

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 December 2011

Public Authority: Northern Ireland Office

Address: 11 Millbank
London
SW1P 4PN

Decision (including any steps ordered)

1. On 14 October 2010, the complainant asked the Northern Ireland Office ('NIO') for information relating to a complaint he had made against the office of the Police Ombudsman for Northern Ireland ('PONI'). Specifically he requested,
 - "1. *Papers the NIO reviewed in relation to the investigation the Police Ombudsman's office undertook to investigate [name redacted] investigating Officer.*
 2. *All papers statements and notes that the NIO reviewed in relation to my complaint that the Ombudsman's Office failed to see in my custody record that I had been de-arrested that the Police had failed to offer me my legal rights and that I had been free to go before they obtained a blood sample. All papers that the NIO reviewed in relation to the Ombudsman's Office then paying me to go seek a legal opinion on their failure as in regards to that custody record.*
 3. *All papers and statements that the NIO reviewed in relation to [name redacted]'s failure to know the wording in Article 5.3 of the Police Code of Ethics, and her failure to then invalidate and reopen a new investigation on the basis of her own omission that she had failed and got it wrong as in regards to the wording of Article 5.3 of the Police Code of Ethics.*
 4. *All papers and statements reviewed by the NIO in relation to my complaint that [name redacted] has continually failed to answer any of my questions contained in a letter sent to him on the 2nd of November 2006. All other papers minutes and statements that*

has been reviewed by the NIO in connection with my complaint about the Police Ombudsman's Office."

2. The NIO refused to disclose that information under sections 36(2)(b)(i) and (c) of the FOIA. Following the Commissioner's intervention, the NIO disclosed some of the information to the complainant, however it continued to withhold the remainder ("the withheld information"), citing sections 36(2)(b)(i), 36(2)(c) and 40(2) as a basis for non-disclosure.
3. The Information Commissioner's decision is that the NIO correctly applied section 36(2)(b)(i) (prejudice to the effective conduct of public affairs). Since his decision is that this section applies to all of the withheld information, he has not considered the NIO's application of sections 36(2)(c) and 40(2).

Background

4. The complainant brought a complaint to PONI regarding his treatment by the Police Service of Northern Ireland ('PSNI'). PONI investigated and found his complaint to be unsubstantiated. The complainant was unhappy with this outcome and after numerous complaints to PONI raised the matter with the then Secretary of State for Northern Ireland, via Peter Robinson MP, in December 2006 and made a complaint of maladministration against PONI.
5. The complainant submitted a request under the Data Protection Act 1998 (the DPA) and the FOIA to the NIO in February 2008, asking for the release of information held and reviewed by the NIO in dealing with his complaint against PONI.
6. The NIO released most of the information he had requested. At the decision of the then Minister of State for Northern Ireland, it was decided that six paragraphs and some information from the covering page of one document were exempt from release and these were withheld under section 36(2)(b)(i) of the FOIA.
7. The complainant requested an internal review into the handling of his request. The reviewer upheld the original decision.

Request and response

8. On 14 October 2010, the complainant wrote to the NIO again. Given the passage of time since the NIO handled his original request, he

asked it to re-consider the release of the information it had previously withheld, submitting the request described in paragraph 1 above.

9. The NIO responded on 25 November 2010. It stated that he had already received the requested information to which he was entitled under the DPA and that the remainder of the information was being withheld under sections 36(2)(b)(i) and 36(2)(c) of the FOIA.
10. The information being withheld consisted of:
 - The final six paragraphs (plus some personal details of other individuals on the cover page) of the NIO's submission to the Secretary of State for Northern Ireland regarding Mr Peter Robinson MP's correspondence about the complainant.
 - The draft reply by the Secretary of State for Northern Ireland to Mr Robinson MP.
11. Following an internal review the NIO wrote to the complainant on 16 December 2010. The reviewer upheld the original decision.

