

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 5 September 2011

Public Authority: Northern Ireland Prison Service
Address: Dundonald House
Upper Newtownards Road
Belfast
BT4 3SU

Summary

The complainant requested information relating to the 'Strategy for Improving Operational Management Capability' as discussed in the Pearson Audit Review. The Northern Ireland Prison Service (NI Prison Service) refused the request citing sections 36(2)(b)(i) and (ii) and section 36(2)(c) of the Act.

The Commissioner finds that the exemption under section 36(2)(b)(ii) was engaged and that the public interest in maintaining the exemption outweighed the public interest in favour of disclosing the information. The Commissioner also recorded a procedural breach of the Act in relation to the NI Prison Service's handling of the request.

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.
2. The Commissioner notes that under the Act the NI Prison Service is not a public authority itself, but is actually an executive agency of the Department of Justice which is responsible for the NI Prison Service and therefore, the public authority in this case is actually the Department of Justice not the NI Prison Service. However, for the sake of clarity, this decision notice refers to the NI Prison Service as if it were the public authority.

The Request

3. On 25 March 2010, the complainant made the following request to the NI Prison Service:

"The Pearson Audit review as recently published on the NIPS website alludes to the Strategy for Improving Operational Management Capability.

I should be grateful for a copy of this document or indeed an indication where I could obtain the same. I have searched the website but cannot find one."

4. On 26 April 2010, the NI Prison Service wrote to the complainant advising it was extending the 20 working day limit for issuing a response to allow further consideration of the public interest test and advising it was considering the application of section 36 of the Act to the withheld information in the case.
5. On 24 May 2010, the NI Prison Service advised the complainant that it was still not in a position to answer his request, explaining that a submission to the Minister for Justice, Mr David Ford MLA had been sent to the Department of Justice Private Office and it was awaiting a response.
6. On 7 June 2010, the NI Prison Service issued a refusal notice to the complainant advising that whilst no formal strategy yet exists [for improving operational management capability], it did hold a discussion document. However, the NI Prison Service advised that this information was exempt under section 36(2)(b) and (c) of the Act.
7. On 7 June 2010, the complainant requested an internal review of the NI Prison Service's decision not to disclose the information requested.
8. On 5 August 2010, the NI Prison Service wrote to the complainant to advise the internal review had been completed and had upheld its original decision to withhold the requested information on the basis of the exemption at section 36 of the Act.

The Investigation

Scope of the case

9. On 8 August 2010, 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 his

views that the internal review and application of the section 36 exemption was flawed. The complainant highlighted the fact that the Pearson Review was set up by the then Minister of State Mr Paul Goggins "*with a fanfare of publicity*" to look at the facts surrounding a death in custody. The review team had made a number of recommendations which were responded to by the NI Prison Service and the complainant has stated he is at a loss to understand why the requested information has been exempted, particularly in the context of a press release statement indicating the review team is "*helping to create a more accountable [prison] service for Northern Ireland*".

Chronology

10. On 28 September 2010, the Commissioner wrote to the NI Prison Service advising a complaint had been received and requesting a copy of the withheld information.
11. On 19 May 2011, the Commissioner wrote a further letter to the NI Prison Service and again requested a copy of the withheld information along with further information on its application of the section 36 exemption.
12. The NI Prison Service responded to the Commissioner on 24 May 2011, providing a copy of the withheld information along with further clarification on its application of the section 36 exemption.

Analysis

Substantive Procedural Matters

Section 36 – prejudice to the effective conduct of public affairs

13. The NI Prison Service withheld the requested information under section 36(2)(b)(i) and (ii) and 36(2)(c).
14. The relevant parts of sections 36(2) state 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-

(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 likely otherwise prejudice the effective conduct of public affairs."

15. This is a qualified exemption, and is therefore subject to the public interest test.
16. The Commissioner notes that in this case the NI Prison Service has claimed more than one limb of section 36(2) in this case. The Commissioner has reviewed the withheld information and has first considered the application of section 36(2)(b)(ii).

