

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 March 2017

Public Authority: Independent Parliamentary Standards Authority
Address: 4th Floor
30 Millbank
London SW1P 4DU

Decision (including any steps ordered)

1. The complainant requested a copy of a report presented at a Board meeting. The position of the Independent Parliamentary Standards Authority (IPSA) is that this information is exempt from release under sections 36(2)(b)(i) and 36(2)(c) of the FOIA (prejudice to the effective conduct of public affairs), and that the balance of the public interest lies in maintaining the exemption.
2. The Commissioner's decision is that, at the time of the request, IPSA correctly applied section 36(2)(b)(i) to the withheld information and that the public interest favoured maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 26 May 2016, the complainant wrote to IPSA and requested information in the following terms:

"Please supply a copy of this following report, directly relevant to the public consultation on and the decision on Pay for Committee Chairs: -

The report presented by the Director of Regulation, at item 6 at the IPSA Board meeting of 24 Feb 2016, briefing on the consultation and the

factual background data on the roles and activities of the Committee Chairs."

5. IPSA responded on 30 August 2016. It said the information the complainant has requested is exempt from disclosure under section 36 and that the balance of the public interest lies in maintaining the exemption.
6. The complainant requested an internal review but because he did not request one within two months of having received its response, IPSA did not provide a review.

Scope of the case

7. The complainant contacted the Commissioner on 17 October 2016 to complain about the way his request for information had been handled.
8. The Commissioner's investigation has focussed on IPSA's application of section 36(2)(b)(i) and 36(2)(c) to the withheld information.

Reasons for decision

Background

9. IPSA has provided a background to the request. It has told the Commissioner that it has a statutory obligation to conduct a review of MPs' pay and pensions in the first year of each Parliament. This includes a statutory obligation to review the additional salaries that are paid to Chairs of Select Committees, and to Members of the Panel of Chairs.
10. IPSA's Board considered a number of papers at the beginning of 2016, before agreeing questions to be put to a public consultation. It subsequently launched a public consultation that ran from 11 March 2016 to 18 April 2016 and which considered whether any changes to the current arrangements were warranted.
11. Following the consultation, a final report was published on 25 May 2016. IPSA received the complainant's request soon after this report had been published. The Commissioner notes that the request was submitted on 26 May 2016.
12. The requested information is a Board paper that a) requests approval of the draft consultation document on Pay for Specified Committee Chairs and b) concerns the role of Members of the Panel of Chairs, as part of the review into the pay for Chairs of Specified Committees.

Section 36 – prejudice to the effective conduct of public affairs

13. Section 36(2) of the FOIA says that information is exempt if disclosing it would, or would be likely to, prejudice the effective conduct of public affairs.
14. IPSA considers that section 36(2)(b)(i) and section 36(2)(c) apply to the information in this case. Under section 36(2)(b)(i) information is exempt if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank provision of advice or, under 36(2)(c), would otherwise prejudice or would be likely otherwise to prejudice, the effective conduct of public affairs.
15. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
16. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
17. In determining whether IPSA correctly applied the exemption, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - ascertain who was the qualified person or persons;
 - establish that an opinion was given by the qualified person;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
18. IPSA has explained to the Commissioner that its qualified person, as designated by the Secretary of State for Justice, is Sir Robert Owen QC. Sir Robert is a member of IPSA's Board and a former High Court judge.
19. Sir Robert's opinion was sought on 20 June 2016. His opinion was that the exemptions under section 36(b)(b)(i) and 36(c) were engaged and that the public interest favoured maintaining the exemptions.
20. Sir Robert was provided with: a covering letter that requested his reasonable opinion; a pro forma containing arguments in favour and against the engagement of the exemption; all of the requested information and an email from the complainant to IPSA dated 18 June

2016, which the complainant thought should be included as context to his request. IPSA has provided this material to the Commissioner with a copy of Sir Robert's opinion, which the Commissioner has reviewed as part of her considerations.

21. The Commissioner is satisfied that the opinion is that of the appropriate qualified person for IPSA. She has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold. This only requires that it is *a* reasonable opinion, and not necessarily *the most* reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
22. Sir Robert's opinion is that disclosing the requested information would be likely to inhibit the frank expression of views to the Board, which might unintentionally impair the quality of the Board's decision making. He also considers that there is considerable force in the general argument that disclosing the information could inhibit IPSA staff from expressing themselves openly and fully, or, from exploring a wide range of options when providing advice or expressing views as part of the process of enabling the board to make well informed decisions. Inhibiting IPSA staff from providing advice or exchanging views with the Board – because it would be known that the advice would be disclosed – could have a 'chilling effect'. The consequence of this would be to impair the quality of decision making by IPSA. This would in turn have a detrimental effect on the Board's conduct of public affairs.
23. As a prejudice-based exemption, section 36(2) 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'.
24. With regard to section 36(2)(b), the Commissioner considers that the exemption concerns processes that may be inhibited in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure could inhibit the process of providing free and frank advice for the purposes of deliberation.
25. 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, as in this

case, the prejudice envisaged must be different to that covered by the other exemption.

26. With regard to the above point, the Commissioner notes that the qualified person's position is that the effective conduct of public affairs would be likely to be prejudiced *because* the free and frank provision of advice would be likely to be inhibited. No separate and different prejudice has been identified. Consequently, the Commissioner does not consider section 36(2)(c) to be engaged as the arguments relied upon by the qualified person appear to relate only to section 36(2)(b)(i).
27. The Commissioner also notes that some aspects of the qualified person's opinion appear to relate to section 36(2)(b)(ii). This subsection concerns inhibition to the free and frank exchange of views, rather than the free and frank provision of advice. However, the Commissioner considers that sufficient of the qualified person's opinion addresses section 36(2)(b)(i) and she is satisfied that the qualified person's opinion that section 36(2)(b)(i) is engaged is a reasonable opinion to hold. The opinion given addresses the relevant issues and expresses a reasoned view on the likely impact of disclosure. She has therefore concluded that this particular exemption does apply in this case.

Public interest test

28. Section 36(2)(b)(i) is a qualified exemption so the public interest test set out in section 2(2)(b) of the FOIA must be applied. The requested information, though exempt, can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.
29. The Commissioner notes that it was the qualified person's opinion that disclosure of the withheld information 'would be likely' to have the effects set out in sections 36(2)(b)(i), as opposed to that it 'would' have those effects. In her view this means that there is a real and significant chance of the prejudice occurring, even though the probability may be less than fifty per cent. The Commissioner has taken this into account in assessing the public interest arguments in favour of maintaining the exemption.
30. Following the Information Tribunal's decision in (EA/2006/0011 & EA/2006/0013), it is the Commissioner's opinion that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the likely inhibition on the free and frank provision of advice, the free and frank exchanges of views for the purposes of deliberation and the likely prejudice to the effective conduct of public affairs.

31. IPSA considered the following factors against disclosure:

- The requested information contains frank advice to the Board, in the interests of allowing the Board to come to a well-informed and reasoned decision regarding the salaries for Chairs of Committees. Disclosing the advice could be likely to inhibit the frank exchange of views in the future. This may unintentionally impair the quality of decision making by the Board in the future.
- In a more general sense, as the exemption relates to processes being prejudiced (rather than the information itself), disclosure could, or could be likely to inhibit the ability of IPSA staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may create a future 'chilling effect' and impair the quality of decision making by IPSA.
- Elements of the Board paper, such as that relating to strategic risks, are sensitive in nature. IPSA considers it is possible that such free and frank advice would not have been included (and would not be included in future Board papers) were it known at the time that the advice would be disclosed. Were IPSA's policy team to feel inhibited in its freedom to offer free and frank advice to IPSA's Board, this would be likely to be detrimental to the effective conduct of public affairs.

32. IPSA considered the following factors for disclosure:

- The presumption of FOI legislation is that information should be released on request.
- Many other public bodies actively publish Board papers on a regular basis.
- In 2013, a request was received for copies of a Board paper and CEO reports. The decision at the time was to disclose the reports in part, with reference to discussion of specific topics withheld. No 'chilling effect' resulted after the information was disclosed.
- The issue to which the current Board paper relates is no longer still 'live' – the issue has been decided upon and settled. Disclosing the Board paper at this time would probably not therefore undermine that 'safe space' that exists for IPSA's Board to consider a wide range of varying ideas in relation to this specific topic, and increases public understanding in the Board's decision.

- A large amount of the information contained within the paper has already been published in the official consultation report. Sensitive information (disclosure of which may prejudice the effective conduct of public affairs) could be withheld from the published reports.
 - In contrast to the argument that disclosing frank advice would be likely to cause a 'chilling effect' in the future, it has also been argued that the 'threat' of future disclosure of such Board papers could lead to better quality advice being contained within.
 - There should be a high degree of transparency and accountability relating to the way IPSA, and especially its Board, conducts its business. The public should be able to understand why IPSA's Board has come to the decision that it has, particularly as it relates to taxpayer money – and be free to challenge decisions that they think have been made in error.
 - Other exemptions, most notably section 40 (personal information), would apply to parts of the correspondence ensuring anonymity.
33. IPSA has summarised its public interest arguments as follows. It acknowledges that there is always a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. There is also a legitimate public interest in the issue of MPs' salaries, business costs and expenses, demonstrated by the continued widespread media coverage. As such, there is a public interest in furthering debate on the issue. However, IPSA's view is that there is also an argument that the public interest lies in sensible, well-considered policies being made, which can only come about when a safe space is provided in which to formulate and develop such policy. By disclosing the advice and undermining such a 'safe space' for policies to be considered, the quality of future determinations may be impacted, which would not be in the public interest.
34. IPSA recognises that there is a public interest in the proceedings concerned being as transparent as possible. It says it is for this reason that, in relation to Committee Chairs' pay, it has already published a consultation document, responses to that consultation, a final report and minutes of Board meetings. In addition, in response to other FOIA requests, IPSA has also published a report presented to IPSA's Board on Committee Chairs' pay in January 2016, and a copy of the draft final report which was presented to IPSA's Board in May 2016.
35. IPSA argues that the public interest in transparency and accountability has already been met by the publication of the above documents. It considers that any contribution made to the public interest by disclosing

the requested Board paper in this instance would be outweighed by the prejudicial harm which would be likely to be incurred.

Balance of the public interest

36. The Commissioner has given the arguments for and against disclosure careful consideration. She has considered the severity and frequency of the likely prejudice and inhibition IPSA has argued would be likely to arise if the requested information were disclosed.
37. Section 36(2)(b)(i) provides an exemption to protect public authorities against inhibition on the ability of its members and officers to deliberate openly, honestly and completely in order to reach robust decisions. Disclosure could well hinder the public authority's ability in the future to consider its options free and frankly, ultimately resulting in potentially poor decision making.
38. Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.
39. Whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
40. The Commissioner has reviewed the withheld information. The report - 'Pay for Committee Chairs' - includes items on the background, financial implications, strategic risk implications and communications and media handling. The Commissioner considers that the information is of some sensitivity ie it consists of more than simply neutral statements. This adds weight to the argument that disclosing the information, at the time of the request, could inhibit the provision of advice in the future.
41. The meeting at which the IPSA Board had discussed the requested information and the planned consultation on Pay for Committee Chairs had occurred in February 2016. At the time of the request, the consultation had concluded. The IPSA Board had considered the issue of Pay for Parliamentary Committee Chairs at its meeting on 18 May 2016. IPSA's final report, in which it detailed its position having duly considered the issue, had been published on 25 May 2016. For Select Committee Chairs, no changes had been proposed. For Members of the

Panel of Chairs, it was agreed that changes would be reflected in their June 2016 salary. The first adjustment by the rate of annual change in public sector average earnings would take place in April 2017.

42. The Commissioner considers that IPSA has provided strong public interest arguments for releasing the requested information. Amongst these it has acknowledged that the issue – that is, the pay to be awarded to Committee Chairs – was no longer live at the time of the request. While it is true that the matter was settled, the Commissioner notes that it had been settled very recently comparative to the request being submitted. The consultation had concluded in April with the report, informed in part by the consultation, being finalised and published on 25 May 2016; the day before the complainant submitted his request.
43. It is the timing of the request that the Commissioner considers is of significance in this case. The Commissioner has noted her decision in [FS50534508](#). In that case, the complainant had requested information relating to an increase in MPs' pay that was proposed at the time (2014). The Commissioner found that section 36(2)(b)(ii), in that case, had been correctly applied and that the public interest favoured maintaining the exemption. This was, in part because, although the request had been made after the decision regarding MPs' pay had been made, it was only a very short time afterwards. The Commissioner considered that this increased the likelihood of future inhibition ie hindering the authority's ability in the future to consider options freely and frankly. The Commissioner found that this would be contrary to the public interest.
44. In this case, the complainant submitted his request the day after the final report was published on 25 May 2016. As noted previously, the section 36 exemption concerns processes that may be inhibited in the future. The Commissioner considers that it is not generally in the public interest to encourage scrutiny of sensitive information, forming part of a free and frank exchange, at the climax of a particular deliberative process within the necessary private space for sensitive decision making. Disclosure could well hinder the authority's ability in the future to receive appropriate, free and frank advice to enable it to consider all its options. This would result in potentially poor decision making, which would not be in the public interest.
45. The Commissioner appreciates that, following the parliamentary expenses scandal that emerged in 2009, there is more awareness and interest in MPs' allowances, expenses and pay which, as a result, have been subject to a higher level of scrutiny and transparency.

46. The Commissioner is aware that, in early 2016, there had been a degree of media and press attention in the salaries awarded to Chairs of Committees and Members of the Panel of Chairs. Such concern may strengthen the public interest argument for the release of the requested information against any chilling effect such a release could have on future IPSA Board proceedings.
47. However, with regards to the public interest in ensuring Chairs of Committees are remunerated appropriately, the Commissioner notes that IPSA conducted a public consultation on this matter and published information on the consultation, the final report that resulted from the consultation and minutes from IPSA Board meetings. (Detailed information about Members' pay and expenses and ministerial salaries 2016/17 is also now published on Parliament's website.) In the Commissioner's view, this satisfied the public interest in transparency and accountability with regard to the matter in question.
48. The Commissioner therefore finds that the exemption under section 36(2)(b)(i) was correctly applied to the withheld information. Having considered all the public interest arguments, she is of the opinion that, at the time of the request, the balance of the public interest favoured maintaining the exemption in this case; to protect the process of providing advice freely and frankly.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

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