

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 February 2012

Public Authority: Scotland Office
Address: Dover House
Whitehall
London
SW1A 2AU

Summary

The complainant requested information relating to Ministerial engagements. The public authority refused this request, citing the exemptions provided by sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and to the free and frank exchange of views). The Commissioner finds that these exemptions are engaged in relation to some of the information falling within the scope of the requests, but that the remainder of this information is not exempt. The public authority is required to disclose the non-exempt information. The Commissioner also finds that the public authority breached the procedural requirements of the Act through its handling of the request.

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.

The Request

2. The complainant made the following information requests on 13 September 2010:

"The content of any correspondence, emails, minutes of meetings and notes of any communication between the Secretary of State for Scotland, or the Private Office of the Secretary of State, or Special

Advisors to the Secretary of State for Scotland, or the Scotland Office Press Office, and officials in the Scotland Office:

(1) In relation to Ministerial engagements undertaken or planned, including details of travel and correspondence with the WHIPS Office, in relation to the Secretary of State for Scotland's attendance in the House of Commons on 13 July 2010. Specifically, details of each individual visit, its venue, the date it was arranged, and the travel arrangements to and from the engagements including start and finish times for the Secretary of State for Scotland on 13 July 2010;

(2) [From] the period 1 June 2010 to 25 July 2010, in relation to Ministerial engagements undertaken or planned with external parties for the week beginning 20 July 2010;

(3) For the period from [the appointment of the Secretary of State for Scotland] to 6 September 2010, in relation to the number of Ministerial engagements undertaken or planned in the City of Glasgow, Edinburgh, South Lanarkshire, North Lanarkshire, Renfrewshire, the Scottish Borders, Perth and Kinross and Aberdeen;

(4) In relation to Ministerial meetings with external parties and organisations which were due to take place but did not take place for the week beginning 20 July 2010."

3. The responses to these requests were dated 13 October 2010. Requests (1) and (3) were refused under section 35(1)(d) (information relating to the operation of any Ministerial private office) and requests (2) and (4) were refused under sections 35(1)(b) (information relating to Ministerial communications) and 35(1)(d).
4. The complainant responded to this on 28 October 2010 and requested that the public authority carry out an internal review. The public authority responded with the outcome on 26 January 2011. In relation to requests (1), (2) and (3), some information was now disclosed to the complainant. Whilst the public authority later confirmed to the Commissioner's office that the remainder of the information falling within the scope of requests (1), (2) and (3) was believed to be exempt by virtue of sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and the free and frank exchange of views), the internal review response made no mention of this exemption. Neither did this response give any other explanation as to why the information that continued to be withheld would not be released. In relation to request (4), the public authority now stated that it did not hold any information falling within the scope of this request.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner's office initially on 10 January 2011. At this stage the complaint concerned the failure by the public authority to complete the internal review by that time.
6. Following the completion of the internal review, there followed an exchange of correspondence between the Commissioner's office and the complainant in which the complainant confirmed that he wanted the Commissioner to consider the citing of sections 36(2)(b)(i) and (ii) and the response to request (4) that no relevant information was held.
7. The complainant was also asked to clarify the ambit of requests (1) and (3). Whilst an objective reading of these requests was arguably that they were limited in scope, the public authority had read these more widely. Request (1) had been read as a request for all information about Ministerial engagements on the date specified and request (3) for all information about Ministerial engagements during the period and at the locations specified. The complainant confirmed that the intention was that these requests should be read broadly as the public authority had done. Given that these requests have been read in this way by both complainant and public authority, the Commissioner accepts this reading of these requests.
8. The complainant had also asked that the investigation cover why the public authority had altered its stance in response to his request at internal review stage. In response to this the complainant was advised that the investigation would not cover issues that were resolved. The procedural breaches in the handling of the requests are, however, covered in this Notice.
9. As the initial citing of sections 35(1)(b) and (d) was effectively withdrawn at internal review stage, this Notice does not cover the citing of those exemptions and instead focuses on sections 36(2)(b)(i) and (ii).

Chronology

10. The Commissioner's office contacted the public authority on 14 April 2011. In relation to requests (1), (2) and (3), the public authority was asked to respond with explanations for the citing of sections 36(2)(b)(i) and (ii); in relation to request (4), with an explanation of the searches carried out for the information requested and, if applicable, any other reasoning as to why it had concluded that this information was not held. The public authority had previously supplied a copy of the withheld information to the Commissioner's office.

11. The public authority responded to this by letter dated 16 June 2011 and provided an explanation of the searches carried out for information falling within the scope of request (4). The public authority also at this stage explained the citing of sections 36(2)(b)(i) and (ii) in response to requests (1), (2) and (3).