Scope of the case

12. The complainant contacted the Information Commissioner ('the Commissioner') to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider the NIO's application of the exemptions under sections 36(2)(b)(i) and 36(2)(c) to the information.
13. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the FOIA.
14. Following the Commissioner's intervention, the NIO disclosed the draft reply and some of the information from the cover page of the submission to the complainant. However it continued to withhold,
 - the final six paragraphs of the submission; and
 - the remaining information from the cover page,citing sections 36(2)(b)(i), 36(2)(c) and 40(2) as a basis for non-disclosure.

Reasons for decision

Exemptions

Section 36 - prejudice to the effective conduct of public affairs

15. Sections 36(2)(b)(i) provides that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
16. In order to engage section 36, the 'qualified person' must give an opinion that the prejudice would or would be likely to occur, but that in itself is not sufficient; the opinion must be reasonable.
17. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
 - ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
18. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that is, not irrational or absurd. 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 even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.
19. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC*¹ (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus,

¹ EA/2006/0011 & EA/2006/0013

'does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'.

20. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, the Commissioner is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

The engagement of section 36(2)

21. Section 36(5)(a) states that in relation to information held by a government department in the charge of a Minister of the Crown, the qualified person includes any Minister of the Crown. In this case the Commissioner has established that the reasonable opinion was given by Rt Hon Hugo Swire MP, who is currently and was at the time of this request Minister of State for Northern Ireland. The Commissioner is therefore satisfied that Mr Swire was a qualified person for the purposes of section 36(5)(a) of the FOIA.
22. The NIO explained that the qualified person's opinion was sought before a substantive response was sent to the complainant. The qualified person was given a detailed submission, followed by a further detailed briefing by the relevant officials and subsequently approved the use of section 36(2) in relation to the withheld information.
23. The NIO sent the Commissioner a copy of its submission to the qualified person. In that submission, it had set out the background to the complainant's request and the information falling within the scope of that request. It made it clear that the complainant had been provided with the majority of the information falling within the scope of his request and explained in detail why it believed the exemption under sections 36(2)(b)(i) and 36(2)(c) were engaged in relation to the withheld information. The submission also contained a detailed analysis of how the NIO had carried out the public interest test, its conclusion and requested the qualified person's opinion on its application of sections 36(2)(b)(i) and 36(2)(c). The Commissioner notes that the qualified person, before reaching his decision, received a full briefing from those officials during which the withheld information and the potential consequences of its release were discussed in detail.

Section 36(2)(b)(i)

24. Section 36(2)(b)(i) provides that information is exempt from disclosure if disclosure, in the reasonable opinion of a qualified person, would or would be likely to inhibit the free and frank provision of advice. The qualified person, from the detailed submission and subsequent briefing, appears to have considered several factors in forming the view that disclosure of the withheld information would or would be likely to inhibit the free and frank provision of advice.
25. The Commissioner considers that the qualified person was provided with a sufficiently detailed submission, followed by a full and detailed further briefing regarding the information and the application of the exemption, to enable him to reasonably arrive at the conclusion that section 36(2)(b)(i) is engaged in relation to the withheld information.
26. The Commissioner considers that the withheld information does contain candid advice to assist in high-level decision-making relating to the complainant's maladministration complaint. The Commissioner accepts that it is a reasonable opinion that if this advice were disclosed it would be likely to cause officials involved to be less candid in the advice they provide in relation to ongoing and future complaints. Whilst the Commissioner does not accept that officials will be put off providing advice in full, it is not unreasonable to conclude that the depth and rigour of advice provided would be likely to be affected which would have a damaging impact on the decision making process.
27. The Commissioner accepts that it was reasonable to conclude that disclosure would or would be likely to inhibit the free and frank provision of advice in the future. He considers that the information does contain very free and frank advice and that if it were disclosed officials would be likely to be more restrictive in relation to the frankness of such advice provided in the future.
28. The Commissioner notes that Mr Swire has not explicitly said whether disclosure would **or** would be likely to cause the prejudice outlined in sections 36(2)(b)(i) and 36(2)(c). Therefore the Commissioner, mindful of the findings of the Tribunal in the case of *McIntyre v Information Commissioner and MoD*² has decided that the lesser test should be applied. The Tribunal in *McIntyre* commented at paragraph 45 that:

² EA/2007/068

'we consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.'

29. The Commissioner finds that the opinion of the qualified person is a reasonable one. He therefore finds that section 36(2)(b)(i) was correctly engaged in relation to the withheld information.

Public interest test

30. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in the disclosure of the information. The Tribunal in *Guardian & Brooke* indicated the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

"The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice."

31. The Commissioner agrees with this view. The fact that it is "not for the Commissioner to form an independent view..." does not prevent him from considering the severity, extent and frequency of any prejudice or inhibition which might occur when he is assessing the public interest. Whilst the Commissioner can and should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should also consider the severity, extent and frequency of the likely prejudice or inhibition which would be likely to be caused by disclosure of the information withheld under section 36 and any relevant subsections.

Public interest arguments in favour of disclosing the withheld information

32. The NIO acknowledged that there a number of factors which favour disclosure, including openness and transparency of government activities, informing public debate and increase in public confidence in government departments.
33. The NIO believes that there is a strong public interest in openness and transparency in relation to government activities. It also considers that disclosure of information to the public which contains free and frank advice arising from candid discussions would inform the public as to the nature and quality of those discussions. This would facilitate an informed public debate on significant issues and may improve the quality of the discussions which take place when preparing advice and lead to greater transparency of decisions taken by government departments.
34. The NIO believes that it has already acknowledged and gone some way towards meeting the public interest considerations above in this matter as it has already released the majority of the information requested by the complainant. The information that it still considers to be exempt represents a small proportion of the information that was considered in handling his original request.

Public interest arguments in favour of maintaining the exemption

35. The NIO has argued that ministers and their officials need to be able to think through all the implications of particular options before decisions are reached. In particular, they need to be able to undertake rigorous and candid assessments of the risks to particular positions and responses. This can only happen if those who provide this advice can do so in a candid manner and, in doing so suggest options and opinions that are unusual or unconventional. These options and opinions would be less likely to be put forward by officials in a free and frank manner if they were aware that their contributions would be likely to be subsequently released. This would mean that the discussions and deliberations that take place would not be as thorough or as varied, which would not be in the public interest.
36. The NIO considers that it is also important to consider that the release of these minutes would increase the likelihood that the discussions and opinions put forward by officials in the future might be materially different because of the possibility of disclosure; effectively restraining and changing the quality and depth of the discussions that take place.

Balance of the public interest arguments

37. The Commissioner considers that there is a public interest in furthering understanding of the process of discussion which leads ultimately to decision-making within government departments such as the NIO. Disclosure of the withheld information may increase public confidence in government and its decision-making processes.
38. The Commissioner also considers that disclosure of information relating to discussions behind the government's decision-making processes may help to improve the quality of those discussions and lead to greater transparency of the decisions made within government. He accepts that these arguments in favour of disclosing the withheld information carry are significant but the weight in favour of disclosure is not compelling.
39. The Commissioner finds that disclosure of this particular information, given the context of the surrounding issues, would be likely to cause prejudice of some impact on other similar circumstances in the future. There is a strong public interest in the NIO and other government departments being able to discuss similar sensitive issues freely and frankly to ensure that every aspect of these issues is considered with a view to making a full and informed decision.
40. The Commissioner considers that the public interest in favour of disclosure of the withheld information is outweighed by the public interest in maintaining the exemption at section 36(2)(b)(i) of the FOIA.
41. As the Commissioner has found that section 36(2)(b)(i) is engaged in respect of the withheld information, he has not gone on to consider the application of section 36(2)(c).

The decision

45. The Commissioner's decision is that the NIO dealt with the request for information in accordance with the FOIA.

Steps Required

46. The Commissioner requires no steps to be taken.

Right of appeal

47. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

49. 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.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

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