Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 August 2016

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

Decision (including any steps ordered)

1. The complainant originally submitted a request to the Cabinet Office seeking information relating to the decision to confirm the proposal of Robert Kerslake for a life peerage. The complainant subsequently sent the Cabinet Office a 'meta-request' seeking information generated by its handling of his original request. The Cabinet Office sought to withhold the information falling within the scope of the meta-request on the basis of the following sections of FOIA: 37(1)(a) (communications with the Sovereign); 37(1)(ad) (communications with the Royal Household); 37(1)(b) (conferring of an honour or dignity); and 36(2) and (c) (effective conduct of public affairs).

2. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) and section 37(1)(ad).

Request and response

3. In March 2015 the complainant submitted a request to the Cabinet Office for information relating to the decision to confirm the proposal of Robert Kerslake for a life peerage. The Cabinet Office sought to withhold the requested information on the basis of section 37(1)(b) of FOIA. The complainant raised this matter with the Commissioner. The Commissioner issued a decision notice on 26 May 2016 which concluded

that the requested information was exempt from disclosure on the basis of section 37(1)(b) but that in all the circumstances of the case the public interest in maintaining the exemption did not outweigh the public interest in disclosure of the information.[1]

4. Having received the Cabinet Office's internal review response in relation to his original request, the complainant submitted the following further request to the Cabinet Office on 15 September 2015:

'Whilst this matter can now be decided by the Information Commissioner, would you now please provide the metadata generated when processing this request, i.e. copies of material in any format such as but not limited to memos, notes, correspondence with any other persons, etc.'

5. The Cabinet Office contacted the complainant on 15 October 2015 and explained that it needed further time to consider the balance of the public interest test. It issued him with a similar letter on 12 November 2015.

6. The Cabinet Office provided him with a substantive response to his request on 23 November 2015. The response explained that the requested information was considered to be exempt on the basis of the following sections of FOIA:

- Section 37(1)(a) – communications with the Sovereign
- Section 37(1)(ad) – communications with the Royal Household
- Section 37(1)(b) – conferring of an honour or dignity
- Sections 36(2)(b) and (c) – effective conduct of public affairs

7. The complainant contacted the Cabinet Office on 23 November 2015 and asked it to conduct an internal review of this decision.

8. The Cabinet Office informed him of the outcome of the internal review on 11 January 2016. The review upheld the application of the various exemptions cited in the refusal notice.

[1] https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624277/fs_50597373.pdf

Scope of the case

9. The complainant contacted the Commissioner on 5 January 2016, shortly before the Cabinet Office completed its internal review, to complain about its decision to withhold the information that he had requested. The withheld information includes correspondence that the complainant exchanged with the Cabinet Office in respect of his original request and copies of the information falling within the scope of his original request. As the complainant is in the possession of such information, the Commissioner has not considered this information as part of this current complaint. The remaining information, which is the focus of this decision notice, consists of internal discussions within the Cabinet Office about how to handle the original request and discussions between the Cabinet Office and the Royal Household about the request.

Reasons for decision

Section 36 – effective conduct of public affairs

10. The Cabinet Office argued that parts of the withheld information were exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) and 36(2)(c) of FOIA. These state that:

> *'(2) 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*
>
> *(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'*

11. In this case the Minister for the Cabinet Office provided the opinion in relation to the application of the exemptions contained at section 36. The Commissioner is satisfied that the Minister is a qualified person for the purposes of section 36.

12. In determining whether these exemptions are engaged the Commissioner must determine whether the qualified person's opinion

was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

13. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

14. The qualified person argued that disclosure of email exchanges between officials discussing how to handle the original FOI request would discourage similar discussions in the future both in terms of how to handle FOI requests and more widely. The qualified person did not specify whether the exemptions were engaged on the basis that such prejudice 'would' occur or simply on the basis that such prejudice 'would be likely' to occur. The Commissioner has therefore simply considered whether the lower limb of the prejudice test is engaged, ie whether such prejudice would be likely to occur.

15. In respect of the opinion given by the qualified person and the exemptions contained at section 36(2)(b), the Commissioner accepts that it is reasonable to argue that disclosure of the material could potentially lead to a chilling effect on officials' contributions to discussions about how to handle FOI requests in the future. The exemptions contained at sections 36(2)(b)(i) and (ii) are therefore engaged. However, in relation to section 36(2)(c), in the Commissioner's view it is not clear from either the submission to the qualified person, or his opinion, what the nature of the 'other' prejudice is, beyond the interests which are protected by the exemptions

contained at section 36(2)(b). The Commissioner cannot therefore accept that the opinion is reasonable in respect of section 36(2)(c).

Public interest test

16. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining either of the exemptions cited outweighs the public interest in disclosing the information.

17. The complainant queried the degree to which disclosure of the withheld information would be likely to genuinely inhibit the free and frank exchange of views in the future. He also emphasised that in his view there was a clear public interest in the disclosure of information regarding the appointment of life peers.

18. The Cabinet Office argued that it was important that officials and Ministers should have the ability to discuss and consider alternative approaches to cases, without concern that this discussion would be subject to inappropriate and untimely disclosure. The Cabinet Office emphasised that disclosure would discourage legitimate consideration of options available, and would impact on the quality and nature of advice provided both in respect of FOI cases and more widely. Furthermore, the Cabinet Office emphasised that the very recent nature of this advice and discussion increased the harm that would be caused by release of the information as officials would have reasonable concern that any and all similar discussions between officials could be released through FOI requests.

19. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.

20. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when giving advice. They should not easily be deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may

also carry weight. However, once the decision making in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

21. In the circumstances of this case, in the Commissioner's view the decision making process in question - namely the Cabinet Office's handling of the original FOI request of 16 March 2015 - could arguably be said to still be live at the point the complainant submitted his meta request on 15 September 2015. Although the Cabinet Office informed the complainant of the outcome of the internal review into his original request on the same date, the complainant immediately referred the Cabinet Office's handling of that request to the Commissioner. In the Commissioner's opinion it is reasonable, in light of such a referral, to see the Cabinet Office's decision making process in respect of its handling of that request as ongoing due to the subsequent investigation by the Commissioner.

22. Furthermore, the Commissioner accepts that disclosure of the information withheld on the basis of section 36 would be likely to have a chilling effect on future discussions about how to handle FOI requests, both in respect of the complainant's original request and other unrelated FOI requests received by the Cabinet Office. The Commissioner has reached this view given the candid nature of the discussions contained in the withheld information and given the content she considers it plausible that disclosure would alter the nature or tone of similar discussions in the future. Furthermore, the Commissioner recognises that there is a clear public interest in the Cabinet Office being able to have effective and efficient discussions about how to handle FOI requests and moreover the ability to have frank internal discussions about such requests is central to this process. Consequently, in the Commissioner's opinion there is a considerable public interest in maintaining the exemptions contained at section 36(2)(b).

23. Nevertheless, the Commissioner recognises that there is an inherent public interest in public authorities being transparent about their decision making processes. Consequently, she accepts that there is a public interest in the disclosure of information which would demonstrate how public authorities consider and reach decisions in respect of FOI requests. In the particular circumstances of this case the Commissioner believes that disclosure of the information withheld on the basis of section 36 would be genuinely informative in respect of the issues considered by the Cabinet Office in relation to the complainant's original request.

24. However, given the widespread potential risks of disclosure, namely undermining the Cabinet Office's ability to have effective discussions

about how to handle the variety and significant number of FOI requests its receives, the Commissioner has concluded that the public interest favours maintaining the exemptions contained at section 36(2)(b).

Section 37(1)(ad) – communications with the Royal Household

25. The Cabinet Office argued that the remaining information was exempt from disclosure on the basis of section 37(1)(ad) which provides an exemption for information which relates to communications with the Royal Household.

26. The Commissioner has reviewed the information withheld on the basis of this exemption and is satisfied that it falls within the scope of this exemption given that it reports the views of the secretariat within the Royal Household on the sensitivity of the information falling within the scope of the original request.

27. However, section 37(1)(ad) is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

28. The Cabinet Office acknowledged that there is a general public interest in transparency about, and understanding the awareness of the role of, the Royal Household. However, the Cabinet Office explained that it was firmly of the view that there was a stronger public interest in maintaining the confidentiality of communications to and from the Royal Household. This was particularly the case where the information contains expressions of the views of a member of the Royal Household as in this case. The Cabinet Office argued that this confidentiality was necessary to encourage a frank exchange of views so that decisions can be taken on the basis of a full understanding of the sensitivities of information and an understanding of the consequences that might arise from the release of information. The Cabinet Office argued that if information of this sort was disclosed, the candour of communications between the Royal Household and government would be harmed and consequently the ability of the Royal Household and government to most effectively and appropriately deal with FOI requests of this sort could be compromised.

29. As with her findings in relation to section 36(2)(b), in the Commissioner's opinion disclosure of the information which has been withheld on the basis of section 37(1)(ad) would provide a clear and informative insight into the nature of the issues considered in handling the complainant's original request. Given the nature of the particular discussions between the Cabinet Office and the Royal Household, the Commissioner believes that this public interest should not be

underestimated. However, the Commissioner recognises that there is a clear public interest in the government and the Royal Household being able to engage in full and frank discussions about information requests which seek information in which the latter has an interest. In the circumstances of this case she has concluded that this argument attracts greater weight and thus the public interest favours maintaining the exemption contained at section 37(1)(ad) of FOIA.

Right of appeal

30. 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

31. 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.

32. 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 ……

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF