

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2018

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence by named senior officials and Ministers regarding Carillion PLC between June and August 2017. The information held by the public authority within the scope of the request was withheld relying on the exemptions at sections 36(2)(b)(ii), 36(2)(c) and 43(2) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemptions at sections 36(2)(b)(ii) and 36(2)(c) FOIA.
3. No steps required.

Request and response

4. The complainant submitted a request for information to the public authority on 11 August 2017 in the following terms:

"I wish to request, under the freedom of information act, details of any internal or external correspondence from or between John Manzoni, the First Secretary of State, Junior Ministers and Malcolm Harrison regarding the UK contractor Carillion between 01 June 2017 and 01 August 2017."
5. The public authority responded on 11 September 2017. It confirmed that it held the information requested. Some of the information was

withheld on the basis of section 21 FOIA¹, and the remainder on the basis of section 43(2) FOIA.

6. The complainant requested an internal review on 11 September 2017.
7. The public authority wrote back to the complainant on 16 November 2017 with details of the outcome of the internal review. The review upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complaint was accepted for investigation on 25 January 2018 following the provision of additional documentation requested by the Commissioner.
9. On 20 February 2018 the Commissioner wrote to the complainant and explained that her investigation will consider the application of section 43(2) FOIA by the public authority to the remainder of the requested information.
10. However, during the course of the Commissioner's investigation, the public authority sought to additionally rely on the exemptions at sections 36(2)(b)(ii) and 36(2)(c) FOIA.
11. The Commissioner has therefore considered whether the public authority was entitled to rely on the exemptions at sections 36(2)(b)(ii), 36(2)(c) and 43(2) FOIA to withhold the remainder of the requested information.

Reasons for decision

¹ This exemption applies to information that a public authority considers is reasonably accessible to an applicant otherwise than under the FOIA. <https://carillionplc-uploads-shared.s3-eu-west-1.amazonaws.com/wp-content/uploads/2017/07/0538BR-trading-update-presentation-original.pdf>

Application of exemptions

Withheld information

12. The withheld information comprises of email exchanges between officials including Malcolm Harrison, Chief Executive of the Crown Commercial Service and John Manzoni, Chief Executive of the Civil Service, shortly following the profit warning issued by Carillion PLC (Carillion) on 10 July 2017.²
13. By way of background, further profit warnings were issued by the company in September and November 2017 before it went into liquidation in January 2018. Carillion was the UK's second largest construction firm and a major supplier to the UK in vital areas including schools, NHS services and the HS2 high-speed rail link. It is estimated that in 2016 it had 43,000 employees globally including 19,000 in the UK.

Sections 36(2)(b)(ii) and 36(2)(c)

14. The Commissioner has first considered the application of the exemptions at sections 36(b)(ii) and 36(2)(c).
15. The relevant provisions in section 36 state³:

“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

² <https://www.bbc.co.uk/news/business-42022956>

<https://carillionplc-uploads-shared.s3-eu-west-1.amazonaws.com/wp-content/uploads/2017/07/0538BR-trading-update-presentation-original.pdf>

<https://www.investegate.co.uk/carillion-plc/rns/trading-statement/201707100700105229K/>

³ The full text of section 36 can be found here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/36>

- c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”
16. Both exemptions can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person who issued the opinion in this case was the Minister for the Department for the Constitution, Chloe Smith MP. The Commissioner is satisfied that the Minister is a qualified person by virtue of section 36(5)(a) FOIA.⁴
 17. The opinion of the qualified person was sought by officials on 23 April 2018 and provided by the qualified person on 4 May 2018. The Commissioner has summarised the opinion below being careful to exclude parts which reveal withheld information. It should be pointed out for the avoidance of doubt that the Commissioner has considered the opinion in full including those parts she has chosen not to reveal in this notice.
 18. The qualified person was of the opinion that disclosure of the withheld information would or would be likely to inhibit the free and frank exchange of views between officials in relation to how public services delivered by Carillion might be affected by the profit warning issued by the company. Disclosure could inhibit the frankness of similar discussions/communications in relation to the Carillion issue. Officials expressing candid views on the issue assumed that they were doing so in a confidential safe space.
 19. With respect to the application of section 36(2)(c), although not entirely clear from the opinion, it would seem that the qualified person was of the view that disclosure of the withheld information would or would be likely to prejudice the effective conduct of public affairs. This is because inhibiting the candid expression of views in relation to the profit warning issued by Carillion would be detrimental to the process of due diligence, the provision of quality advice and sound decision-making.

Was the qualified person's opinion reasonable?

⁴ Section 36(5)(a) states that a qualified person in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.

20. In determining whether the exemptions are engaged, the Commissioner must consider 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. Whether it concerns an important issue 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.
21. 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 unreasonable 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.
22. Although it appears that the qualified person did not inspect the withheld information which is not substantial, officials provided a fairly accurate summary of the information and she would also have been aware of Carillion's publicised financial difficulties.
23. The Commissioner considers that the interests covered by section 36(2)(c) are broader than those covered by section 36(2)(b). The prejudice envisaged when relying on section 36(2)(c) must be different to that covered by the exemptions at section 36(2)(b).
24. The Commissioner considers that prejudice to the effective conduct of public affairs could refer to an adverse effect on a public authority's ability to offer an effective public service or to meet its wider objectives. In *McIntyre v Information Commissioner and the Ministry of Defence* (EA/2007/0068), the Tribunal commented that: "this....exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would

prejudice the public authority's ability to offer an effective public service or to 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."

