

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2013

Public Authority: The Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested information relating to advice received by the Department for Education (DfE) on the application of the Freedom of Information Act 2000 (FOIA). The DfE refused to disclose the requested information under section 36(2)(b)(i) and (ii) and 36(2)(c) FOIA.
2. The Commissioner's decision is that the DfE has incorrectly applied section 36(2)(b)(i) and (ii) and section 36(2)(c) in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the date and time when the advice was given.
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

5. On 22 February 2012, the complainant wrote to the DfE and requested information in the following terms:

"1. Could I apply for any advice received from the Treasury Solicitor by the Department for Education relating to the application of the Freedom of Information Act within the past 6 months. This will, of course, require overriding the legal advice exemption within the Act. I believe the public interest in doing so is overwhelming on the basis that there is a PI argument for disclosure of legal advice in cases where PAs overrule or ignore their primary legal advice. This argument, I have reasonable grounds to believe, covers this case.

As has been documented by other journalists, an individual calling themselves "Captain Sensible" wrote comments on the "FoI Man" blog which showed inside knowledge of the DfE's machinations. For example, they identified Sam Freedman as a recipient of the contested December 29 2010 email. I had not done so.

The official in question seem to claim that the Treasury Solicitor had warned the DfE that it ought to comply with my FoI requests for searches of private email addresses for government data. That is also the view of the ICO. According to the inaptly named Captain Sensible, the DfE has, it seems, sought further advice which it prefers.

That gives me prime facie grounds to argue for its release.

2. I would like to know the date and time on which the guidance from the Cabinet Office, upon which the DfE's position currently stands, was issued. Even if the advice is not disclosable, the timestamp on the email in question is clearly both in scope and not withholdable under s35/6.

3. I would like copies of the current guidance relating to departmental ICT distributed to DfE civil servants which relates to private email addresses. I am after the guidance referred to here, or its successor guidance:

<http://www.theyworkforyou.com/wrans/?id=2011-07-19b.66782.h&s=email+speaker%3A10753#g66782.q0>

If there is newer guidance, please release the information and state the day upon which it was issued."

6. The DfE responded on 7 August 2012. It said that it did not hold any advice within the scope of part 1 of the request. In relation to part 2 of the request, it said that it did hold the date and time of the early Cabinet Office guidance, but this information was exempt under section 36(2)(b) and (c) of the FOIA. It explained that section 36 is subject to a public interest test and confirmed that the DfE believes the public

interest for non-disclosure outweighs the reasons for disclosure in this case. It responded to part 3 of the request by directing the complainant to the relevant published information.

7. The Commissioner normally expects an internal review to have been completed before he accepts a case for investigation, however due to the delay already experienced by the complainant between the making of his request and the initial response by the DfE in this case the Commissioner decided to accept this case without the internal review having been carried out.

Scope of the case

8. The complainant contacted the Commissioner on 7 August 2012 to complain about the way his request for information had been handled. In particular he was dissatisfied with the application of section 36(2)(b)(i) and (ii) and 36(2)(c) to withhold the date and time the relevant advice from the Cabinet Office was issued.
9. The Commissioner has considered whether or not section 36(2)(b)(i) and (ii) and 36(2)(c) have been applied correctly in this case to withhold the date and time the relevant advice from the Cabinet Office was issued.

Reasons for decision

10. Section 36 FOIA 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-

(2)(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

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

11. The DfE has applied all subsection 36(2)(b)(i) and (ii) and 36(2)(c) to the withhold the date and time on which the guidance from the Cabinet

Office, upon which the DfE's position currently stands, was issued, as requested at part 2 of the request.

12. It was stated in the Tribunal decision of *Guardian Newspapers Ltd & Heather Brooke v the Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013) that:

"On the wording of section 36(2)(c) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable... (paragraph 60).

On the weight to be given to the process of reaching a reasonable opinion, the Tribunal further noted that, "...in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at..." (paragraph 64) "...can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as 'the reasonable opinion of a qualified person' under section 36 merely because the conclusion happened to be objectively reasonable?"

13. In determining whether section 36(2)(b)(i) and (ii) and section 36(2)(c) was correctly engaged by the DfE the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was objectively reasonable and reasonably arrived at.

14. The DfE has explained that a Cabinet Minister, Francis Maude, is the qualified person in this case and his opinion was requested on 5 April 2012 and obtained on 12 April 2012. The DfE has provided the Commissioner with a copy of the qualified person's opinion as well as the submissions which were put to the qualified person to enable the opinion to be reached. Those submissions and the qualified person's opinion all related to a different request, made by someone other than the complainant, for the guidance the Cabinet Office had provided to the DfE on the handling of official information held in private or personal email accounts and FOI.

15. The submissions put to the qualified person related entirely to the prejudice which would be caused by the disclosure of the actual advice from the Cabinet Office. Nothing was specifically mentioned in those submissions or in the opinion about any prejudice that would be caused by the disclosure of the date and time the advice was given. However, one of the arguments concerned the fact that the advice given was based on what was understood at the time, prior to the ICO issuing its relevant guidance.
16. The qualified person's response agrees that section 36(2)(b)(i) and (ii) and section 36(2)(c) is engaged. The qualified person's opinion is that the prejudice in this case would be likely to occur.
17. The Commissioner considers that the issue of access to information held in private email accounts is contentious and not straightforward. There was, at the time of the request, and still is significant media interest in this matter. Therefore it was reasonable to conclude that if advice on this issue were disclosed into the public domain it would be likely to inhibit the provision of future advice on sensitive issues where there is significant media interest. Advice on the matter was not settled and was evolving. However in this case the complainant has accepted that he is unable to obtain the substance of the advice, and has narrowed his request to only the date and time the advice was given. As explained in paragraph 14 above, the submissions put to the qualified person did not address that point and indeed were not actually made in relation to this request at all.
18. The Commissioner therefore does not consider that a reasonable opinion of a qualified person has been given in this case, not because the opinion relied upon was itself unreasonable, but because it did not specifically address the prejudice which might arise from disclosure of the information which is the subject of this complaint. The opinion relates to the disclosure of the substance of the advice, not the date and time the advice was given. Indeed the opinion was based upon submissions which actually related to a different request for information made by another requester. Because the engagement of section 36 hinges entirely on a relevant reasonable opinion of a qualified person, the essential ingredient for reliance on the exemption is not present here. The Commissioner has therefore concluded that the exemptions at section 36(2)(b)(i) and (ii) or section 36(2)(c) have not been engaged in this case.
19. In correspondence with the DfE about this case, the Commissioner advised that he would consider any new exemptions it applied in respect of the withheld information. However, the DfE informed the Commissioner that no new exemptions were being applied.

20. In these circumstances, given the Commissioner's conclusion that the exemption claimed has not been engaged, there is no requirement on him to go on and consider the public interest test or any further matters. However, he recognises that the issue of the scope of the qualified person's opinion may be disputed. In the circumstances, he has considered where the public interest would lie had the exemption been effectively engaged.
21. The DfE put forward generic arguments in favour of withholding the date and time of early and evolving advice. The argument was not compelling and did not specifically relate to the giving of advice in this case. Its other arguments all related to the public interest in withholding the advice itself, not the date and time it was given.
22. The Commissioner considers there is a public interest in knowing when the advice in this case was given. At the time of the request there was a significant degree of interest in issues relating to the use of private email for the purpose of transacting government business. The advice given by the Cabinet Office on the matter and on the applicability of the Freedom of Information Act to any information held other than on official, departmental email accounts had itself been the subject of parliamentary questions (6 February 2012: Column 63W¹ and 20 February 2012: Column 599W²) and discussion in the media. This reflected genuine and legitimate concern regarding developments in communications technology and their impact on the conduct of government business.
23. Further arguments which the Commissioner considers to be in favour of disclosure in this case cannot be referred to in this decision notice as to do so would disclose information which is itself exempt or claimed to be exempt.
24. The Commissioner's view, in these circumstances, is that, had the exemption provided by section 36(2) been effectively engaged, the public interest in disclosure would in any event have outweighed that in maintaining the exemption.

1

http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120206/text/120206w0003.htm#column_63W

2

http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120220/text/120220w0005.htm#column_599W

Right of appeal

25. 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

26. 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.
27. 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
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