

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 July 2017

Public Authority: Parliamentary and Health Service Ombudsman
Address: Millbank Tower
Millbank
London
SW1P 4QP

Decision (including any steps ordered)

1. The complainant has requested information relating to meeting minutes.
 2. The Commissioner's decision is that Parliamentary and Health Service Ombudsman ('PHSO') has correctly applied section 36(2)(b)(ii) (prejudice to effective conduct of public affairs) to part of the withheld information.
 3. However the Commissioner also finds that PHSO has incorrectly applied section 40(2) (personal data) to the remaining part of the withheld information. Finally, the Commissioner finds that although it has complied with section 17(1) in stating which exemption is to be relied upon, by failing to complete its public interest test considerations within a reasonable time period PHSO has breached section 17(3) of the FOIA and that PHSO has breached section 10(1) of the FOIA (time for compliance)
 4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 40(2) of the FOIA.
 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 the Act and may be dealt with as a contempt of court.
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Request and response

6. On 2 September 2016, the complainant wrote to PHSO and requested information in the following terms:

*Please supply the last two sets of minutes of these four (*excluding audit) committees, or direct me to where I might read them on the PHSO website.*

1. *The Remuneration and Nominations Committee (agrees pay and performance review arrangements for Executive Directors and agrees their annual individual pay awards. It meets around twice a year).*
 2. *Quality Committee (The Quality Committee provides critical assessment and challenge to the Executive Team on matters related to quality. It meets around four times a year.)*
 3. *The third committee, which is not listed on this informative page. (No information given)*
 4. *NB * I have already requested the Audit Committee minutes.*
7. The PHSO responded on 30 September 2016. It stated that it held the information requested but that it considered it was exempt by virtue of section 36(2)(c). It further explained that it needed additional time to consider the public interest test.
8. On 11 November 2016 PHSO provided its substantive response. It provided some information within the scope of the request but refused to provide the remainder. It cited sections 36(2)(b)(ii) and 40(2) as its basis for doing so. It withdrew its reliance on section 36(2)(c).
9. Following an internal review PHSO wrote to the complainant on 28 December 2016. It provided four further job titles of meeting attendees, but continued to withhold the remaining information maintaining its reliance on section 36(2)(b)(ii) as its basis for doing so.

Scope of the case

10. The complainant contacted the Commissioner on 1 January 2017 to complain about the way her request for information had been handled.
11. The Commissioner considers the scope of this case to be to determine if PHSO has correctly applied section 36(2)(b)(ii) and section 40(2) to the withheld information.

Reasons for decision

Section 40(2) – Third party personal data

12. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data

13. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
14. PHSO stated that staff members are clearly identifiable from their names and contact details and so the information requested properly constitutes personal data. The Commissioner also considers that the information withheld under section 40(2) is information from which living data subjects would be identifiable and is therefore personal data.

Would disclosure breach the Data Protection Principles?

15. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that the processing of personal data is fair and lawful. The Commissioner has initially considered whether the disclosure would be fair.
16. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:
- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;

- any particular circumstances of the case, e.g. established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
 - The consequences of disclosing the information, i.e. what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain; if so the source of such a disclosure;
 - and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?
17. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling legitimate interest in disclosure to the public.
18. In considering 'legitimate interests', in order to establish if there is a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sake, as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach.
19. The information redacted under section 40(2) of the FOIA consists of the names of three individuals. Having done a simple search on the internet all these names are publically available. Although not necessarily in a public facing role it is clear that this information is in the public domain and linked to the PHSO, along with their job titles.
20. The Commissioner therefore does not accept that those concerned would reasonably expect their names to be withheld in this case, as the information is already publically available. In addition, all three are in management roles at the PHSO. In fact, from the information provided to the Commissioner it appears that the name of the Corporate Governance Manager has already been disclosed although it is not clear if this was in error. Furthermore the name of the Quality Assurance Manager has been provided in a response to a request via the "What do they know website".

21. As the Commissioner considers that disclosure is not unfair, she has considered whether there is a condition in Schedule 2 which would permit disclosure.
22. Condition 6(1) of Schedule 2 of the DPA states that personal data may be processed if: -

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

23. The Commissioner has looked at whether there is a legitimate interest in disclosure of the individual's name. She accepts that there is a legitimate public interest in accountability and transparency,
24. This would not cause any prejudice to the rights, freedoms or legitimate interests of the three individuals concerned (the data subjects) as the names of two of them are already in the public domain. All three are in management roles at the PHSO and disclosure would not be likely to cause any damage or distress to those individuals.

