

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 26 April 2011

Public Authority: Local Government Ombudsman
Address: 10th Floor
Millbank Tower
Millbank
London
SW1P 4QP

Summary

The complainant requested a copy of a report prepared by the Local Government Ombudsman following a visit to numerous Ombudsmen in Australia. A copy of the report was provided to the complainant however some information was redacted on the basis that section 36(2)(b)(ii) and 36(2)(c) applied. On review the LGO confirmed its reliance on that exemption, although one additional section of information was provided to the complainant.

The Commissioner's decision is that the LGO was correct to apply section 36(2)(b)(ii) to the information. He has also decided that the LGO breached section 10(1) in not providing the information within the required 20 day period.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. In 2005 the Local Government Ombudsman made a fact finding trip to Australia, visiting numerous Australian Ombudsmen. The complainant alleges that that trip coincided with a talk which the Ombudsman was giving on a personal basis to the Certified Public Accountants Association (the 'CPA'), and a private holiday for him and his wife. She states that the fact finding trip was paid for by the LGO out of public money, but that the central basis of the trip was for his own private purposes. She therefore asked for a copy of any information which the LGO holds as a result of that trip. The LGO stated that the only information it retains from the trip is a report which the Ombudsman produced on his return.

The Request

3. On 31 July 2010 the complainant requested from the authority:

"I would like all the information which Tony Redmond produced during 2005 in order to convey to Commission members and staff what he had learnt, at taxpayer's expense, during his study tour of Australia."
4. The complainant received an acknowledgement from the LGO on 3 August 2010.
5. On 31 August 2010 the LGO wrote again to the complainant stating that due to staff being on leave their response would be slightly delayed.
6. On 17 September 2010 the complainant wrote to the LGO asking for a review as she had not received a response to her request within a reasonable time period.

7. On 22 September 2010 the LGO wrote to the complainant providing a redacted copy of the report together with a refusal notice for some sections of it. It stated that the redacted sections were exempt under section 36(2)(b)(ii) and 36(2)(c) of the Act.
8. On 23 September 2010 the complainant wrote to the LGO requesting information. She said that she would be asking it to review its decision shortly, but before doing so she wished to know who would carry out that review. She said that she wanted to reassure herself that that person would be sufficiently independent from the original decision to agree the Ombudsman's trip in the first instance. Her argument was that the qualified person who had provided the initial refusal notice had also been partially responsible for agreeing that the LGO could fund the Ombudsman's trip in the first instance. Her view was that there was therefore a conflict of interests.
9. On the 28 September 2010 the LGO responded providing details of the person who would carry out the review.
10. On 29 September 2010 the complainant wrote to the LGO stating that she would provide details of her complaint within the next few days. She then submitted the response on the same day.
11. 27 October 2010 the LGO responded to the request for review. It provided one further section of information but refused to provide the rest on the grounds that section 36(2) applied.

The Investigation

Scope of the case

12. On 2 November 2010 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - whether the information she had asked for should have been provided to her
 - whether the delays which occurred with the LGO's responses breached the time limits set by the Act.

Chronology

13. The Commissioner wrote to the LGO on 11 December 2010 stating that an eligible complaint had been received and that he was preparing to investigate it.
14. The LGO responded on 22 December 2010 providing an unredacted copy of the report together with further argument in support of its decision to redact some sections of the information under section 36(2) of the Act.

Analysis

Substantive Procedural Matters

15. The Commissioner notes that the complainant's request was made on 31 July 2010. The LGO's provided some information on 22 September 2010. This falls outside of the statutory deadline for providing information of 20 working days. The Commissioner's decision is that this is a breach of section 10(1) of the Act. The Ombudsman also breached section 17(1) in failing to provide a refusal notice within 20 working days.

Exemptions

Section 36

16. Section 36(2)(b) states that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the Act would, or would be likely to, inhibit-
 - the free and frank provision of advice, or
 - the free and frank exchange of views for the purposes of deliberation, or
17. Section 36(2)(c) states that information is exempt if in the reasonable opinion of the qualified person a disclosure under the Act-
 - would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
18. The Ombudsman applied the exemption in section 36(2) to the information. It stated that:

"The legal grounds for these deletions is s36(2)(b)(ii) and (c) of the FOIA. I am a qualified person authorised under s36(5)(o)(iii)

by the Secretary of State for Communities and Local Government. In my opinion the release of this information would prejudice the free and frank exchange of views or otherwise prejudice the effective conduct of public affairs (which is the wording in the Act). The need for Ombudsmen to be able to have frank exchanges with their counterparts in other countries and to learn from these exchanges, outweighs any public interest that would be advanced by publishing these particular parts of [the Ombudsman's] report."

