

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 December 2012

Public Authority: The Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested details of communications between the Home Office and the Policy Exchange think tank. The Home Office withheld some information within the scope of the request citing section 36(2)(b)(i) and (ii) (prejudice to effective conduct of public affairs).
2. The Commissioner's decision is that the exemption is engaged and that the public interest in maintaining the exemption outweighs the public interest in favour of disclosing the information. He is also satisfied that the Home Office complied with section 1(1) in relation to the request. He requires no steps to be taken.

Request and response

3. On 4 May 2012, the complainant wrote to the Home Office and requested information in the following terms:

"For the period from May 2010 to date, please supply details of the subject and content of all communications between Home Office Ministers, Special Advisors and officials and staff/representatives of the Policy Exchange think tank".
4. To assist, he provided a list of Policy Exchange staff.
5. The Home Office provided its substantive response on 5 July 2012. It provided some information within the scope of the request but refused to provide the remainder. It cited sections 36(2)(b)(i) and 36(2)(b)(ii) (prejudice to effective conduct of public affairs) as its basis for doing so.

6. The complainant requested an internal review on 5 July 2012. The Home Office sent him the outcome of its internal review on 20 July 2012 upholding its original position. The Commissioner notes that the Home Office confirmed that it was applying the exemption "*to only a small amount of information in comparison to the information that was released*".

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He explained his reasons for considering that it was in the public interest for the information to be disclosed:

".. details of these communications are in the public interest if government opinion and policy is being formed inappropriately between representatives of the Home Office and The Policy Exchange Think Tank ..."

8. The complainant also brought to the Commissioner's attention his concerns about the Home Office's response to his request for information:

"The Home Office have not, as was requested, supplied any details of communications between themselves and the Policy Exchange for 2010 and only one for 2011. It does seem improbable that they had no communications during this period."

9. During the course of the Commissioner's investigation, the Home Office confirmed that it is relying on section 36(2)(b)(i) and (ii) to withhold all the information at issue.
10. The Commissioner considers the scope of his investigation to be the Home Office's citing of section 36(2)(b)(i) and (ii). In the Commissioner's view these exemptions are about the processes that may be inhibited: in other words, he considers section 36(2) is about the effects of disclosing the information, not the content of the information. In this case, the issue he will consider is whether disclosure would or would be likely to inhibit the processes of providing advice or exchanging views.
11. He has also addressed the matter of the amount of information in scope of the request.

Reasons for decision

Section 1 General right of access

12. As there is some dispute between the public authority and the complainant about the amount of information that may be held the Commissioner has first addressed that issue.
13. The Commissioner cannot provide an expert opinion on the likely volume of exchanges between the Home Office and the Policy Exchange think tank. However, having considered the Home Office's response to his questions about the amount of information within the scope of the request, the Commissioner is satisfied with the Home Office's explanation about the quantity of information it holds.

Section 36 Prejudice to effective conduct of public affairs

14. Section 36 is the only exemption in FOIA that requires a determination by a 'qualified person'. The exemption will only apply if the reasonable opinion of a qualified person is that one of the forms of adverse effect specified in subsection 2 would follow from disclosing the information.

15. Section 36(2) 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-

(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".

16. Section 36(2) is expressed in broad terms, and in order for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. The term 'inhibit' is not defined in FOIA. The Commissioner's view is that, in the context of section 36, it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
17. Information may be exempt under section 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for

this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority.

18. In correspondence with the complainant, the Home Office argued that, in its view, disclosing the requested information in this case 'would' inhibit the free and frank exchange of advice and 'would' inhibit the free and frank exchange of views for the purposes of deliberation.

The opinion of the qualified person

19. The first condition for the application of the exemption at section 36 is the qualified person's reasonable opinion. In this case, the Home Office explained that the qualified person was Lynne Featherstone, the then Home Office Minister with responsibility for freedom of information matters.
20. In support of its reliance on section 36, the Home Office provided the Commissioner with a copy of the submission, dated 3 July 2012, that was provided to the qualified person, and her response of 5 July 2012.

Is the opinion reasonable?

21. In the Commissioner's view, section 36 depends crucially on the qualified person's exercise of discretion in reaching their opinion. This means that they must consider the circumstances of the particular case before forming an opinion.
22. The Commissioner has considered both the submission provided to the qualified person and their response.
23. Having considered the withheld information - and the broader context - the Commissioner accepts that it was reasonable for the qualified person to conclude that disclosure would inhibit the free and frank provision of advice in the future as well as the free and frank exchange of views for the purposes of deliberation. This is because individuals may feel less free to discuss their views and advice openly for fear of this being disclosed into the public domain.
24. It follows that he finds the exemption engaged with respect to the Home Office's citing of the exemption in section 36(2)(b)(i) and (ii).

The public interest

25. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.

Public interest arguments in favour of disclosing the requested information

26. Arguing in favour of disclosure, the complainant told the Home Office:

"Details of all communications between representatives of this organisation and the Home Office will not prejudice the effective conduct of public affairs as long as the parties have conducted themselves in proper manner and in accordance with their stated objectives".

27. The Home Office acknowledged the public interest in disclosure, telling the complainant:

"The work of the Home Office in considering and making changes to how police forces operate (including the implementation of cost saving practices) is of significant public interest".

28. It also recognised the public interest in transparency and accountability and in promoting public understanding. For example, it accepted that releasing information about how it approves cost-saving measures within (police) forces, and about the decision-making process that aims to obtain value for money, was in the public interest.

29. Regarding the complainant's argument in favour of disclosure, the Home Office told the Commissioner:

"the email exchanges withheld in this case do not in our view suggest that any of the parties have conducted themselves improperly".

30. The Commissioner would note that, while, in his view, the withheld information could be described as candid and informal, there is nothing improper in the nature or content of the withheld information.

Public interest arguments in favour of maintaining the exemption

31. In favour of maintaining the exemption, the Home Office told the complainant:

"the ability of the Home Office to meet its objectives is dependent on the ability to exchange free and frank views and opinions within the Department and our partners. Ministers, officials and partners such as the police service need to be able to think through all the implications of particular options before decisions are reached".

32. It also argued that release of the information at issue in this case would have an inhibiting effect:

"because ministers would be less likely to consult with think tanks, and members of think tanks would be less likely to put forward their opinions in a free and frank manner if they were aware details of discussions would be likely to be released relatively soon after they took place".

33. By way of explanation about the nature of its relationship with Policy Exchange, the Home Office told the Commissioner:

"Ministers and officials consult a wide range of organisations to obtain a diversity of views and opinions In common with previous governments, the organisations which the Department consults include those commonly referred to as think tanks. Different governments may consult with different think tanks, but this is now an established part of the way that government works."

34. The Home Office brought to the Commissioner's attention that it had released some information within the scope of the request, but argued that:

"it does not necessarily follow that the public interest would be served by the release of every exchange between the Home Office and Policy Exchange".

Balance of the public interest arguments

35. In reaching a decision in this case, the Commissioner is mindful that section 36(2) is about the effects of disclosing the information.
36. The Commissioner considers that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, he must give weight to that opinion as a valid piece of evidence in his assessment of the balance of the public interest. However, he will also consider, and form his own view on, the severity, extent and frequency with which inhibition of the free and frank provision of advice or exchange of views will or may occur.
37. In this case, the Commissioner accepts the importance of officials being able to consult with think tanks and of the willingness of individuals to engage in an exchange of views in a free and frank manner. Having accepted the qualified person's opinion that the free and frank provision of advice and free and frank exchange of views would be inhibited as a result of disclosure, the Commissioner recognises that the impact of this inhibition could be severe given the importance of the provision of advice and the ability to engage with external parties, to the functioning of government departments such as the Home Office.

38. As to the frequency of inhibition, having accepted that the provision of advice, including informal advice, plays an important role in the functioning of the public authority, it follows that such advice may be provided frequently. The Commissioner would not necessarily accept, however, that inhibition would be a likely result of disclosure in every situation where such advice is provided. However, in this case he accepts that Policy Exchange staff are not public officials and that their expectations regarding disclosure would not be the same as those employed as public officials.
39. Similarly, as to the free and frank exchange of views, the Commissioner would not accept that future inhibition would result in every case where the Home Office exchanges views with external parties.
40. The Commissioner accepts that it is in the public interest for the Home Office to be capable of functioning effectively. Where the severity, extent and frequency of inhibition resulting from disclosure results in prejudice to its ability to function effectively, he considers that this contributes to the argument that maintenance of the exemption is in the public interest.
41. Having accepted the opinion of the qualified person as objectively reasonable, the Commissioner has also recognised that, given the role that think tanks have in the provision of advice to government departments and the importance of the Home Office being capable of exchanging views with external parties free from inhibition, this inhibition would both be significant and of some frequency.
42. In the absence of compelling and specific public interest grounds for disclosure in this case, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The arguments in favour of maintenance of the exemption are stronger, given the extent and frequency of the inhibitory impact on the public authority.

Right of appeal

43. 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

44. 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.
45. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF