

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 April 2015

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information relating to a previous FOI request he made to the Home Office. The Home Office refused to disclose that information and cited the exemptions provided by sections 36(2)(b)(i) (inhibition to the free and frank provision of advice) and 36(2)(c) (other prejudice to the effective conduct of public affairs) of the FOIA.
2. The Commissioner's decision is that the Home Office cited section 36(2)(c) correctly and so it was not obliged to disclose this information.

Background

3. The request refers to a previous FOI request made by the complainant. The Commissioner issued a decision notice relating to that request on 12 November 2014¹, some aspects of which were appealed to the First-tier Tribunal (Information Rights).

Request and response

4. On 17 December 2014, the complainant wrote to the Home Office and requested information in the following terms:

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1043260/fs_50514999.pdf

"- correspondence sent/received by Theresa May regarding my FOI request (as I understand, your reference is 28795)

- forecasted/estimated cost of appeal to the First Tier Tribunal."

5. The Home Office responded on 15 January 2015. It stated that the request was refused and cited the exemptions provided by sections 36(2)(b)(i) (inhibition to the free and frank provision of advice) and 36(2)(c) (other prejudice to the effective conduct of public affairs) of the FOIA.
6. The complainant responded on the same date and asked the Home Office to carry out an internal review. The Home Office responded with the outcome of the review on 12 February 2015. The conclusion of this was that the refusal of the request under the exemptions cited previously was upheld.

Scope of the case

7. The complainant contacted the Commissioner on 13 February 2015 to complain about the refusal of his information request. The complainant indicated at this stage that he believed that it would be in the public interest to disclose the information he had requested.

Reasons for decision

Section 36

8. In relation to correspondence external to the Home Office, it has cited the exemptions provided by sections 36(2)(b)(i) and 36(2)(c) of the FOIA. Section 36(2)(b)(i) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank provision of advice. Section 36(2)(c) provides the same in relation to prejudice to the effective conduct of public affairs in a manner other than specified elsewhere in section 36. The approach of the Commissioner to this subsection is that the public authority should identify prejudice that is also not covered by any of the other exemptions in part II of the FOIA.
9. These exemptions can only be cited on the basis of the reasonable opinion of a specified qualified person (QP), which for government departments is any Minister. The task for the Commissioner in reaching a conclusion as to whether these exemptions are engaged is to establish whether this exemption was cited on the basis of an opinion from a Minister and whether that opinion was reasonable. Section 36 is

qualified by the public interest, which 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.

10. The Home Office has provided evidence that these exemptions were cited on the basis of an opinion from James Brokenshire MP, Immigration and Security Minister, and that this opinion was given on 7 January 2015. Having been provided with this evidence the Commissioner accepts that this exemption was cited on the basis of an opinion from a valid QP.
11. The next step is to consider whether this opinion was reasonable. The Commissioner's approach on this point is that an opinion must be objectively reasonable. This means that the opinion does not have to be one that the Commissioner would agree with, nor the *most* reasonable opinion. As long as the opinion was in accordance with reason, section 36 will be engaged.
12. The only information identified by the Home Office as within the scope of the request is a submission dated 3 December 2014 that concerned the possibility of the Home Office appealing against the aforementioned decision notice issued by the Commissioner in relation to a previous information request made by the complainant. This sets out factors around whether to proceed with an appeal and gave an estimate of the cost of an appeal. This submission is within the scope of both parts of the request.
13. In explanation for the QP's opinion, the Home Office supplied to the ICO a copy of a submission that was provided to the QP to assist them in the formation of their opinion. This submission recommended the citing of section 36(2)(c) due to the harm that it believed disclosure would cause to the work surrounding the appeal of the previous decision notice. The Commissioner accepts that this prejudice would not obviously be covered by any of the other exemptions in the FOIA.
14. The wording of the submission indicated that the opinion of the QP was that inhibition and prejudice *would* result, rather than *would be likely* to result. The approach of the Commissioner when considering other prejudice based exemptions is that he will accept that prejudice *would* result where the likelihood of this is more probable than not. He has applied a similar test here and considered whether it was reasonable for the QP to hold the opinion that disclosure would be more likely than not to result in prejudice.
15. The Commissioner recognises that it is reasonable for the QP to be of the opinion that the appeal process will operate best where a space in which the factors for and against proceeding with an appeal can be

considered privately. Not the least of the arguments for this are so these factors can be considered without the other parties to the appeal becoming aware of the details of this consideration.

16. Having taken into account the content of the information in question and the basis for the QP's opinion as set out in the submission, the Commissioner accepts that disclosure could plausibly have the result that the QP envisaged. As a result, the conclusion of the Commissioner here is that the opinion of the QP was objectively reasonable and so the exemption provided by section 36(2)(c) of the FOIA is engaged.
17. Having found that the exemption is engaged, the next step is to consider the balance of the public interests. The finding that the QP's opinion was reasonable and so the exemption is engaged is not reconsidered here. Instead the task here is to consider the scope, extent and frequency of the outcome of disclosure that the QP believed would result. In favour of disclosure, the Commissioner has taken into account what public interest there is in the information in question, as well as the general public interest in the transparency of the Home Office.
18. Covering first factors in favour of disclosure of the information, the Commissioner, having concluded in the earlier decision notice that the public interest favoured disclosure of some of the information covered in that notice, is of the view that there is public interest in information relating to an appeal against that decision notice. However, beyond that circumstance, the Commissioner does not believe that the public interest in most of the specific content of the information in question here is great. This content is brief and covers technical details on whether to proceed with a Tribunal appeal, although the Commissioner does believe that there is public interest in disclosure of the information about the cost estimate.
19. Turning to those factors that favour maintenance of the exemption, having found that the QP's opinion that disclosure would be harmful to the process of preparing for Tribunal appeals was reasonable, the public interest in avoiding that outcome must be recognised. It would be counter to the public interest to prejudice that process. As referred to above, how much weight that point should be afforded as a public interest factor depends on the severity, extent and frequency of that prejudice.
20. As to the extent and frequency of that prejudice, the view of the Commissioner is that this may extend beyond appeals to the First-tier Tribunal (Information Rights) to cover situations where officials are advising Ministers on appeals to other First-tier Tribunals. The prejudice would, therefore, be of quite considerable extent and frequency, which indicates that the severity of that prejudice would also be considerable.

21. In conclusion, the Commissioner has recognised some public interest in favour of disclosure of this information; namely, that this information relates to a matter that the Commissioner has previously recognised as being of public interest and to the expenditure of public money. He does not, however, regard that public interest to be of particularly great weight. Therefore, in line with the analysis above on the severity, extent and frequency of the prejudice, the finding of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure and the Home Office was not obliged to disclose the information in relation to which section 36(2)(c) was cited.

Right of appeal

22. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

23. 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.
24. 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

Rachael Cragg
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