Analysis

Substantive Procedural Matters

Section 1

12. In relation to request (4) the public authority has stated that it does not hold any information falling within the scope of this request. The task for the Commissioner in relation to this request is to consider whether the public authority's response is correct and in accordance with section 1(1)(a) of the Act in stating that this information is not held. The conclusion of the Commissioner will be made on the basis of the balance of probabilities and will take into account the following:
 - the scope, quality, thoroughness and results of the searches; and
 - if applicable other explanations offered as to why the information is not held.
13. Covering first the description provided by the public authority of the searches carried out for this information, it has stated that the Action Officer consulted the Diary Secretary and others involved in arranging Ministerial meetings. Those consulted were asked to search their emails and other "*relevant files*" for information falling within the scope of the request. No such information was located through these searches. The Commissioner considers that these searches cannot have been undertaken properly until the internal review stage as it was only then that the public authority stated that the information was not held.
14. Secondly, the public authority also provided an explanation as to why it had concluded that no information falling within the scope of this request is held. The public authority referred to the "*intense pressure*" on Ministerial time and stated that, as a result of this, meetings are regularly altered and occasionally cancelled. The public authority stated that changes to Ministerial diaries are not generally logged as such a log would be of little value and would be time consuming to maintain. It also stated that it would anticipate that any information of relevance to this request was likely to have been in the form of emails to the Diary Secretary, but that searches in this area had located no relevant information.

15. The public authority has provided to the Commissioner both a reasonably detailed description of the searches that were carried out for information falling within the scope of this request and a cogent explanation as to why it is plausible that no such information would be held. On the basis of these representations from the public authority, the Commissioner accepts, on the balance of probabilities, that no information falling within the scope of request (4) is held. The conclusion here is, therefore, that the public authority complied with section 1(1)(a) of the Act in relation to this request.

Exemptions

Section 36

16. The public authority has cited sections 36(2)(b)(i) (inhibition to the free and frank provision of advice) and 36(2)(b)(ii) (inhibition to the free and frank exchange of views for the purposes of deliberation). Consideration of these exemptions is a two-stage process. First, the exemptions must be engaged. Secondly, these exemptions are qualified by the public interest, which means that, for the information to be withheld, the public interest in the maintenance of the exemptions must outweigh the public interest in disclosure.
17. Turning first to whether the exemptions are engaged, sections 36(2)(b)(i) and (ii) can be cited only where the reasonable opinion of a specified qualified person (QP) is that the inhibition described in these sections would be at least likely to result. The QP for each public authority is either specified in the Act, or is authorised by a Minister of the Crown. In considering whether these exemptions are engaged, the Commissioner will cover the following:
- whom the Act or a Minister of the Crown specifies as QP for this public authority;
 - whether the QP gave an opinion in this case;
 - when this opinion was given;
 - whether the opinion given was reasonably arrived at and objectively reasonable in substance.
18. Section 36(5)(a) of the Act specifies that, in relation to information held by a government department, the QP is any Minister of the Crown. In this case, the public authority has specified that the QP was the Secretary of State for Scotland and that an opinion was given by the QP on 26 January 2011. The Commissioner accepts that an appropriate individual acted as QP and that the opinion was given by the date of the internal review response.

19. As to whether the opinion was reasonably arrived at, the key factor here is what was taken into account by the QP when the opinion was formed. The public authority has stated that the QP was provided with a submission, which was prepared by officials to assist in the formation of the opinion, and also that further advice was provided later, but that no record of the later advice was made. The public authority also stated that the QP "*had sight*" of the information in question.
20. The public authority has provided to the Commissioner's office a copy of the submission upon which the opinion of the QP was at least partly based. This sets out some relevant arguments; however, the Commissioner notes that these arguments are not set out in particular detail
21. If it had been the case that the opinion of the QP had been formed solely on the basis of this submission, it is unlikely that the Commissioner could have concluded that the opinion was reasonably arrived at.
22. However, the public authority has stated that the QP also took into account advice provided to him verbally, and that the QP "*had sight*" of the information, although it has been unable to provide any record of the verbal advice and has not specified whether the QP viewed the entirety of the information in question, or what proportion of it. Whilst the decision on this point would have been on a stronger footing had more detail been provided as to what the opinion was based upon, through a combination of the submission, the verbal advice and the fact that the withheld information was available for the QP to view, the Commissioner finds that the opinion of the QP was reasonably arrived at.
23. As to whether that opinion was objectively reasonable in substance, the public authority has specified that the opinion of the QP was that inhibition *would be likely* to result, rather than *would* result. The test that the Commissioner applies when considering whether inhibition would be likely to result is that the possibility of this must be real and significant, and more than hypothetical or remote. The question here, therefore, is whether it was objectively reasonable for the QP to hold the opinion that there was a real and significant likelihood of inhibition relevant to sections 36(2)(b)(i) and (ii) resulting through disclosure of the information in question.
24. The conclusions of the Commissioner and reasoning for these are set out broadly here. A confidential annex sent with this Notice to the public authority sets out which documents the Commissioner concludes are not exempt and should be disclosed.

