

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2012

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

Decision (including any steps ordered)

1. The complainant requested information concerning allegations of misconduct by special advisers and any investigation of these. The Cabinet Office refused to disclose this information, citing the exemptions provided by the following sections of the FOIA: 36(2)(b)(i) (inhibition to the free and frank provision of advice), 36(2)(b)(ii) (inhibition to the free and frank exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs). The Commissioner's decision is that the Cabinet Office applied these exemptions correctly and so it is not required to disclose this information.

Request and response

2. On 28 February 2011 the complainant wrote to the Cabinet Office and requested information in the following terms:

"Please provide me with information held by the department that pertains to the following (the time period for all parts of the request is from May 2010 to the present):

- *Information relating to matters concerning breaches of the civil service code or the special advisers' code of conduct of any other proprietary issues around the performance of DCLG's special advisers [names redacted] since May 2010.*
- *Any information concerning improper use of public expenditure within DCLG since May 2010, specifically the use of public money for*

political purposes.

- *Any information held by the department concerning improper influence of DCLG special advisers and/or ministers on the DCLG press office since May 2010.*
- *Any information held by the department concerning improper media briefings made by DCLG special advisers and/or ministers since May 2010.*
- *Any information held by the department concerning the non renewal of Jenny Watson's position as a board member of the Audit Commission, particularly concerning issues around briefings made to the media by DCLG special advisers or civil servants that may or may not have been considered potentially defamatory."*

3. The complainant also made a further information request on 17 May 2011:

"On the 10 May 2011 Sir Gus O'Donnell wrote to shadow communities secretary Caroline Flint (see letter attached) confirming that he had 'fully investigated' allegations concerning negative briefings made by a DCLG source against outgoing Audit Commission board member Jenny Watson in an article in the Times on 8 September 2010 (pasted below).

Could the department please provide:

- *Any information pertaining to the investigation that Sir Gus refers to in his letter to Ms Flint.*

In addition, could the department please answer the following specific questions:

- *What did the investigation into the allegations entail? What was its scope?*
- *What efforts were made to identify the origin of the briefing published in the Times?*
- *Did the investigation identify the origin of the briefing to the Times?*
- *If so, was the source of the briefing a departmental official, a special adviser or a minister?*
- *Was any disciplinary action taken – whether formal or informal – against the source of the briefing? If so, what was the nature of that action? If not, why not?"*

4. The Cabinet Office responded following a lengthy delay, and only following the intervention of the ICO, on 14 September 2011. It stated that the requests were refused and cited the exemptions provided by

sections 36(2)(b) and (c) (prejudice to the effective conduct of public affairs) and 40(2) (personal information) of the FOIA.

5. Following an internal review the Cabinet Office wrote to the complainant on 27 October 2011. It stated that the refusal of the request under the exemptions cited previously was upheld.

Scope of the case

6. The complainant contacted the Information Commissioner (the Commissioner) on 20 July 2011 to complain about the way his request for information had been handled. At this stage the complaint concerned the failure of the Cabinet Office to respond to the request in a timely fashion. The Commissioner's office contacted the Cabinet Office on 6 September 2011 and raised the issue of the failure to respond substantively to the requests. As recorded above, shortly after this the Cabinet Office responded to the requests.
7. Following the provision of the substantive response and the completion of the internal review, the complainant contacted the Commissioner's office again on 31 October 2011. At this stage the complainant indicated that he did not agree with the exemptions that had been cited in response to his requests.
8. During the investigation of this case a representative of the Commissioner's office visited the Cabinet Office to view the information within the scope of the requests.

Reasons for decision

Section 36

9. The Cabinet Office has cited the exemptions provided by the following sections of the FOIA:
 - 36(2)(b)(i) (inhibition to the free and frank provision of advice)
 - 36(2)(b)(ii) (inhibition to the free and frank exchange of views)
 - 36(2)(c) (other prejudice to the effective conduct of public affairs)
10. The exemptions provided by section 36 can be cited only on the basis of the reasonable opinion of a specified qualified person (QP).

Consideration of these exemptions is a two-stage process; first, it must be established that this exemption was cited on the basis of a reasonable opinion given by the QP that inhibition or prejudice relevant to these exemptions would be likely to occur. Secondly, this exemption is qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

11. Turning to whether this exemption is engaged, section 36(5)(a) provides that the QP for a government department is any Minister. In this case the Cabinet Office has stated that an opinion was given by Francis Maude MP, Minister for the Cabinet Office. It has also supplied to the Commissioner's office a copy of a submission to the QP dated 2 September 2011, in which the opinion of the QP was sought. The Commissioner accepts, therefore, that the opinion of a valid QP was sought in relation to the citing of this exemption.
12. The next step is to consider whether this opinion of the QP was reasonable. In forming a conclusion on this point the Commissioner has considered the explanation provided by the Cabinet Office of the reasoning for the opinion of the QP and compared this to the content of the information in question.
13. The Cabinet Office provided the following explanation of the grounds for the opinion of the QP.
 - Section 36(2)(b)(i)

Disclosure would be likely to inhibit the future provision of free and frank advice between the Head of the Civil Service and the Prime Minister on matters concerning the conduct of special advisers.
 - Section 36(2)(b)(ii)

Disclosure would be likely to inhibit future exchanges of views between officials and the Prime Minister concerning the conduct of special advisers.
 - Section 36(2)(c)

Disclosure would be likely to prejudice the proper management and discipline of civil servants, including special advisers, in future.
14. The question for the Commissioner here is whether it was reasonable for the QP to hold the opinion that the inhibition and prejudice described above would be likely to result through disclosure. As set out in the

Commissioner's published guidance on this exemption¹, the approach here is that if the opinion is in accordance with reason and not irrational or absurd, then it is reasonable.

15. The Commissioner has considered the exemptions under section 36(2)(b)(i) and (ii) first.
16. As well as the considerations set out at the bullet points above, the Cabinet Office also advanced reasoning for the opinion of the QP more closely related to the specific issue of information relating to special advisers (spads). In summary the argument was made that, even without disclosure being made in this case, it is already challenging for mainstream civil servants to brief Ministers about spads.
17. There were a number of reasons for this, including that there are relatively few spads, approximately 80, and they often have a close professional connection to the Minister whom they have been appointed to advise. The small number of spads meant that there was potential for issues raised with Ministers about unnamed spads to be linked to individuals. The often close working relationship between spads and Ministers means that there is a potentially difficult environment in which it may be necessary for civil servants to raise concerns with Ministers about spads.
18. It was also stressed that the spads are appointed following permission from the Prime Minister, as is recorded in the *"Model Contract for Special Advisers"* of which a copy was supplied to the Commissioner's office by the Cabinet Office. The Cabinet Office stressed that in order for the Prime Minister to make an informed decision as to whether this permission should be granted, and possibly on whether it should be withdrawn, it is essential that he can be briefed on issues relating to spads without inhibition.
19. The withheld information was viewed by a representative of the Commissioner. This information records the provision of advice to the Prime Minister relating to the management of spads. The Commissioner accepts that the content of the information engages the issues described

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx

by the Cabinet Office and it is a reasonable argument that the disclosure of the information could have the effects set out in the exemption.