Section 36

25. Section 36(2)(b)(ii) provides that:

"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-

(2)(b) would, or would be likely to, inhibit-

ii. the free and frank exchange of views for the purposes of deliberation,

26. PHSO has applied section 36(2)(b)(ii) to part of the withheld information. In determining whether section 36(2)(b)(ii) was correctly engaged by PHSO, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and

- Consider whether the opinion was reasonable.
27. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. Nor is it necessary for the Commissioner to agree with the qualified person's opinion.
 28. However, in determining if the opinion is reasonable the Commissioner will consider all relevant factors when assessing whether the opinion was reasonable, including the nature of the information and the timing of the request, and whether the prejudice relates to the specific subsections of section 36(2) that are being claimed.
 29. The Commissioner notes that the qualified person is Dame Julie Mellor. PHSO confirmed that Dame Julie Mellor reviewed the documentation personally and her view was confirmed by email. It explained that the qualified opinion was provided on 10 November 2016. The qualified person's opinion was that section 36(2)(b)(ii) FOIA was applicable in this case.
 30. PHSO stated that the material redacted from the Remunerations and Nominations Committee minutes is sensitive and relates to the performance of individual members of staff. It considered that the minutes record opinions that were delivered in a free and frank manner and that the disclosure of this information, relating to remuneration and reward, would prejudice free and open discussion in the future, and likely also impede the ability of PHSO to attract staff to its senior roles if they thought that discussion of their performance and future objectives were to be discussed in a public forum. As an organisation, PHSO needs a safe space in which to discuss the performance of its staff, no matter what their seniority.
 31. PHSO explained that the material redacted from the two sets of Quality Committee minutes related to internal matters of quality, extending to operational planning and performance management. Comments record frank assessments of the success of ongoing initiatives and it would not have been appropriate to publish these at the time the request was made.
 32. The Commissioner considers the opinion of the qualified person is a reasonable one.
 33. As the Commissioner has decided that the exemption is engaged, she has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In her approach to the competing public interest arguments in this case,

34. the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
35. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in her assessment of the balance of the public interest.
36. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and she gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

37. PHSO explained that when considering the arguments for disclosure of the information, it took into account the importance of publically funded organisations, like the PHSO, being open and transparent about their decision making, and members of the Board and Executive Team are held accountable for these decisions. It also took into account that disclosure would provide insight to the rigorous scrutiny, and the free and frank exchange of views that takes place at these committee meetings.

Public interest arguments in favour of maintaining the exemption

38. The PHSO has explained that it believes the following public interest arguments favour maintaining the exemption:
 - It is fundamental that its committee members have a protected space where they can exchange such views on extremely sensitive matters such as pay, internal audit reports and the quality of the PHSO's
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¹ EA/2006/0011; EA/2006/0013

decisions, in an uninhibited manner in order to fulfil their role in monitoring and scrutinising its governance, policy and performance.

- Disclosure of the withheld information would impede discussions at future committee meetings if committee members believed their discussions and advice could be disclosed into the public domain; as it would reduce the candour of discussion, it would simultaneously diminish effectiveness of the committee as a scrutiny mechanism.
- Any chilling effect on the exchange of views would lead to the loss in quality of its decision making.

39. PHSO further stated that all the minutes from Board meetings (the highest decision making body at PHSO) are published frequently on its website.

Balance of the public interest arguments

40. The Commissioner considers that these areas require free and frank discussion and sharing of views between the Ombudsman and her staff. Disclosure of information which would be likely to inhibit the frankness and candour of such discussions would not be in the public interest as in turn it would be likely to have a negative impact upon the PHSO's ability to successfully monitor and scrutinise its own performance.
41. The Commissioner considers that there is a strong public interest in disclosure of information relating to how public authorities reach decisions relating to senior staff pay and performance, as well as how it measures the quality of its own work.
42. The development of quality measures is an on-going process as are discussions around senior staff performance. Therefore the Commissioner considers that there is also a strong public interest in allowing safe space for discussion and to enable views to be shared freely and frankly relating to these issues.
43. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) FOIA was therefore correctly applied in this case.

Section 10 – time for compliance

44. The complainant also raised concerns about the time taken to respond to her request for information and request for review.