19. The Commissioner must consider whether the qualified person's opinion was reasonable in substance and reasonably arrived at. He has considered first what information the qualified person had before him when making his decision. The Commissioner is satisfied that the primary requisites for the qualified person to reasonably arrive at his decision were in place.
20. In his refusal notice the Ombudsman's Officer confirmed that he was a qualified person for the purposes of the Act. He had access to the relevant information itself at the time of his decision. The Ombudsman also stated that no further information exists relevant to the request, and the information itself indicates that it is the only document which the Ombudsman produced. This has not been questioned by the complainant and so has not been considered further in this Notice. The Commissioner has also considered the nature of the information. He is satisfied that the information itself is sufficient to provide the qualified person with the basis for making a decision on the application of section 36. Accordingly he is satisfied that the qualified person's decision was reasonably arrived at.
21. Having agreed that the decision was reasonably arrived at the Commissioner must next decide whether the qualified person's opinion was reasonable in substance.
22. The Commissioner has considered the two claims to subsections 36(2)(b)(ii) and 36(2)(c) separately.

Section 36(2)(b)(ii)

23. The Commissioner has firstly considered whether a disclosure of the information would prejudice the free and frank exchange of views for the purposes of deliberation.
24. The Commissioner has considered the nature of the information which has been exempted. The Ombudsman's visit to his Australian counterparts took note of the general set up of their offices, how they

handled complaints and how they managed their office to best effect. This information is clearly not sensitive and accordingly has been disclosed in the unredacted sections of the report.

25. The disclosure of this information has led the complainant to believe that the information which has been reported by the Ombudsman is easily obtained through a phone call or from the websites of the particular Ombudsman. The Commissioner is satisfied that as regards the withheld information, that is not the case.
26. Subsection (b) refers to the provision of a free and frank exchange of views for the purposes of deliberation.
27. The word deliberation is not defined in the Act, however it can loosely be defined as discussion and consideration of all sides of an issue. As such it encompasses such matters as thought and discussion about particular subjects or a deliberate, specific analysis of a situation or circumstances.
28. The Commissioner notes that the primary function of the Ombudsman is to investigate and make decisions as to whether the organisations which he regulates have acted appropriately. He deliberates over the circumstances and facts of a complaint with a view to reaching an end decision on whether an authority has acted appropriately or not. In addition to general deliberations over individual cases the LGO would also deliberate over ways of making the processing of complaints more efficient to provide a better service to the public. This would include techniques for complaint handling, operational considerations, or thoughts on particular interpretations of legislation. There will be many more factors which affect 'deliberations' in this regard.
29. Any deliberation over the best way to provide efficient and appropriate services to the public may be informed from the experience of similar organisations, both nationally and internationally. A widely used tool used by regulators is to meet and discuss experiences with similar organisations and individuals. This is often achieved through fact finding missions or regular discussions with national and international counterparts to 'compare notes' and discuss topics of interest.
30. The Commissioner accepts that discussions and fact finding missions with national and international counterparts are often useful in order to share experience, and discuss the results of particular strategies or operational procedures in an open and candid way. In that way information is shared which may prove beneficial if similar circumstances arise in other countries. Sharing experiences provides insight and may prevent mistakes being repeated in other

organisations. Insight into the 'political landscape' in which the Ombudsmen work may also be helpful to understand their decisions and actions which might not otherwise be obvious.

31. The information in this case does not encompass information such as tactics, strategies or other techniques which might aid the UK Ombudsman's functions directly. The withheld information actually addresses the different regulatory regimes which run within Australia and some of the issues which such an interlinked system raises for particular Ombudsman and their offices.
32. The Ombudsman argues that the information has been redacted because it is sensitive information which the Australian Ombudsman shared on the basis that it would only be repeated back to a very limited audience – that it was for the purposes of informing the UK Ombudsman and his staff about current issues which faced their particular offices. The Commissioner recognises that if comments which were made on such a basis were to be disclosed more widely then this could result in a potential loss of trust and confidence between the parties. The disclosure of frank discussions could sour relationships between the parties.
33. If this were to occur, in future fact finding missions other Ombudsmen may become far more guarded about the issues they share and as a result less information may be recorded of this nature. Although the Commissioner has confidence that civil servants have the courage to ensure that appropriate records are taken it is entirely possible that information of this sort would not be recorded or even provided in the future. This is because the redacted information is not information which is 'necessary' to be shared, however it does colour the picture which is painted of the circumstances in which the Australian Ombudsmen's Offices' operate.
34. The Commissioner must therefore consider whether a disclosure of such information would in fact prejudice the exchange of full and frank views for the purposes of deliberation. The Commissioner doubts that the withheld information would be particularly useful to the LGO's day to day work. He considers that its disclosure would be unlikely to prevent or prejudice his ability to carry out his day to day functions to any great extent. However the Commissioner is satisfied that a disclosure would prejudice the trust and confidence which the Ombudsman has previously shared with his Australian counterparts, and that in doing so it would lead to less full and frank discussions, and sharing of experiences in the future. This in itself would be prejudicial to the LGO's ability to obtain information and intelligence on how their international counterparts operate. A more guarded approach would

therefore be likely to affect information which the LGO might want to obtain in the future which would affect the day to day operation of their offices.

35. Finally the Commissioner has considered the fact that the information was created in 2005 and that the request was not received until 2010 – 5 years later. He has therefore considered whether the sensitivity of that information has waned over time. His decision is that it has not as the information still retains its sensitivity and is still current.
36. Accordingly the Commissioner is satisfied that the Ombudsman was correct to apply section 36(2)(b)(ii) to the information because it was reasonable to conclude that a disclosure of the information would prejudice the free and frank exchange of views for the purposes of deliberation.
37. Section 36(2)(b)(ii) is subject to a public interest test to decide whether the information should be disclosed in spite of the fact that the exemption is engaged. The test is whether the public interest in maintaining the exemption outweighs that of disclosing the information.

Public interest arguments in favour of disclosing the requested information

38. The central public interest in the information being disclosed lies in creating greater transparency in the actions of the Ombudsman and in his use of public finances by the LGO.
39. The public interest in transparency has particular weight in this case because the trip allegedly involved a large element of private benefit for the particular Ombudsman and his family. The Commissioner does not know whether that is correct or not, although he notes the Ombudsman's office has not disputed the complainant's statements to that effect.
40. The Commissioner also notes the complainant's argument that the qualified person had conflicted interests when refusing her request. The Commissioner notes that it is not possible for the Ombudsman to have delegated the decision to any other person than the qualified person however as this is a requirement of the application of section 36 within legislation. It was not therefore open to the Ombudsman to delegate that decision to another person in spite of his previous involvement in the issues under consideration.

41. In any case the Commissioner is satisfied that the qualified person's opinion that a disclosure of the information would be prejudicial is reasonable, and therefore places little weight on the above argument. Although there is a public interest in justice being 'seen to be done', in this case that interest is lessened somewhat by the fact that the review was carried out by a person who had nothing to do with the original decision to allow the LGO to pay for the trip.
42. The LGO's primary function is to deal with complaints about local government and local authorities. The redacted information has little in common with that part of his work. It is difficult to envisage a severe impact on the day to day functions of the Ombudsman through a disclosure of this data. This strengthens the argument that the information should be disclosed. If the LGO's direct functions would not be greatly affected by a disclosure then this lessens the arguments for withholding the information, and places greater emphasis on the public interest in transparency and providing the general public with a greater ability to scrutinise the value of the trip to the public.

Public interest arguments in favour of maintaining the exemption

43. The Commissioner recognises that fact finding tours can be a useful exercise in sharing and obtaining knowledge. In general, the more open such discussions are the more that may be learnt from such exercises.
44. Full and frank discussion on any matters of interest are of worth where that information can be recorded and reported back to relevant individuals within the organisations concerned. This informs the organisation and allows it to operate with a greater understanding of its international counterparts.
45. If organisations are not able to do that because they fear that a disclosure would breach levels of personal trust then the process of experience sharing becomes devalued and less useful.
46. If disclosure results in a lack of trust, or in soured relationships between the organisations then valuable information which might otherwise be obtained or shared in the future may not be provided. This may affect the day to day running of the LGO and ultimately, mistakes which might have been prevented may be made, or the benefits of information shared not received. Ultimately this may affect the efficiency of the LGO's service.

Balance of the public interest arguments

47. The Commissioner has considered whether a disclosure of the information would create any additional transparency on the worth of

the trip for the taxpayer. It would prove that relatively frank discussions did occur with some Australian Ombudsman; but would not however validate the trip further other than to clarify that information was exchanged which would be unlikely to have been obtained from the website or from telephone calls.

48. The Commissioner has placed the greatest weight on the negative side effect on the ability to have full and frank discussions with international counterparts in the future. It is clear that the information was provided to the Ombudsman with a view that its disclosure within the UK would be to a limited amount of people, namely those who work within the Ombudsman's Office. Clearly a global disclosure (as requests under the Act are taken to be) would be likely to be considered, at the least, to be a significant breach of trust and would undermine the ability to discuss matters fully and frankly in the future.
49. The Commissioner's decision is therefore that the public interest in maintaining the exemption outweighs that of disclosing the information in this case.

Section 36(2)(c)

50. Given his finding above that section 36(2)(b)(ii) applies the Commissioner has not considered the application of section 36(2)(c) further.

The Decision

51. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- It was correct to withhold the information under section 36(2)(b)(ii)
52. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
- The Ombudsman breached regulation 10(1) in not providing the information to which the complainant was entitled within the time prescribed by the Act of 20 working days
 - The Ombudsman breached regulation 17(1) in failing to provide a refusal notice within the time prescribed by the Act of 20 working days.

Steps Required

53. The Commissioner requires no steps to be taken.

Right of Appeal

54. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

55. 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.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 26th day of April 2011

Signed

**Lisa Adshead
Group Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

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."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 36(2) provides that –

“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.