20. On the basis of the reasoning provided for the opinion, the Commissioner accepts that there exists an already somewhat challenging atmosphere for civil servants to advise Ministers on spads.
21. For these reasons, the Commissioner accepts that the opinion of the QP that inhibition and prejudice relevant to sections 36(2)(b)(i), (b)(ii) be likely to occur as a result of disclosure of the information in question was reasonable. The exemptions provided by these sections are, therefore, engaged.
22. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs these concerns. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the QP, but will also consider the severity, extent and frequency of the inhibition and prejudice that he has accepted would be likely to result through disclosure.
23. In the situation to which the request in this case relates, the negative briefings attributed to spads raised the possibility of legal action for damages being taken by the subject of the briefings against the Department for Communities and Local Government. The Commissioner accepts that if prejudice to the effective management of spads was to lead to similar situations arising in future, this would be a significant public interest factor in favour of maintaining both limbs of the exemption. It is therefore clear that the impact of disclosure could have a significant level of severity.
24. 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 Cabinet Office, it follows that such advice is provided frequently. The Commissioner would not, however, accept that the frequency of the inhibition here would be as high as in every case where advice is provided by officials to Ministers. Instead, as tacitly acknowledged by the Cabinet Office when advancing arguments specifically relating to spads, the inhibition in question here concerns advice and exchanges relating to spads. The view of the Commissioner is that the frequency of inhibition would be limited to the frequency with which advice and exchanges about spads occur.
25. Having accepted the opinion of the QP as reasonable, the Commissioner, placing weight on the timing of the request, recognises that this

inhibition and prejudice would be likely to result with some frequency; potentially in any situation where an official provides advice to or has an exchange with a Minister on an issue concerning spads. It is in the public interest for the Cabinet Office to be capable of functioning effectively. Where the severity, extent and frequency of inhibition and prejudice resulting from disclosure results in prejudice to the ability of the Cabinet Office to conduct itself effectively, this contributes to the argument that maintaining the exemption is in the public interest. The Commissioner accepts there is a public interest in the effective management of spads, and whilst improving accountability through disclosure of information plays a role in an effective spad system there is still a need for private advice in some aspects of the process.

26. Turning to public interest arguments in favour of disclosure, civil service officials are under a duty to provide appropriate advice to Ministers. This duty extends to ensuring that it is as free and frank as necessary. 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 exemption due to the severity of the inhibition and prejudice is reduced as a result of the existence of this duty.
27. The subject of the withheld information is highly relevant to where the balance of the public interest lies here. Questions about the work and role of spads were a current issue at the time of the request and refusal and this is a matter of legitimate public interest. That disclosure of the information in question here would aid transparency and public understanding about steps taken by the Cabinet Office to ensure that spads act appropriately contributes to the argument that the public interest here favours disclosure.
28. Further to this point is that the role of spads has been a matter of public debate. Concerns have been raised about the conduct of spads and how they may influence the policy making process away from the traditional model involving civil servants and towards more informal methods, which has been termed 'sofa government'. There has also been debate about the conduct of spads, including in relation to the situation which prompted the complainant to make the request in this case, where it was suspected that spads had been responsible for negative briefing to the media in relation to a public official. There are a number of other examples where the actions of spads have been controversial and their role in government has been called into question. Disclosure would be in the public interest here in order to add to understanding of how the employment and role of spads impacts upon the policy making process, and about the conduct of spads, and to add to the debate about this.

29. The Commissioner has recognised strong public interest arguments in favour of disclosure. Amongst these, the argument that carries most weight is that related to the content of the withheld information as the issue of the conduct and role of spads is of public interest.
30. However, the Commissioner, having accepted as reasonable the opinion of the QP that disclosure would be likely to result in inhibition and prejudice, has also recognised that, given the central role that the provision of advice and exchanges of views between officials and Ministers has to the work of the Cabinet Office, the impacts of disclosure on the process of managing spads would be significant. An important factor is the timing of the requests, which were made during or in close proximity to the specific issues related to the spads being considered.
31. The Commissioner acknowledges that the factors on both sides are strong but he has concluded that the public interest in maintaining each of the exemptions outweighs the public interest in disclosing the information. Whilst the Commissioner has recognised strong public interest arguments in favour of disclosure, the arguments in favour of maintaining each exemption are stronger, on the circumstances of the case. The Cabinet Office is not, therefore, required to disclose the information in question. The Cabinet Office correctly applied section 36(2)(b)(i) and (ii) to the information. As he has reached a conclusion on these exemptions the Commissioner has not considered section 36(2)(c).

Right of appeal

32. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

33. 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.
34. 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

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