45. Under section 1(1) of the FOIA, anyone who requests information from a public authority is entitled (a) to be told whether the authority holds the requested information and (b) to have the information communicated to him or her if it is held.
 46. Section 10(1) says that an authority must comply with section 1(1) as soon as possible and within 20 working days. Section 17(3) states that if a public authority is relying on a qualified exemption, the time limit for compliance may be extended in order to consider the public interest in maintaining the exemption or disclosing the information.
 47. A public authority may take such time as is 'reasonable in the circumstances', and must then either disclose the requested information or explain to the applicant why the public interest in maintaining the exemption outweighs the public interest in disclosure.
 48. Although the FOIA does not define what a reasonable time is, the Commissioner considers it reasonable to extend the time to provide a full response including public interest considerations by up to a further 20 working days - which means that the total time spent dealing with the request should not exceed 40 working days. Any extension beyond 40 working days would require there to be exceptional circumstances, fully justified by the public authority.
15. The PHSO provided the following chronology:
- 2 September 2016 - request submitted via Whatdotheyknow.com website.
 - The statutory deadline for responding to the request was 30 September 2016. On 30 September 2016, PHSO issued a public interest test extension notice on that date, to advise that it needed an additional 20 working days to consider the balance of public interest in relation to section 36 FOIA and hoped to respond by 28 October 2017
 - On 28 October 2016, PHSO issued a further public interest test extension for the consideration of section 36 FOIA and advised that a substantive response would be available by 11 November 2016 at the latest. On 1 October 2016, the complainant requested an internal review.
 - On 10 November 2017, the Ombudsman, Dame Julie Mellor (the qualified person), agreed the application of section 36(2)(b)(ii). A full

response was sent on 11 November 2017. Minutes were provided with some information redacted in line with section 36(2)(b)(i) FOIA and staff names under section 40(2) FOIA.

- There was then some further correspondence and an internal review decision was delivered on 28 December 2016. The complaint was partly upheld on the basis that some staff job titles were removed in error as part of the third party personal data redactions.

49. PHSO referred to the Commissioner's guidance 'Time limits for compliance'² which states:

Section 10(3) of the FOIA enables an authority to extend the 20 working day limit up to a 'reasonable' time in any case where;

- *it requires more time to determine whether or not the balance of the public interest lies in maintaining an exemption,*
- *or it needs further time to consider whether it would be in the public interest to confirm or deny whether the information is held.*

This extension will therefore only apply to requests where the authority considers a 'qualified exemption' (an exemption that is subject to a public interest test) to be engaged.

The Act does not define what might constitute a 'reasonable' extension of time. However, our view is that an authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days. An extension beyond this should be exceptional. Examples of such circumstances could include extreme pressures placed on the public authority by a major incident or exceptional levels of complexity involving a number of external parties. Public authorities will need to demonstrate that the length of any time extension is justified.

Any authority claiming an extension will still be obliged to issue a refusal notice explaining which exemption applies and why within 20 working days. This notice must explain that it requires more time to consider the public interest test, and provide an estimate of the date on which a final decision is likely to be made.

² <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

50. The Commissioner notes that the qualified person's opinion was not obtained until 10 November 2016. PHSO has not provided any further information as to when the opinion was sought or where the delay occurred.
51. PHSO took a total of 60 days to comply with the request and considered the extensions were applied correctly (i.e. in relation to a qualified exemption which had been considered engaged from the outset). It explained that the two public interest extensions applied to the case were done so because the issue to be considered as part of the balancing exercise was unreasonable as this was a complex request relating to sets of minutes which PHSO does not routinely publish.
52. The Commissioner is not persuaded by PHSO's position. It is good practice to issue updates to applicants in a timely manner and 20 working days is to be considered a 'long stop'. PHSO considered that section 36 was engaged at the outset and was fully aware that the public interest test would need to be carried out and the opinion of the qualified person obtained.
53. The Commissioner further notes that in a previous decision notice³ (FS50535588) issued in December 2014 PHSO stated that it had recently sought certification from the Cabinet Office for an additional 'qualified person'.
54. It said this was so it could ensure that in the absence of the Ombudsman, decisions in respect of this exemption could still be taken without delay. The PHSO received a letter from Francis Maude MP on 14 April 2014, confirming the Ombudsman as the qualified person and also sanctioning the person holding the office of Senior Information Risk Officer (SIRO) to act as the qualified person. It said that currently the role of SIRO is held by the PHSO's Managing Director.
55. It is the Commissioner's view that it is not good practice for a public authority to issue notification of extensions on the day a response is due. Furthermore, from the information provided to her it appears that the qualified person's opinion was not sought in a timely manner.

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/1042882/fs_50535588.pdf

56. In the circumstances of this case, although PHSO has informed the complainant of the delay while the public interest is considered, the total time taken has significantly exceeded 40 working days. No reasons were given for the delay and the Commissioner believes this to be unacceptable. As the Commissioner does not consider this to be a reasonable timescale she finds that PHSO has not complied with section 17(3).

Right of appeal

57. 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

58. 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.

59. 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

Pamela Clements
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