 so far as the dates of the discussions involving the Prime Minister acting in his official capacity are concerned. However, this is not an invariable position.
- 5.15 The Commissioner accepts that the Prime Minister will frequently have discussions with others, for instance members of the security services, leaders of other governments or Ministers the contents of which may be exempt by virtue of other exemptions in the Act. These may include section 24 (National Security), section 27 (International Relations) or section 35 (Formulation of Government Policy). The Commissioner accepts that there will be some cases where the content of the discussions may be inferred from the dates alone. In many instances the public interest is likely to require the maintenance of these exemptions.
- 5.16 Nor does the Commissioner suggest that the public interest will never require the maintenance of the exemption provided by section 36. Clearly there may be some instances in which information does not fall within any of the other exemptions in the Act but where the public interest requires the preservation of the conditions in which the Prime Minister can engage in free and frank discussion with others. However, the Commissioner has been provided with no specific evidence that this consideration arises in this particular case.

Summary of Decision

- 5.17 The Commissioner finds that the Cabinet Office has complied with section 1(1)(a) of the Act in that it has confirmed that the requested information is held by it.
- 5.18 Where no records are held as to the content of the discussions between the Prime Minister and Mr Murdoch or Mr Desmond, the Commissioner accepts that the Cabinet Office was entitled to refuse to release the dates of those discussions. However, the Commissioner considers that a more complete explanation of why the information is exempt should have been provided. In other words, the Commissioner finds the refusal notice given by the complainant to have been



defective in that it did not provide a clear explanation, as required by section 17(1) of the Act as to which exemptions applied to the information and how the public interest had been considered.

- 5.19 In relation to the records that are held of discussions between the Prime Minister and Mr Murdoch or Mr Desmond and that these confirm that the discussions were of an official nature, the dates of those discussions should be disclosed to the complainant (unless an exemption other than s.36 applies).
- 5.20 In the event that the Cabinet Office considers that another exemption applies, it must give a fresh refusal notice to the complainant specifying the exemptions and explaining why they apply in this particular case.

6. Action Required

- 6.1 The action required by the Commissioner will depend upon the nature of the information actually held by the Cabinet Office.
- 6.2 Where no information is held as to the content of the discussions between the Prime Minister and Mr. Murdoch or Mr. Desmond no further information need be supplied to the complainant. However, the Cabinet office should provide the complainant with additional information in order to fully understand the basis of the refusal, in accordance with section 17 of the Act.
- 6.3 In relation to the information held as to the content of the discussions between the Prime Minister and Mr. Murdoch or the Prime Minister and Mr. Desmond which is exempt only by virtue of s.36, the dates of the discussions should be provided to the complainant.
- 6.4 In the event that the information held as to the content of the discussions between the Prime Minister and Mr. Murdoch or the Prime Minister and Mr. Desmond and is exempt by virtue of another exemption which is either absolute or which, if qualified, the Cabinet Office considers should be maintained in the public interest, a fresh refusal notice should be given to the complainant.
- 6.5 The Commissioner requires this information to be provided to the complainant and to himself within 35 days of receipt of this notice.



Information Commissioner's Office
Promoting public access to official information
and protecting your personal information

6. Right of Appeal

6.1 Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "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

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

Dated the 3rd day of July 2006

Signed

Graham Smith
Deputy Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF