

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 6 February 2012

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

Summary

The complainant requested information relating to the amount of money saved by the government from the renegotiation of contracts with its major service suppliers. The public authority disclosed the total amount and the amount broken down by department. It however withheld the amount broken down by supplier on the basis of the exemptions at sections 36(2)(c) (prejudice to the effective conduct of public affairs) and 43(2) (commercial interests).

The Commissioner found that the total amount saved from the renegotiation of a contract with one of the suppliers should have been disclosed but upheld the application of section 36(2)(c) to the remainder of the information.

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 wrote to the public authority on 8 December 2010 and requested information relating to the amount of money the government had saved from renegotiating contracts with major its service providers. The request was phrased as follows:

'In Francis Maude's speech to the Conservative conference on 3rd October he said "we've saved several hundred million pounds just this financial year alone" referring to renegotiation contracts with the Government's biggest suppliers. As part of the Government's drive for increased transparency please provide details about these savings:

Please provide a breakdown of this total of "several hundred million pounds" by each department.

If you still have time within the cost limit, please also provide a breakdown by supplier.'

3. On 10 January 2011 the public authority disclosed a breakdown of savings by department in full. The figures were provided with the caveat that they had not been verified and were therefore subject to change.
4. The public authority withheld the breakdown of savings by supplier (also referred to as the disputed information) on the basis of the exemptions at sections 36(2)(b)(ii), 36(2)(c), and 43(2) of the Act and stated it would require additional time to consider whether the balance of the public interest was in favour of maintaining the exemptions or in favour of disclosure.
5. On 1 February 2011 the public authority wrote back to complainant and explained that the public interest was in favour of maintaining the exemptions at sections 36(2)(c) and 43(2).
6. On 8 February 2011 the complainant requested a review of the decision to withhold the disputed information.
7. On 7 April 2011 the public authority wrote back to the complainant with details of the outcome of the internal review. The decision to withhold the disputed information on the basis of the exemptions at sections 36(2)(c) and 43(2) was upheld.

The Investigation

Scope of the case

8. On 15 April 2011 the complainant contacted the Commissioner to complain about the way her request for information had been handled, specifically the public authority's decision to withhold the disputed information on the basis of the exemptions at sections 36(2)(c) and 43(2).

9. The complainant asked the Commissioner to take into account the following points before reaching his decision:

The need to make government more transparent was instrumental in publishing departmental spending. The disputed information is not any different.

The request is not for the contracts themselves, only the amount of money saved by renegotiating with each supplier. There is an overwhelming public interest 'knowing how these savings have been made.' The request is not for the details of future savings, only details of savings already made.

Companies who have contracts with government departments should expect their dealings to come under public scrutiny.

The overall savings programme would not be put at risk by the disclosure. The disclosure would greatly add to and inform the public debate surrounding government suppliers and contracts.

Chronology

10. On 15 June 2011 the public authority provided the Commissioner with a copy of the disputed information for the purposes of his investigation.
11. On 12 July 2011 the Commissioner wrote to the complainant. He outlined the scope of the investigation as stated above in the 'scope' section and invited her to comment if necessary. The complainant expressed her satisfaction with the scope of the investigation on the same day (i.e. 12 July).
12. On 13 July 2011 the Commissioner invited the public authority to make detailed submissions on the application of the exemptions at sections 36(2)(c) and 43(2). He also requested clarification in relation to the disputed information provided by the public authority on 15 June.
13. On 17 August 2011 the public authority made detailed representations on the application of the exemptions at sections 36(2)(c) and 43(2).

Analysis

Disputed Information

14. The Commissioner pointed out to the public authority that there was a disparity between the total savings broken down by supplier he was provided with in June 2011 and the total breakdown by department disclosed to the complainant in January 2010.

15. The public authority explained that the figures provided to the complainant had not been finalised and were based upon target rather than delivered savings. The breakdown by supplier provided to the Commissioner was based upon delivered savings (which it had only been able to verify at the end of the 2010/11 financial year) and submitted that it should be treated as the disputed information. The public authority however also submitted that the breakdown previously provided to the Commissioner in June 2011 was in any event exempt from disclosure.
16. In view of the above explanation and the fact that the public authority had also made it clear to the complainant at the time of the request that the savings figures had not been finalised, the Commissioner considers the disputed information for the purposes of his investigation to be the breakdown of savings by suppliers provided to him on 15 June 2011. The Commissioner's investigation and decision generally have to be restricted to matters which were relevant at the time of the request and not after the request was made.

Exemptions

17. A full text of all the statutory provisions referred to below can be found in the legal annex.

Section 36(2)(c)

18. Information is exempt from disclosure on the basis of section 36(2)(c) if, in the reasonable opinion of a qualified person, disclosure of the information under the Act would prejudice or would be likely to prejudice the effective conduct of public affairs.

