

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 September 2014

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

Decision (including any steps ordered)

1. The complainant has requested Cabinet Office advice to the Department for Education in 2011 regarding the use of private emails for government business. The Cabinet Office provided a link to information published online but argued that it was withholding other information under section 36 (prejudice to effective conduct of public affairs).
2. The Commissioner's decision is that the Cabinet Office is not entitled to rely on section 36(2)(c) as the qualified person's opinion was not reasonable.
3. The Cabinet Office was also not entitled to rely on sections 36(2)(b)(i) and (i) as a basis for withholding the requested information as the public interest in maintaining the exemption did not outweigh the public interest in disclosure.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with a copy of the information listed in the Confidential Annex to this Notice.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

6. On 28 November 2013, the complainant requested information of the following description:

"Under the Freedom of Information Act please provide me with all Cabinet Office advice and guidance that was issued to the Department for Education on the use of private email accounts for conducting official government business during 2011.

I request a full copy of each of the emails and documents concerned, including any related advice or comment on security of government business, and the names of the senior civil servants from whom they were sent in the Cabinet Office and to whom in the DfE."

7. On 20 December 2013, the Cabinet Office responded. It provided a link to guidance to departments on the use of private emails that it had published online. It argued that the other information it held within the scope of the request was exempt from disclosure by virtue of sections 36(2)(b) and (c) although it did not specify which sub-sections of section 36(2)(b) it sought to rely on.
8. The complainant requested an internal review on 23 December 2013. After some delay and following the Commissioner's intervention, the Cabinet Office sent him the outcome of its internal review on 5 February 2014. It upheld its original position and specified that it was relying on section 36(b)(i) and (ii) as well as section 36(2)(c).

Scope of the case

9. The complainant contacted the Commissioner on 27 February 2014 to complain about the way his request for information had been handled. He had contacted the Commissioner prior to this regarding the Cabinet Office's delayed response to his request for internal review.
10. The Commissioner has considered whether the Cabinet Office is entitled to rely on the provisions of section 36 that it has cited as its basis for withholding the requested information.
11. After considerable delay on the Cabinet Office's part in providing its arguments, the Cabinet Office told the Commissioner that the withheld

information included that information which was considered in the Commissioner's decision notice ref: FS50483307¹.

12. The Commissioner is mindful of his previous decision but has considered this case on its own merits.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

13. Sections 36(2)(b) and (c) state that information is exempt information if, in the reasonable opinion of a qualified person, disclosure under the legislation:

(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.

14. To find that any part of section 36(2) of FOIA is engaged, the Commissioner must be able to establish that a qualified person gave an opinion which found the exemption applied and that the opinion was reasonable.
15. The Cabinet Office said that it sought the qualified person's opinion on 22 January 2014 and the opinion was given on 27 January 2014. The qualified person in this case was Francis Maud MP, Minister for the Cabinet Office.
16. The Commissioner notes that the Cabinet Office did not obtain the qualified person's opinion until the complainant requested an internal review. It was relying on the qualified person's opinion that is referred to in paragraph 7 of FS50483307 (see note 1).
17. The Commissioner is satisfied that Francis Maude MP meets the specification of a 'qualified person' set out at section 36(5) of FOIA. Unusually, Cabinet Office did not obtain the qualified person's opinion

¹ http://ico.org.uk/~media/documents/decisionnotices/2013/fs_50483307.ashx

upon receipt of the request. Rather, it relied on an opinion given in response to a previous request. The immediate question that therefore presents itself is whether the Cabinet Office was entitled to rely on section 36(2) in this situation.