Opinion of the qualified person

17. 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 adverse consequences described in that part of the exemption, in this case the inhibition of the free and frank exchange of views for the purposes of deliberation.
18. In deciding whether the opinion was '*reasonable*' the Commissioner has been led by the Tribunal's decision in the case of *Guardian Newspapers & Brooke v Information Commissioner & BBC [EA/2006/0011 & EA/2006/0013]* in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. The Tribunal concluded that '*in order to satisfy the sub-section, the opinion must be both reasonable in substance and reasonably arrived at*' (paragraph 64).
19. In order to establish whether the exemption has been applied correctly, the Commissioner will first consider whether the opinion was reasonably arrived at. He will then go on to consider whether the opinion was reasonable in substance.
20. If the Commissioner decides that the exemption is engaged he must then go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
21. In considering whether the opinion was reasonably arrived at in this case, the Commissioner has established that the reasonable opinion was given by the Minister of Justice, David Ford MLA, the Northern Ireland Minister in charge of the Department and thereby an authorised qualified person in accordance with section 36(5)(b) of the Act.
22. In its submissions to support the application of section 36, the NI Prison Service has explained the process by which this opinion was provided, advising that a submission outlining the request and the nature of the withheld information was forwarded to the qualified person on 19 May 2010. The submission, which included a draft refusal

- notice, was approved by the qualified person on 1 June 2010 and communicated to the complainant in the NI Prison Service's refusal notice dated 7 June 2010. A copy of the submission to the qualified person was also supplied to the complainant.
23. Unfortunately, this leaves the Commissioner in a difficult position. Although the NI Prison Service submission sets out its arguments to the qualified person as to why the information should not be released, no information has been provided to the Commissioner on what arguments the qualified person took into account in forming his opinion, nor is it clear whether the qualified person was provided with any of the withheld information to which section 36(2)(b)(ii) was applied.
 24. However, despite not being provided with evidence that explicitly explains why the qualified person considered the information in question to be exempt, on this occasion the Commissioner is satisfied that the opinion appears to be reasonably arrived at for the following reasons.
 25. The NI Prison Service provided the Commissioner with a copy of the submission and draft refusal notice that had been submitted to the qualified person for his approval and which set out the NI Prison Service's rationale for the use of the section 36 exemption. The NI Prison Service also provided an email sent on behalf of the qualified person advising he had viewed the submission and agreed with its recommendation, subject to some further consideration be given to the drafting of the refusal notice. The Commissioner considers this is a clear indicator that an opinion was given.
 26. The NI Prison Service advised the Commissioner that in coming to his decision the qualified person had taken into account that the requested information was a confidential management discussion document that had been put together in response to the recommendations of the Pearson Review and was intended to inform a debate by the Prison Service Management Board. The discussion document, set out a number of wide ranging options, some of which it considered could be seen as "*controversial or inflammatory*", and was designed to stimulate discussion. The NI Prison Service considered that disclosure of the discussion document would inhibit debate on the various options and would reduce the quality of any decision reached.
 27. The Commissioner has taken into account the factors which were considered by the qualified person in relation to the application of section 36(2)(b)(ii) which primarily concerned the likely prejudicial effect of disclosure on the frankness and candour of internal discussions surrounding the response to the recommendations of the

- Pearson Review. The NI Prison Service advised those discussions were needed to ensure that all possible options, however unlikely, were placed before senior management for due consideration.
28. The Commissioner has noted that the NI Prison Service stated that the discussion document as presented to the Prison Service Management Board is a discussion document only and that no formal strategy document exists. The NI Prison Service has advised that the discussion document will ultimately lead to a formal strategy which will be published in due course. Bearing this in mind the Commissioner is satisfied that the qualified person did take into account relevant facts when reaching his opinion.
 29. Furthermore, the Commissioner is satisfied that the substance of the withheld information is not such that the qualified person could not reach a reasonable opinion that the exemption is engaged, despite flaws in the application of section 36. Therefore he is satisfied that the qualified person's opinion was reasonably arrived at.
 30. The Commissioner has gone on to consider whether the qualified person's opinion was reasonable in substance.
 31. The basis of the qualified person's opinion in relation to section 36(2)(b)(ii) is that disclosure would or would be likely to have an inhibitory effect on staff contributing to discussions and discussing options. The NI Prison Service advised that the withheld information in this case was written in order to enable debate on the specific recommendations made by the Pearson Review Team. The discussion document contains a number of speculative arguments and proposals, the purpose of which was to ensure that all options, however unlikely, had been put before its senior management team for due consideration.
 32. The Commissioner has examined the withheld information in this case and accepts that it was reasonable to conclude that disclosure of the withheld information would reveal free and frank discussions which could lead to NI Prison Service staff being less willing to discuss issues in a free and frank nature in the future.
 33. Therefore, despite not being provided with details of the explicit evidence which led the Minister to reach the conclusion that the information was exempt on the basis of section 36(2)(b)(ii), the Commissioner is of the view that the opinion can be considered reasonable in substance. He is therefore satisfied that section 36(2)(b)(ii) is engaged in relation to the information withheld under that section.

Level of prejudice

34. Before moving on to consider the public interest test, the Commissioner notes that the qualified person's opinion does not clearly identify the likelihood of the inhibition in the case of section 36(2)(b)(ii) occurring. The Commissioner considers that where the level of prejudice has not been specified then, unless there is clear evidence that the higher level should apply, the lower threshold should be used and has therefore proceeded on the basis that the lower prejudice threshold level applies.