25. The Commissioner has been guided on the interpretation of the phrase 'would prejudice' or 'would be likely to prejudice' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; ie either prejudice 'would' occur or prejudice 'would be likely to' occur.
26. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".
27. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that "clearly this second limb of the test places a stronger evidential burden on the public authority to discharge", and the occurrence of the prejudice claimed "is more probable than not".
28. The Commissioner accepts as reasonable the opinion that there was a real and significant risk that disclosing the withheld information would inhibit candid deliberations in respect of the knock-on effects of Carillion's financial difficulties on the company's extensive contracts with the UK Government.
29. On that basis the Commissioner is prepared to accept as reasonable the opinion that there was also a real and significant risk that disclosure would be detrimental to sound decision-making. Inhibiting the ability of officials to freely and frankly express their views on an issue of consequence to the provision of public services and to the economy more widely would effectively curtail the government's ability to make fully informed decisions in tackling it.
30. The Commissioner has therefore concluded that the public authority was entitled to engage the exemptions at sections 36(2)(b)(ii) and 36(2)(c).

Public interest test

31. Both exemptions are however subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in

maintaining the exemptions outweighed the public interest in disclosing the withheld information.

32. The public authority acknowledged that the general public interest in openness and transparency particularly since the enactment of the FOIA could increase public trust in and engagement with Government and has a beneficial effect on the overall quality of decision-making in Government.
33. More specifically it acknowledged that there was a public interest in understanding whether public services were likely to be affected by the collapse of Carillion and the discussions between senior officials in light of such concern. It however claimed that "this specific public interest has been largely met by the investigation of the Information Commissioner into a complaint made about correspondence between senior officials and Ministers in regards to Carillion. The publication of the information in scope of this request would not add materially to that understanding." The public authority clarified that the ICO case in question is the present case.
34. Arguing in support of maintaining the exemptions in the public interest, the public authority submitted that it is in the public interest to maintain a safe space for free and frank exchanges of views between senior officials to ensure effective deliberation of issues and concerns. It is not in the public interest if officials are more reticent in considering issues to the detriment of sound-decision making.

Balance of the public interest

35. If the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in 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.
36. It is important to note that the Commissioner's role, in determining a complaint made to her under section 50 of FOIA, is limited to considering the circumstances as they existed at the point that a request is submitted rather than at the point she is making a decision on that complaint.
37. At the time of the request on 11 August 2017 the Commissioner understands that Carillion had issued the first of its three profit warnings

the previous month July 2017 and had been awarded a major HS2 rail contract by the government in the same month, July 2017.

38. An investigation of the company's Directors was ordered by the government immediately following the company's liquidation in January 2018. The Financial Reporting Council (FRC) is currently conducting that investigation alongside other investigations pertaining to the collapse of the company. Meanwhile, a report by the Business and the Work and Pensions select committees into the collapse of Carillion was published on 16 May 2018.⁵ The report is particularly critical of Carillion's board as being "both responsible and culpable for the company's failure." It also refers to the "regulatory weakness" exposed by the collapse of Carillion and other corporate failures.
39. The Commissioner considers that there was a strong public interest in disclosing the withheld information. That public interest now clearly carries much greater weight in light of what has since been revealed about the financial difficulties at Carillion. However, the Commissioner has not taken events which post-dated the request into consideration. In line with the position taken by the Upper Tribunal in *APPGER v ICO and Foreign and Commonwealth Office (UKUT 0377 (AC))*⁶, the Commissioner is referring to events post-dating the internal review on 16 November 2017. The second profit warning in September 2017 was issued before the internal review was completed. The third profit warning was issued on 17 November 2017 a day after the internal review was completed.
40. The Commissioner considers that there was a strong public interest in knowing who knew about Carillion's financial difficulties, what they knew and when they knew it, at or around the time the decision was taken to award the company a major HS2 rail contract in July 2017. This public interest should not be underestimated. The Commissioner strongly disagrees with the view that this public interest and the wider public interest in understanding whether public services were likely to be affected by the collapse of Carillion has been largely met by her investigation of this complaint. She considers that the withheld information would provide useful insight into what officials knew about

⁵ <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/769/769.pdf>

⁶ that the public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority including the time of any internal review.

Carillion's financial difficulties and how they addressed concerns relating to the likely impact on public services.

41. The Commissioner however considers that there was a stronger public interest in not inhibiting officials from having frank discussions regarding Carillion's financial difficulties particularly with respect to the knock-on effects on public services. Similarly, there was a stronger public interest in ensuring that decisions affecting millions of people who rely on these services are fully informed and sound. The request was submitted at a crucial period when officials very much needed to have a safe space to calmly and carefully consider what was going on at Carillion in order to take steps to protect affected public services. Disclosing the withheld information would have inevitably focussed their attention on addressing media enquiries and similar thereby distracting focus on this very important task.
42. Furthermore, given the scale of the issue, a chilling effect on free and frank discussions was highly likely to considerably affect the rigour with which ongoing and future deliberations were conducted.
43. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemptions outweighed the public interest in disclosure.
44. In view of her conclusion above, the Commissioner has not considered the applicability of the exemption at section 43(2).

Right of appeal

45. 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

46. 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.
47. 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

Gerrard Tracey
Principal Adviser

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