18. The Commissioner thinks that the wording of section 36(2) only refers to the opinion of a qualified person; it does not specify the circumstances in which an opinion must be obtained. However, the Commissioner notes that the request made in this case and the request made in FS50483307 are not identical and have not been made by the same person. Crucially, the two requests are also not contemporaneous.
19. The Commissioner recognises that the Cabinet Office may have considered it expeditious to rely on an opinion previously given for a request that was broadly similar to the one under consideration in this case. However, he considers this to be a flawed approach particularly given the passage of time between the two requests. It is, ultimately, for the qualified person to consider whether the passage of time changes an opinion given previously about broadly similar or identical information. The qualified person should be given the opportunity to consider this.
20. In any event, the flawed approach was rectified at internal review and the qualified person was given the opportunity to consider the passage of time. The internal review stage in the life cycle of a request provides a public authority with the opportunity to rectify any errors in its initial handling of the request.
21. The Commissioner has therefore concluded that the Cabinet Office did eventually obtain the opinion of a qualified person in respect of this request.
22. He has next considered whether the opinion given was reasonable.
23. The Commissioner has had sight of the submissions produced by officials at the Cabinet Office and put before the qualified person, upon which the qualified person's opinions were based. These included a summary of the relevant issues, an explanation of the section 36 exemption and a recommendation of the preferred position. A copy of the withheld information was also provided.
24. The test of whether an opinion is 'reasonable' is based on the plain meaning of the word. Put simply, an opinion will be considered reasonable if it is an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion and not necessarily the *most* reasonable opinion.
25. As a prejudice-based exemption, section 36(2) of FOIA necessitates that a decision is made about whether there 'would' be a harmful effect as a

result of disclosure or whether it '*would be likely*' that the harmful effect would occur; '*would*' imposing a stronger evidential burden than the lower threshold of '*would be likely*'. In this case, the level of prejudice to which the submissions refer is the lower threshold of '*would be likely*'.

26. With respect to sections 36(2)(b)(i) and (ii), the Commissioner considers that they are about the processes that may be inhibited, rather than what is necessarily contained within the information itself. A key issue is whether disclosure would be likely to inhibit the processes of providing advice or exchanging views. Section 36(2)(c), on the other hand, refers to the prejudice that would be likely *otherwise* to apply. The Commissioner considers that if section 36(2)(c) is used in conjunction with any other exemption, the prejudice envisaged must be different to that covered by the other exemption.
27. In *McIntyre v Information Commissioner and the Ministry of Defence* (EA/2007/0068)², the Tribunal considered that section 36(2)(c) could apply to cases where "*disclosure would prejudice the public authority's ability to offer an effective public service or meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure*" (paragraph 24).
28. The arguments as to additional prejudice such that section 36(2)(c) would apply are not clearly made in any of the submissions to the qualified person. There is an assertion that prejudice to the effective conduct of public affairs could arise but, other than to describe inhibition to the free and frank exchange of views or the provision of advice, the prospect of "otherwise" prejudicing the effective conduct of public affairs is not explained. The submissions, in effect, conflate section 36(2)(c) with section 36(2)(b)(i) and (ii).
29. Having considered the extent of submissions to the qualified person and the information itself, the Commissioner has concluded that the qualified person's opinion is a reasonable one in respect of sections 36(2)(b)(i) and (ii) but not in respect of section 36(2)(c). This is because no distinction has been made between the exemptions in 36(2)(b) and the exemption at section 36(2)(c) in the submissions to the qualified person. The qualified person was therefore never given the opportunity to consider section 36(2)(c) separately. The Commissioner therefore does not agree that his opinion on section 36(2)(c) can be considered reasonable.

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

30. The Commissioner agrees that the information is exempt under section 36(2)(b)(i) and (ii). However, this exemption is subject to a balance of public interests test. The Commissioner has therefore gone on to consider the balance of the public interest. In doing so, the Commissioner will form his own view as to the severity of, and the extent and frequency with which, the detriment specified by the qualified person might occur.