Qualified Person

19. According to the public authority, The Rt Hon Francis Maude MP, the Minister for the Cabinet Office issued the opinion to withhold the disputed information on 27 January 2011.
20. The Commissioner finds that at the time of the request, The Rt Hon Francis Maude MP was a designated 'qualified person' within the meaning of section 36(5)(a) of the Act which authorises any Minister of the Crown to act as a qualified person in relation to information held by a government department.
21. On 25 January 2011 officials made submissions to the qualified person, The Rt Hon Francis Maude MP that the disputed information should be withheld on the basis of the exemptions at sections 36(2) (b) and (c).

22. On 27 January 2011 the qualified person issued his opinion that the disputed information should be withheld on the basis of the exemption at section 36(2)(c). Copies of the submission to the qualified person and his opinion were supplied to the Commissioner for the purposes of his investigation.

The Qualified Person's Opinion

23. According to the qualified person, the renegotiation of the government's contracts with major suppliers under the terms of a Memorandum of Understanding (MOU) with most of the relevant suppliers is a key element in the government's objective of achieving £6.2 billion worth of savings in the 2010/11 financial year. The targeted savings are part of the overall drive to cut the deficit and promote change in the way central government departments operate as a customer to suppliers. Although the MOUs have been signed, all the savings described within them have not yet been delivered and protecting the delivery of the relevant savings is of significant public interest. The qualified person pointed out that the negotiations were ongoing in phases.
24. According to the qualified person, revealing the total savings figure per supplier prejudices the effective implementation of its policy (of changing the relationship between the government and its suppliers) and achieving the maximum possible savings. The qualified person opined that disclosure would lead to a loss of faith in the government's ability to protect the suppliers' commercially sensitive information and consequently impair the relationship it had built with the suppliers and also inhibit its ability to close out the remaining negotiations. The government has no formal powers to compel suppliers to take part in the renegotiation process which was conducted on the basis of the suppliers' willingness to engage.
25. According to the public authority, although one supplier had consented to its total figure being disclosed, such an approach if adopted could eventually make it possible to deduce the savings figures of the other suppliers who have not consented. In other words, routinely disclosing the savings figures for suppliers who have no objection would enable the figures for the other suppliers to be calculated and consequently make them less willing to engage in future to the detriment of the government's wider objective of reducing the deficit.
26. The Commissioner agrees with the Information Tribunal¹ (the Tribunal) that the substance of the qualified person's opinion must be objectively

¹ In *Guardian & Brooke v The Information Commissioner & The BBC* EA/2006/0011 & EA/2006/0013 at paragraph 60

reasonable but there may be room for conflicting opinions which are also reasonable.

27. Furthermore, the Commissioner considers the term 'would be likely to prejudice' in section 36(2)(c) means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. On the other hand, 'would prejudice' places a much stronger evidential burden on a public authority and must be at least more probable than not.
28. The qualified person opined that the disclosure 'would or would be likely to prejudice' the effective conduct of public affairs.
29. Having carefully considered the opinion, the Commissioner finds that likelihood of disclosure resulting in suppliers becoming less willing to renegotiate the terms of their contractual obligations with the government is real and significant. The Commissioner agrees that the disclosure of commercially sensitive information (i.e. the disputed information) about the suppliers' contracts with the government would be a significant impediment to the government's objective of achieving savings through that process.
30. It is well documented that the reducing the deficit is integral to the economic sustainability of the United Kingdom. The Commissioner therefore finds that disclosure would be likely to prejudice the ability of the government to achieve significant savings from its major suppliers and therefore prejudicial to the conduct of public affairs within the meaning of section 36(2)(c). He therefore finds that the qualified person's opinion was reasonable in substance.

Public interest arguments in favour of disclosing the requested information

31. The public authority acknowledged the public interest in understanding the effectiveness of the efficiency savings programme. The public authority however submitted that it had satisfied the public interest in being transparent about the achieved savings by disclosing the total savings and a breakdown of the savings by department.

Public interest arguments in favour of maintaining the exemption

32. The public authority argued that the negative impact from the loss of faith in the government's willingness to protect the commercially sensitive information of the suppliers was not in the public interest. It was overwhelmingly in the public interest for the deficit to be reduced and the savings achieved/and to be achieved from the renegotiations of contracts with suppliers is a significant part of the process.

33. The public authority further submitted that the failure of the renegotiations of contracts with suppliers would leave the government with unnecessarily expensive and inefficient contracts which is also not in the public interest.

Balance of the public interest arguments

34. In addition to the public interest in disclosure recognised by the public authority, the Commissioner finds that the information would enhance and add to existing information in the public domain about public expenditure.
35. The Commissioner agrees with the complainant that there is a significant public interest in knowing how the savings were made. However, this public interest is met to some extent by the disclosure of the departmental breakdown.
36. The Commissioner agrees that companies who enter into contracts with the government should expect greater public scrutiny than companies who are in similar contractual relationships with private sector organisations. However, that scrutiny has to be balanced against the public interest in ensuring that companies who voluntarily agree to renegotiate contractual obligations with the government are not in turn placed in a disadvantageous position as a result of the disclosure of information which could prejudice their commercial interest. If companies are no longer willing to voluntarily renegotiate the terms of their contracts, this could have a significant impact on the ability of the government to achieve its savings targets and consequently also have an impact on the overall deficit reduction programme.
37. The Commissioner considers that the above principles apply notwithstanding the fact the figures under consideration are actually target figures rather than the finalised and verified amounts saved from each supplier. Disclosure would have provided an indication of the financial reduction each supplier was prepared to make to their contract and would have put the government in a difficult negotiation position with the suppliers. The Commissioner finds the public interest in maintaining the exemption is considerable and this outweighs the public interest in disclosing the information.
38. However, the Commissioner is not persuaded that there is a public interest in maintaining the exemption in respect of the total figure for the supplier that had consented to disclosure. The public authority submitted that this could eventually lead to routine disclosures for similar reasons and potentially enable the figures for other suppliers to be deduced.

39. Each disclosure must be considered on its own merits. The public authority has not explained how the disclosure in this case could lead to a deduction of the figures for the other suppliers. The Commissioner has also not seen any evidence to persuade him that it would be possible for such a deduction to be made from the disclosure in the circumstances of this case. The Commissioner considers that there is a public interest in the disclosure of the amount saved from renegotiations with the consenting supplier. Given that there is no discernable evidence that the disclosure would be prejudicial to the other suppliers, making the information publicly available would have enhanced the transparency of the process and therefore in the public interest.
40. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in the disclosure of the disputed information, other than for the supplier that consented to disclosure.
41. The supplier is named in the confidential annex to be provided to the public authority only.
42. In view of his decision above, the Commissioner considered whether the exemption at section 43(2) was engaged in respect of the information in the confidential annex (i.e. the total amount saved from the renegotiations with a named supplier).
43. Information is exempt from disclosure on the basis of section 43(2) if its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
44. As noted above, the supplier named in the confidential annex did not consider the disclosure of the total amount the government had saved from their contractual renegotiations would be prejudicial to the supplier's commercial interests.
45. The public authority however also submitted that disclosure would or would be likely to prejudice its commercial interests for broadly the same reasons that the qualified person had concluded section 36(2)(c) applied. It specifically argued as the qualified person had also submitted in relation to section 36(2)(c) that the disclosure of the figure for the supplier named in the confidential annex would, in conjunction with disclosures for future consenting suppliers, enable the savings figures for other suppliers (who had not consented) to be deduced. The public authority therefore submitted that the disclosure would be detrimental to the commercial interests of the government. It would have a prejudicial effect on its contract renegotiations with the

government's major suppliers and consequently the government's ability to make savings through that process.

46. As the Commissioner has previously noted above, there is no discernable evidence to suggest that the disclosure of the savings figure for the supplier named in the confidential annex would result in the deduction of the savings figures for the other suppliers who had not given their consent for their figures to be disclosed. The Commissioner therefore finds that disclosing the savings figure for the named supplier would not have prejudiced the government's commercial interests.
47. In view of his finding above, the Commissioner did not conduct a public interest test.

Procedural Requirements

48. Sections 1(1)(b) and 10(1) combine to impose a duty on a public authority to disclose requested information within 20 working days of a request.
49. The Commissioner finds the public authority in breach of sections 1(1)(b) and 10(1) for failing to disclose the disputed information for the supplier named in the confidential annex.

The Decision

50. 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:
 - It correctly withheld the disputed information other than the disputed information for the supplier named in the confidential annex.
51. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
 - The disputed information for the supplier named in the confidential annex should have been disclosed.
 - The public authority consequently breached sections 1(1)(b) and 10(1) of the Act.

Steps Required

52. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose the name of the supplier referred to in the confidential annex and the total savings made from that supplier as provided to the Commissioner on 15 June 2011.
53. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

54. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

55. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
56. Part VI of the section 45 Code of Practice (the "section 45 code") makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for the internal review to be completed, and far as he is aware, there was no justifiable reason for the delay.

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

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

Steve Wood
Head of Policy Delivery
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."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

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.