25. In relation to some of the information in question, the conclusion of the Commissioner is that the exemption(s) provided by section(s) 36(2)(b)(i) and / or (ii) are engaged. These documents contain content that could be fairly characterised as free and frank and that relate to the provision of advice and / or the exchange of views. The explanation provided by the public authority for the opinion of the QP was effectively that disclosure would be likely to inhibit participants in meetings, and those providing advice prior to meetings. The Commissioner accepts that this reasoning is relevant to this part of the information. In relation to this part of the information, the Commissioner considers the opinion of the QP to have been objectively reasonable and so finds that the exemptions provided by sections 36(2)(b)(i) and (ii) are engaged.
26. In relation to the remainder of the information, which constitutes a significant portion of the whole, the Commissioner does not believe that the opinion of the QP was objectively reasonable. The Commissioner's view is that for the opinion of a QP to be reasonable, the information in question must engage the issues that this exemption is designed to protect. The information in relation to which the Commissioner considers the opinion not to be reasonable consists mainly of recitation of fact or finalised positions. There is, in the Commissioner's opinion, nothing in that information which, if disclosed, would inhibit or constrain those giving advice or exchanging views for the purposes of deliberation.
27. The Commissioner would stress here that he is not disregarding the opinion of the QP or merely substituting his own. Rather his view is that, in relation to some of the information, the content is such that the opinion of the QP cannot be said to be objectively reasonable.
28. For these reasons, the Commissioner finds that the opinion of the QP in relation to this information was not objectively reasonable. In relation to the information specified in the confidential annex sent with this Notice to the public authority, the conclusion of the Commissioner is that the exemptions provided by sections 36(2)(b)(i) and (ii) are not engaged.

The public interest

29. In relation to the information that is exempt under sections 36(2)(b)(i) and (ii), the Commissioner has considered whether the public interest in maintaining this exemption outweighs the public interest in disclosure. In the case of *Guardian & Brooke v the Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013), the Information Tribunal acknowledged that the application of the public interest test to the section 36 exemption "*involved a particular conundrum*", noting that although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public

interest, *"it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice"* (paragraph 88).

30. In the Tribunal's view, the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion:

"does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant" (paragraph 91).

This means that, whilst the Commissioner should give due weight to the reasonable opinion of the QP, when assessing the public interest he can and should consider the severity, extent and frequency of prejudice or inhibition to the effective conduct of public affairs.

31. On the issue of the severity and extent of the inhibition resulting from disclosure here, the Commissioner accepts the importance to the ability of the public authority to function effectively of Ministers receiving free and frank advice from officials and of the willingness of participants in meetings to engage in an exchange of views in a free and frank manner. Having accepted the QP's opinion that the free and frank provision of advice and the free and frank exchange of views would be likely to be inhibited as a result of disclosure, the Commissioner recognises that the impact of this inhibition could be severe – given the importance of the provision of advice, and the ability to engage in uninhibited meetings with external parties, to the functioning of the public authority.
32. As to the frequency of inhibition, having accepted that the provision of advice from officials to Ministers plays an important role in the functioning of the public authority, it follows that such advice is provided frequently. The Commissioner would not, however, accept that inhibition would be a likely result of disclosure in every situation where advice is provided by an official to a Minister. Instead, he would only accept that such inhibition would be likely to arise in a case where the advice relates specifically to meetings between a Minister and an external party and where it is reasonable to characterise the advice as free and frank.
33. As to the free and frank exchange of views, the Commissioner similarly would not accept that future inhibition would be a likely result in every case where Ministers within the public authority meet with external parties. Instead, the Commissioner would only accept that there is a likelihood of inhibition in cases where the meeting relates to an issue of at least some sensitivity.

34. Having accepted the opinion of the QP as reasonable, the Commissioner recognises that this inhibition would be likely to result with some frequency; potentially in any situation where an official provides advice to a Minister or engages in an exchange of views that is free and frank and that relates to a meeting between a Minister and an external party.
35. It is in the public interest for the public authority to be capable of functioning effectively. Where the severity, extent and frequency of inhibition resulting from disclosure results in prejudice to the ability of the public authority to function effectively, this contributes to the argument that maintenance of the exemptions is in the public interest.
36. Turning to public interest arguments in favour of disclosure, civil servants are under a duty to provide appropriate advice to Ministers. This duty extends to ensuring that it is as free and frank as necessary in the circumstances. Whilst the Commissioner accepts that, notwithstanding this duty, inhibition is made more likely as a result of disclosure than in a case where there is no possibility of disclosure, the argument in favour of maintenance of the exemptions due to the severity of the inhibition is reduced as a result of the existence of this duty.
37. The content of the withheld information is a central consideration to the balance of the public interest. If there were evidence that meetings between Ministers within the public authority and external parties had been the subject of significant public debate, to the extent that disclosure here would contribute to this debate, this would be a factor in favour of disclosure. As it is, the Commissioner can find no evidence of any such debate. He would accept that there is a general public interest in knowing about the activities of government Ministers and finds that this is a valid public interest factor in favour of disclosure, albeit that this carries less weight than would have been the case had there been evidence of a specific public interest relating more closely to this information.
38. Disclosure would add to the public understanding of the workings of the public authority. Disclosure would be in the public interest where this would help to explain decisions about which meetings to attend and about such issues as the reasoning behind positions taken by Ministers at such meetings.
39. The Commissioner has recognised valid arguments here that the public interest would favour disclosure of this information. However, in this case they are general arguments which are not specific to the content of the information which the Commissioner has found to be exempt.

40. The Commissioner, having accepted as objectively reasonable the opinion of the QP that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views, has also recognised that, given the central role that the provision of advice from officials to Ministers has to the work of the public authority and the importance of the public authority being capable of conducting meetings with external parties free from inhibition, this inhibition would both be significant and of some frequency.
41. In the absence of compelling and specific public interest grounds for disclosure in this case, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The arguments in favour of maintenance of the exemption are stronger, given the extent and frequency of the inhibitory impact on the public authority.

Procedural Requirements

Section 1 and 10

42. In failing to disclose within twenty working days of receipt of the request the information that the Commissioner has concluded was not exempt by virtue of sections 36(2)(b)(i) or (ii), the public authority did not comply with the requirements of sections 1(1)(b) and 10(1).

Section 17

43. In failing to specify sections 36(2)(b)(i) and (ii) and in failing to provide any explanation at any stage as to why the various exemptions cited were believed to be engaged, or as to why the balance of the public interest was believed to favour the maintenance of these exemptions, the public authority did not comply with the requirements of sections 17(1)(b), 17(1)(c) or 17(3)(b).

The Decision

44. The Commissioner's decision is that the public authority dealt with the request for information partly in accordance with the Act in that it applied the exemptions provided by sections 36(2)(b)(i) and (ii) correctly in relation to some of the information falling within the scope of the request. However, the Commissioner also finds that these exemptions were not engaged in relation to other information within the scope of the request. The public authority breached sections 1(1)(b) and 10(1) in refusing to disclose this information within 20 working days of receipt of the request. The Commissioner also finds that the public

authority breached the requirements of sections 17(1)(b), 17(1)(c) and 17(3)(b) through its handling of the request.

Steps Required

45. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- disclose to the complainant the information listed in the confidential annex provided with this Notice to the public authority, which the Commissioner has found was not exempt.

The public authority must take the steps required by this notice within 35 calendar days of the date of this Notice.

Failure to comply

46. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

47. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. A procedural breach of the Act is recorded above in relation to the lack of explanation provided by the public authority to the complainant as to why the information requested was believed to be exempt. The Commissioner would also take this opportunity to stress to the public authority that section 17 of the Act requires that, where a request is refused, the public authority must specify which exemption is cited, why it is believed to be engaged and, if applicable, why the balance of the public interest is believed to favour the maintenance of that exemption. The public authority should ensure that future refusal notices are of a better quality than that provided in this case and that they comply fully with the requirements of section 17.

48. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public

authority failed to respond with the outcome of the review within twenty working days. Neither did the public authority respond with the outcome of the review within forty working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

49. 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: 0845 600 0877

Fax: 0116 249 4253

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

Website: www.informationtribunal.gov.uk

50. 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.
51. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
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SK9 5AF

Legal Annex

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 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 17(1) provides that -

"A public authority which, in relation to any request for information, 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."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales 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 or the provision of such advice, or
- (d) the operation of any Ministerial private office."

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-

- (a) would, or would be likely to, prejudice-
 - i. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - ii. the work of the Executive Committee of the Northern Ireland Assembly, or
 - iii. the work of the executive committee of the National Assembly for Wales,
- (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."