Public Interest test

35. Under section 2(2) of the Act, exempt information must still be disclosed unless in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Commissioner has considered public interest arguments in relation to section 36(2)(b)(ii). In accepting that the opinion of the qualified person was reasonable, the Commissioner has accepted that disclosure of the information in question would be likely to inhibit this process. The role of the Commissioner is to consider whether these concerns outweigh the public interest in disclosure.
36. As noted in the case of *McIntyre v Information Commissioner and the MOD (EA/2007/0068)*, the reasonable opinion of the qualified person is limited to the degree of likelihood that inhibition or prejudice may occur and *'does not necessarily imply any particular views as to the severity or extent of such inhibition or prejudice, or the frequency with which it may occur, save that it will not be so trivial, minor or occasional as to be insignificant'*. The Commissioner understands this to mean that whilst 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 nature, severity, extent and frequency of prejudice or inhibition.

Public interest arguments in favour of disclosing the requested information

37. The NI Prison Service recognised the general public interest in that disclosure would inform and enable debate on the issues of the day as well as ensuring that its decision making was transparent and open to public scrutiny. The NI Prison Service also considered that disclosure should improve the quality of decision making as those individuals responsible for such decisions may be held to account.
38. The Commissioner agrees with the NI Prison Service's public interest arguments in favour of disclosure relating to transparency and accountability. He also considers that in this case, disclosure of the

withheld information would show the public how the senior management team within the NI Prison Service deal with the recommendations of the Pearson Audit Review as well providing some insight into how this process happens.

39. Furthermore, the Commissioner supports the NI Prison Service's view that disclosure of officials' advice and deliberations could actually improve the decision making process – by providing a certain level of encouragement to those officials involved who would be doing so in the knowledge that their decision making processes may be the subject of some external scrutiny.
40. The complainant has argued that the NI Prison Service's application of the section 36 exemption is wrong and flawed. He has placed considerable emphasis on the fact that the Pearson Report was set up "*with a fanfare of publicity*" both from the NI Prison Service and the then Prisons Minister Paul Goggins. The complainant has stated he is at a loss to understand why the requested information has been exempted, particularly in the context of a press release statement¹ indicating the review team is "*helping to create a more accountable [prison] service for Northern Ireland*". The complainant firmly believes there is an overwhelming public interest in how the NI Prison Service is to put things right following the death of a prisoner in custody, adding that "*surely there can be no bigger public interest than ensuring bodies of state do not allow citizens to simply die in custody.*"

Public interest arguments in favour of maintaining the exemption

41. The NI Prison Service maintain that the necessarily controversial nature of some of the proposals contained within the withheld information would be likely to focus attention away from the proposals of the Pearson Review and could lead to a decline in industrial relations between the NI Prison Service and the Prison Governor's Association/Prison Officer's Association, which could have the effect of creating a stalemate situation between the management side and prison staff with progress on the Pearson recommendations either being considerably delayed or perhaps stopped entirely.
42. Furthermore, the NI Prison Service argue that in this particular case, the withheld information is a confidential management document that was written in order to stimulate debate on the specific recommendations arising out of a highly critical report into a death in

¹ <http://www.niprisonservice.gov.uk/module.cfm/opt/1/area/News/page/news/caid/1/nid/516>

custody. The withheld information includes the consideration of a wide range of options that the NI Prison Service believe could be seen by some as controversial or inflammatory and which may not have been included – or at the very least watered down, had the writer thought the document would become public.

43. The NI Prison Service also believe that disclosure of the withheld information would have the effect of reducing the options available to the Prison Service Management Board, thereby narrowing any debate and reducing the quality of its decision making.

Balance of the public interest arguments

44. In considering where the balance of the public interest lies, the Commissioner notes that the main argument for non-disclosure outlined above surrounds a breakdown in relations between the NI Prison service and its Trade Unions – particularly the Prison Officer's Association and the Prison Governor's Association, and the effect that disclosure of an early stage discussion document would have on already difficult industrial relations. The Commissioner considers that in this particular case, the views contained within the discussion document were aimed at exploring all available options to improve the operational management capability of the NI Prison Service and were developed to facilitate debate in response to several of the recommendations of the Pearson Review that related to the recruitment and promotion arrangements for Governor Grades within the organisation.
45. Furthermore the Commissioner notes that the NI Prison Service is also relying on the fact that disclosure would or would be likely to have an inhibitory effect on staff contributing to discussions and discussing options with the inference being that disclosure would inhibit similar discussion in the future. In relation to any 'chilling effect' on the future frankness and candour of discussions that might result in poorer decision making, the guiding principle is the robustness of officials, i.e. they should not be easily deterred from doing their job properly.
46. However, the Commissioner accepts that public authorities need time, space and privacy when deciding how to respond to such reviews, which in this particular case was particularly sensitive.
47. The NI Prison Service advised that the withheld information was written in order to enable debate on the specific recommendations of the Pearson Review and contains a number of speculative arguments and proposals, the purpose of which was to ensure that all options – however unlikely, had been put before its senior management team for consideration.