Public interest arguments in favour of disclosure

31. The Commissioner finds that there is a strong public interest in understanding how the government provides advice and guidance on the use of private email by civil servants. The subject matter of the request has importance in relation to the integrity of the freedom of information regime and government record keeping more broadly, including consideration of guidance in the Cabinet Manual. This has somewhat diminished now that formal guidance on this topic has been published.³ The publication in June 2013 took place before the request in this case was made. There is also a public interest in understanding how the government's position (as expressed in the published guidance) evolved. Concerns had been widely expressed about alleged attempts to circumvent the effect of FOIA by using non-official means (such as private emails) to conduct official correspondence. The guidance was published, in part, to address that.
32. The complainant provided extensive examples of public statements by senior members of the government to illustrate what appeared to be confusion about the use of private emails for government business. These examples included comments reported in Hansard (which maintains a record of parliamentary business) made by Michael Gove, the then Education Secretary at the Department for Education ("DfE"). The complainant asserted that these comments also gave rise to concerns about whether appropriate levels of security were maintained for the conduct of government business electronically. This added weight, in his view, to the public interest in disclosure. Mindful of Parliamentary Privilege, the Commissioner does not place any weight on the specific public interest in challenging statements made in Parliament. The Commissioner does, however, give weight to the public interest in testing other public statements made outside Parliament.

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207131/Private_Email_guidance.pdf

33. He acknowledges that before the guidance was issued there was a considerable lack of clarity about the government's position; the withheld information in this case provides some important insight into how this position arose.
34. The Cabinet Office commented that there was a general public interest in openness in government and in promoting transparency and accountability. It also said that it recognised "a strong public interest in understanding how the Cabinet Office communicates with other government departments, including the role that civil servants play in these communications".

Public interest arguments in favour of maintaining the exemption

35. The Cabinet Office put forward the following arguments in favour of maintaining the exemption:
 - there is a very strong public interest in preserving the confidentiality of government communications particularly where a matter is discussed at its initial stages so that communications are not inhibited;
 - there is also a strong public interest in ensuring a full range of views are considered in order to assist sound decision making;
 - disclosing preliminary discussions could undermine the decision ultimately taken because it would mean that a resolved decision would be reopened as focus would be given to any discarded views are further analysed.
 - Disclosure would add nothing of substance given that the final version of the guidance has now been published
 - There is no evidence of impropriety
 - The public interest factors in disclosure that it had identified are of a general nature

The balance of the public interest

36. The Commissioner recognises that there has been considerable debate about the use of private emails for government business. He accepts that the disclosure of this information would provide more detail about how the government's position on this topic evolved. It would show what factors were being considered at a particular point in time prior to the publication of the final version of the guidance. Noting the points in paragraphs 30-33 he finds that there is a strong public interest in disclosure.

37. The Commissioner accepts the public interest in avoiding inhibition to the free and frank exchange of views and to the provision of advice in the circumstances of this case. The Commissioner gives some weight to the fact that the request was made relatively recently after the guidance was published. The government and the electorate expect officials to carry out their duties with professionalism and thoroughness. The operation of the Act should not inhibit officials from doing the job expected of them, that is, to provide and discuss a full range of options on a matter. Officials should not be inhibited by the operation of the Act. However, the Commissioner accepts that officials may be inhibited in future work where records of preliminary discussions about a recent topic are disclosed under the Act. Such inhibition is to the detriment of good government and is not in the public interest. However, the Commissioner only gives limited weight to this factor given the passage of time.
38. The Commissioner accepts that the concept of 'safe space' is an important one; allowing public authorities some time and room in which to explore options and potentially act on recommendations away from the public glare. It will, however, only carry significant weight in the context of the public interest where the issues are live or still relatively recent as is the case here. In this case the need for safe space had passed once the guidance was published and the Commissioner does not see any clear evidence for a connection with other live issues at the time of the request, so that safe space should to be given weight as a factor. The Commissioner also recognises a need for a "space to defend" once a decision is announced but this would only be a strong argument for a short period after the announcement, unless specific evidence was advanced to support it applying for a longer period.
39. As the decision notice referred to in footnote 1 shows, the Commissioner has already considered the application of provisions of section 36 in relation to this information and has upheld the use of those provisions. The complainant argued that the passage of time should be a weighty factor in this case..
40. The Commissioner has concluded that the public interest in maintaining the section 36(2)(b)(i) and (ii) exemptions does not outweigh the public interest in disclosure.

Right of appeal

41. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF