

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 November 2012

**Public Authority:** The Cabinet Office

**Address:** 70 Whitehall

London

SW1A 2AS

### Decision (including any steps ordered)

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1. The complainant requested any correspondence held by civil servants at the DfE related to an advertising spending freeze.
2. The Commissioner's decision is that the Cabinet Office has not engaged section 36(2)(c).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply 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.

### Request and response

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5. On 1 February 2012 the complainant wrote to the Cabinet Office (CO) and requested information in the following terms:

*'any correspondence held by civil servants with the DfE that relate to attempts to enforce the advertising spend freeze or attempts to seek exemptions from it.'*

6. The CO responded on 23 February 2012. It stated that it was withholding the requested information under section 36(2)(c).

7. Following an internal review the CO wrote to the complainant on 4 April 2012. It stated that it was upholding its original decision on the same grounds.

### Scope of the case

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He explained that he felt that, as the request was for information pertaining to conditions under which the government would waive its own rules on not spending money on advertising, the public interest was strongly in favour of disclosure.
9. The Commissioner will consider if the CO was correct to apply section 36(2)(c) to the withheld information. He will also consider the time taken to deal with the request.

### Background

10. Departments are required to seek the approval of HM Treasury and the Efficiency and Reform Group (ERG) in the Cabinet Office for all departmental expenditure on marketing services over £100k. All requests are considered by and subject to the approval of the Minister for the Cabinet Office (the MCO).
11. Marketing Exemption Request Forms are part of a formal submission for consideration by the MCO. The request form details a recommendation for proposed marketing communications activity; requests do not represent a firm or final commitment to any particular course of action.
12. Information on approved actual marketing and advertising expenditure over £25,000 is published on individual departmental public-facing websites.

### Reasons for decision

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13. Section 36(2)(c) of FOIA states 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-*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'*

## Qualified Person

14. The CO explained to the Commissioner that it considered that the Qualified Person's opinion in relation to a previous similar request dated 21 April 2011, applied in this case.
15. The CO provided the Commissioner with a copy of its own request to the PS/Minister for the CO, with regard to the application of section 36(2)(c) in the previous request of 21 April 2011. It also provided a copy of an email from the office of the PS/Minister agreeing that section 36 applied in the 21 April 2011 case.
16. However the CO explained to the Commissioner that it had not contacted the Qualified Person in this case to find out whether his opinion would still be the same.
17. The request of 21 April 2011 was as follows:  
  
*'I would like to see a copy of all Marketing and Advertising Freeze Exemption request Forms submitted to the Efficiency and Reform Group and the reply made'.*
18. The Commissioner notes that the request from the present complainant is more specific than the previous request, as he wants information held by civil servants in relation to the Department for Education (the DfE) rather than in respect of all of the Marketing and Advertising Freeze Exemption Request Forms submitted to the Efficiency and Reform Group (and replies made) as was requested in the April 2011 request.
19. The Commissioner also notes that the CO has made it clear that it did not seek the Qualified Person's opinion for this particular request. He notes the CO's explanation that it considered the present request was for information that was a subset of the information requested on 21 April 2011; therefore the Qualified Person's opinion regarding the application of section 36(2)(c) in that instance could be used in the present case. The Commissioner notes that there is approximately ten months between each request.
20. The Commissioner does not consider it appropriate for the Qualified Person's opinion from an earlier related (but not identical) request to be applied to this request. At the very least the CO should have contacted the Qualified Person to ascertain whether his opinion would still be the same with regard to the present request.
21. The Commissioner considers that section 36(2)(c) is not engaged as the CO did not obtain a Qualified Person's opinion.

## **Other matters**

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22. The Commissioner notes that the complainant requested an internal review on 24 February 2012. However he notes that the CO did not confirm that it had carried out the internal review until 4 April 2012.
23. Although there is no time limit for carrying out an internal review, the Commissioner considers that a further 20 working days is reasonable, unless there are exceptional circumstances.

## Right of appeal

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24. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

25. 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.

26. 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**