48. Having reviewed the withheld information, the Commissioner considers that the opinions expressed in the discussion document were given freely and frankly and with the intention of informing debate on the recommendations of the Pearson Review and that in this particular case, there is a real possibility that disclosure may lead to less candid and robust discussions taking place with hard choices being avoided if officials are not able to give such opinions freely and frankly. The Commissioner accepts that a chilling effect in the frankness and candour of discussions would be significant if disclosure was made at this stage and has therefore given significant weight to the timing of the request and the impact this would have on the openness of present and future discussions of options relating to the recommendations of the Pearson Review.
49. The Commissioner accepts that disclosure could provide the public with further insight on some of the options being considered by the NI Prison Service on how it addresses the concerns raised in the Pearson Review and acknowledges the complainant's argument that the Pearson Review had been launched with some media hype promising "*...more accountability*". However, the Commissioner is also mindful of the role free and frank discussion plays in enabling early stage discussions about issues that threaten the delivery of objectives, providing officials with the opportunity to think strategically, develop thinking and explore options and other implications in a frank and candid way. Furthermore, the NI Prison Service has advised that it is intended that the withheld information will ultimately lead to the development of a formal strategy which it intends to publish.
50. The Commissioner concludes that the public interest in maintaining the exemption contained at section 36(2)(b)(ii) outweighs the public interest in disclosing this information.
51. As the Commissioner has found that section 36(2)(b)(ii) is engaged in respect of the withheld information, he has not gone on to consider the application of section 36(2)(b)(i) and 36(2)(c).

Procedural Requirements

Section 17(3): refusal of a request

52. Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

53. The NI Prison service’s first response to the request of 25 March 2010 was dated 26 April 2010 and advised the complainant that it was considering the application of section 36 of the Act however required further time to consider the application of the public interest test. The Commissioner notes that the section 36 exemption could not have been engaged at this time as the opinion of the qualified person was not obtained until 1 June 2010. A refusal notice was issued on 7 June 2010, some 50 working days later.

54. In this case, the NI Prison Service issued a public interest test extension notice and then took unreasonable time to communicate the outcome of the public interest test and therefore breached section 17(3) of the Act. The Commissioner has produced Good Practice Guidance No. 4 which provides advice on what the Commissioner considers to be a reasonable time²

The Decision

55. The Commissioner’s decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The NI Prison Service correctly withheld the information under section 36(2)(b)(ii) of the Act.

56. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- Section 17(3) of the Act in that the NI Prison Service issued a public interest test extension notice and then took unreasonable time to communicate the outcome of the public interest test.

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/foi_good_practice_guidance_4.pdf

Steps Required

57. The Commissioner requires no steps to be taken.

Other matters

58. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.

59. For the purposes of the section 36 exemption, in order to establish whether a qualified person's opinion was reasonable the Commissioner will consider the information that the qualified person had in front of them when making a decision. This approach accords with the Information Tribunal's findings in *McIntyre v Information Commissioner* (EA/2007/0068), in which it stated at paragraph 47 that:

"We would recommend to the Commissioner that in future investigations for complaints where a s.36 (2) exemption has been claimed that he should require to see more evidence in relation to the opinion given by the qualified person, such as civil servants' submissions to ministers and their responses."

60. During his investigation, the Commissioner asked the NI Prison Service to provide him with the information that the qualified person had access to when coming to a decision. While the NI Prison Service provided detail on some of the arguments that were considered it did not provide detail on which factors were taken into account by the qualified person to help him form his opinion. Whilst the section 36 exemption was considered to be engaged in this case, the Commissioner would have preferred to see a better documented process of obtaining the qualified person's opinion and would refer the NI Prison Service to the case of *University of Central Lancashire v the Information Commissioner* (EA/2009/0034) in which the Tribunal commented that it would normally expect a public authority to have documented the process undertaken when applying section 36. The Commissioner has published guidance on what records he would expect a public authority to keep at:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/section_36_practicalities_v1.pdf

Right of Appeal

61. 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,

Arnhem House,

31, Waterloo Way,

LEICESTER,

LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

62. 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.
63. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 5th day of September 2011

Signed

**Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

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.