

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 May 2008

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2As

Summary

The complainant requested information held by the Cabinet Office relating to his correspondence on an earlier matter. The Cabinet Office refused to disclose this under section 36(2)(c) of the Act. The Commissioner has investigated and found that the exemption at section 36 of the Act is not engaged. The Commissioner requires the Cabinet Office to disclose the withheld information within 35 calendar days of this notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant has advised that on 27 March 2006 he made the following request for information to the Cabinet Office:

"I request to be provided with all the documents and records relating to my correspondence on this matter"

This request referred to an earlier letter sent to the Prime Minister on 10 January 2006 in which the complainant asked: *"How does Mr Blair justify giving the £1bn per year to the EU whilst at the same time withdraw the full A&E facilities from Hemel Hempstead hospital simply because the Government has failed to provide the PCT with adequate funding to keep it open."*

3. The Cabinet Office responded on 26 May 2006 informing the complainant that it holds information relevant to the request but refused to disclose this information by virtue of sections 21 and 36 of the Act. The Cabinet Office explained that some of the information it holds consists of records of the complainant's own correspondence and as such was exempt under section 21 as it was reasonably accessible to him by other means. The Cabinet Office stated that the remainder of the information was being withheld because in the reasonable opinion of the qualified person its disclosure, would or would be likely to, inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation. The Cabinet Office explained that it had conducted the public interest test and found that the public interest favoured maintaining the exemption.
4. On 31 May 2006 the complainant requested an internal review of the decision to withhold the requested information under section 36. He did not dispute the application of section 21.
5. The Cabinet Office conducted its internal review and communicated the findings to the complainant on 30 August 2006. The internal review upheld the decision to withhold the information from disclosure under section 36 of the Act.

The Investigation

Scope of the case

6. On 14 October 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the exemption provided by section 36(2) (c) was properly relied on by the Cabinet Office.

Chronology

7. The Commissioner began his investigation on 26 January 2007 by writing to the Cabinet Office to ask them for further explanation regarding the application of the exemption and for a copy of the withheld information.
8. The Cabinet Office responded on 21 March 2007 providing further information and a copy of the withheld information.
9. The Commissioner wrote again on 10 April 2007 requesting further details regarding the qualified person's opinion.
10. On 27 April 2007 the Cabinet Office responded providing the Commissioner with details regarding the qualified person. The Cabinet Office also explained what information had been provided to the qualified person to assist her in reaching a decision.

11. On 24 May 2007 the Commissioner wrote requesting a copy of the documents generated by, or considered in the obtaining of, the relevant person's opinion.
12. On 30 July 2007 the Cabinet Office responded informing the Commissioner that it felt that it had provided sufficient evidence to the Commissioner and that it had complied with the requirement to obtain the reasonable opinion of the qualified person.
13. Following a review of the case the Commissioner wrote to the Cabinet Office on 10 October 2007 outlining his position on the application of section 36 to the withheld information and inviting comments on the possible application of section 35(1) (d).
14. The Cabinet Office responded on 31 October 2006 informing the Commissioner that it did not believe section 35(1) (d) could be applied. It explained that for information to be exempt under this exemption it must relate to the operation of any Ministerial private office. It pointed out that the Prime Minister's Office (who hold the information) forms part of the Cabinet Office and is staffed by civil servants and special advisers. Due to the quantity of letters sent to the Prime Minister a Direct Correspondence Unit was established within the Prime Minister's Office to provide personal administrative support to the Prime Minister for handling and processing all incoming mail. For these reasons, the Cabinet Office stated, the information held does not relate to the operation of any Ministerial private office and it does not intend to rely on this exemption.

Analysis

Exemption: Section 36 'Prejudice to the effective conduct of public affairs'

15. Section 36(2)(c) provides that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to prejudice the effective conduct of public affairs.
16. Information can only be exempt under section 36 if 'in the reasonable opinion of a qualified person' disclosure would, or would be likely to lead to the above adverse consequences. 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;
 - Consider whether the opinion was objectively reasonable and reasonable arrived at
17. The Commissioner has established that at the time the request was dealt with the qualified person was Hilary Armstrong, Minister for the Cabinet Office. A written

- submission was put to her on 23 May 2006 by Officials, advising, that in their view; the information held was exempt under section 36. The Minister was asked to consider whether in her reasonable opinion the exemption applied.
18. The Information Tribunal has decided (*Guardian & Brooke v The Information Commissioner & the BBC*) (EA/2006/0011 and EA 2006/0013) that a qualified person's opinion under section 36 is reasonable if it is both '*reasonable in substance and reasonably arrived at*'. It elaborated that the opinion must therefore be 'objectively reasonable' and based on good faith and the proper exercise of judgement, and not simply '*an opinion within a range of reasonable opinions*'. However, it also accepted that '*there may (depending on the facts) be room for conflicting opinions, both of which are reasonable*'. In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.
 19. The Cabinet Office explained that it was put to the Minister that the information held relates to how correspondence has been handled internally and should not be released. In particular it was argued that routine release of this information would prejudice the process by which officials undertook routine administration relating to the handling of correspondence received by the Prime Minister's Office, and that it should be possible for this to be conducted in a manner where every detail need not be disclosed. Release of the minute detail of government processes would prejudice the necessary management administration of Government in the future and would adversely impact on the effective conduct of public affairs.
 20. The Cabinet Office explained that internal correspondence is held on the No 10 tracking system which shows decisions made regarding the timing of responses, the format in which to respond, and who should respond.
 21. The Cabinet Office put it to the Minister that to release the information would unnecessarily impact on how official's duties are performed and would disrupt the management of routine administration. Officials need to ensure that they are performing their duties effectively and to release the information requested would inhibit, or would be likely to inhibit officials from making correct handling decisions.
 22. The Minister gave her opinion on the 24 May 2006 that the release of the information would prejudice the effective conduct of public affairs.
 23. The Commissioner has considered the evidence which was before the qualified person when they arrived at their opinion. The Commissioner notes that the qualified person was briefed about the nature of the requested information and given advice about relevant issues concerning the application of the exemption. However, the Commissioner also notes that the qualified person did not have sight of the withheld information.

24. The Commissioner has viewed the withheld information and is not persuaded that, in the circumstances of this case, the opinion of the qualified person is a reasonable one, as he does not consider that the qualified person would have found that disclosure of the information, would or would be likely to prejudice the effective conduct of public affairs if they had viewed the substance of the information. The Commissioner believes that if they had viewed the information they would have been unable to reach a reasonable opinion that disclosure would have this negative effect.
25. In reaching this decision the Commissioner has considered the Tribunal decision EA/2005/005 *'John Connor Press Associates vs. The Information Commissioner'*. The Tribunal confirmed that "the change of prejudice being suffered should be ore than a hypothetical possibility; there must have been a real and significant risk." (para 15). This was further expanded in the Tribunal decision *'Hogan vs. The information Commissioner EA/2005/0026'* and *'Bexley vs. The Information Commissioner EA/2006/0060.'*
- 26 In these cases the Tribunal considered what was meant by "would be likely to prejudice" and when a prejudice based exemption might apply. The Tribunal found that 'prejudice must be real, actual and of substance', it went on to explain that there are two alternative ways in which disclosure can be said to prejudice and that one of these must be shown. Where prejudice 'would be likely to occur' the likelihood need not be more probable than not, though it should be real and significant; where prejudice 'would' occur, the chance should be greater – more probable than not. The Cabinet Office have not specified which limb of the prejudice test it has applied. In the Tribunal Case *McIntyre vs Ministry of Defence EA/2007/0068* the Tribunal found that where a public authority has not specified which limb it is applying the Commissioner should apply the lower test. The Commissioner has therefore considered if disclosure would be likely to prejudice the effective conduct of public affairs.
27. The Commissioner has considered the content of the information and notes that it consists of 8 pages including copies and extracts of the letters already sent to and received from the complainant; covering proformas attached to the correspondence; and print outs from the No10 Correspondence Record system. The proformas are standard covering notes used to forward correspondence to the appropriate department detailing who the correspondence is being sent to; how the reply will be sent; and if there are any special instruction such as deadlines. The print outs from the Correspondence Record System show the complainant's details; a summary of the subject of his correspondence; dates of the letters received and the dates of the replies sent as well as a copy of the text of the reply.
28. The Commissioner considers the information to show the work management system used to handle correspondence as it arrives in the Prime Minister's Office. Whilst the information does show the management of routine administration the Commissioner cannot see how disclosure would 'disrupt' this routine. The qualified person considered that release of the minute detail of government process would prejudice the necessary management of the administration of

government and therefore the effective conduct of public affairs. However, the Commissioner cannot see how disclosure of information which reveals the dates of replies and covering letters sent with correspondence would have this negative impact.

29. The Commissioner understands the concerns of the qualified person that if the Cabinet Office were routinely compelled to disclose information of this type on request, it would impinge on their ability to manage correspondence effectively. However, the Commissioner and the qualified person must consider if disclosure of the information would have this adverse effect. The Commissioner recognises that if everyone who wrote to the Prime Minister asked for this information that it could be so disruptive that section 36 might be engaged. However, he does not consider that it is obvious that this would happen and one person asking for the information doesn't of itself have this effect. He is not persuaded that the opinion of the qualified person that disclosure of if this information would inhibit officials from making correct handling decisions is a reasonable one. The Commissioner does not believe that the qualified person would have reached the same decision if they had had sight of the information when making their decision.
30. For these reasons the Commissioner finds that section 36(2)(c) is not engaged as he does not accept that the opinion of the qualified person is a reasonable one. He does not find that disclosure would, or would be likely, to inhibit the effective conduct of public affairs.

The Decision

- 31 The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

The exemption under section 36(2)(c) is not engaged in respect of the requested information.

Steps Required

32. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose to the complainant the information withheld under section 36(2)(c). If wider disclosure is envisaged, the personal details of the complainant should be redacted.

Failure to comply

33. Failure to comply with the steps described above 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.

Right of Appeal

34. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 27th day of May 2008

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) 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-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (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, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(3) provides that –

“The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).”

Section 36(4) provides that –

“In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

Section 36(5) provides that –

“In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.”

Section 36(6) provides that –

“Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions.”

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.