Reference: FS50481760

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **23 April 2013**

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

Decision (including any steps ordered)

1. The complainant has requested information relating to audits conducted into the Cabinet Office's handling of FOIA requests. The Cabinet Office refused to provide the information citing provisions of section 36 (Effective conduct of public affairs). It upheld this position at internal review.

2. The Commissioner's decision is that the Cabinet Office is entitled to rely on section 36 as a basis for withholding the requested information but it contravened the requirements of section 10(1) and section 17(1) by failing to advise the complainant of this within 20 working days.

3. No steps are required.

Request and response

4. On 9 July 2012, the complainant wrote to the Cabinet Office and requested information in the following terms:

   "I am writing to request information from the Cabinet Office pursuant to the Freedom of Information Act 2000. The information that I seek relates to FOI performance within the Cabinet Office.

   I would like the content of any internal audit reports (or similar) created which assess the Cabinet Office's performance (including compliance with) in relation to the handling of FOI requests.

   I also seek any "action plans" (or similar) which have been

produced following any such report(s).

For the purpose of this request I seek any reports created from 1 July 2011 to 30 June 2012 and their associated action plans. An "action plan" (or similar) which has been produced after 30 June 2012, but relates to an audit report (or similar) produced before 30 June 2012 would fall within the scope of this request.

Should you require any clarification on any element of this request please do not hesitate to contact me by return E-mail."

5. On 7 August 2012 and 5 September 2012, the Cabinet Office contacted the complainant to explain that it needed more time to consider the balance of public interest in relation to section 33 (Audit functions exemption). The complainant chased the Cabinet Office for a response on 5 September 2012 having received the second message.

6. On 27 September 2012, the Cabinet Office sent him a refusal notice. It said that the requested information was exempt from disclosure under 3 provisions of section 36 (Effective conduct of public affairs). Specifically, it cited section 36(2)(b)(i) and (i) as well as section 36(2)(c).

7. The complainant requested an internal review on 27 September 2012 and the Cabinet Office acknowledged receipt of this the following day. However, the Cabinet Office did not send the outcome of its internal review to the complainant until 26 November 2012 following the intervention of the Commissioner.

Scope of the case

8. The complainant first contacted the Commissioner on 6 November 2012 to complain about the delays that had arisen in the Cabinet Office's handling of his request, particularly in the obtaining of a qualified person's opinion in order to engage section 36.

9. On 21 January 2013, during a telephone conversation with the Commissioner's office, the complainant confirmed that he also wished to complain about the Cabinet Office's use of section 36.

10. The Commissioner has therefore considered the following:

- whether the Cabinet Office has complied with its FOIA obligations in the time it took to handle the request; and

- whether the Cabinet Office is entitled to rely on the provisions of section 36 that it has cited as a basis for withholding the requested information.

11. The complainant also raised concerns about the Cabinet Office's delay in conducting an internal review. This is addressed in the Other Matters section of this notice.

Reasons for decision

Section 10(1) and section 17(1)

12. Section 10(1) of the FOIA requires that a public authority complies with section 1(1) promptly and in any event not later than 20 working days following the date that a request was received. If public authority is seeking to rely on an exemption to refuse to comply with a request then, in line with section 17(1), it must provide the requestor with a refusal notice, within 20 working days, stating which exemption(s) is being relied upon. It can extend the deadline for response where it is considering the balance of public interest test but it must first tell the complainant within 20 working days which exemption it is seeking to rely on.

13. By the Commissioner's calculation, it took 58 working days for the Cabinet Office to tell the complainant that it was seeking to rely on section 36 and 42 working days to respond to the complainant's request for an internal review (this is addressed in Other Matters).

14. The Cabinet Office explained that it sought the qualified person's opinion with regard to this request on 20 September 2012 and that the qualified person gave his opinion on 26 September 2012. This corroborated evidence supplied by the complainant which he had obtained as the result of a separate FOIA request to the Cabinet Office. The Cabinet Office explained that it had not realised that section 36 rather than section 33 was engaged until this point. It apologised and acknowledged the importance of citing the correct exemption in a timely manner.

15. In failing to comply with section 1(1) within 20 working days of the request, the Cabinet Office contravened the requirements of section 10(1) of the FOIA. In failing to cite which exemption it was relying on which 20 working days, the Cabinet Office contravened the requirements of section 17(1) of the FOIA.

Section 36 (Effective conduct of public affairs)

16. Section 36(2) of FOIA states that:

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

17. Section 36 operates in a different way to the other prejudice-based exemptions contained in the FOIA. Section 36 is engaged only if, in the reasonable opinion of a qualified person ('QP'), disclosure of the information in question would, or would be likely to, have any of the results described in sections 36(2)(b) and (c).

18. When investigating cases involving the application of section 36, the Commissioner will:

- ascertain who is the QP for the public authority in question;
- establish that an opinion was given and when it was given; and
- consider whether the opinion given was reasonable.

19. Section 36(5)(a) states that in relation to information held by a government department, the QP is any Minister of the Crown. In this case, the Commissioner has established that the reasonable opinion was given by Francis Maude MP, Minister for the Cabinet Office. He is the QP in relation to the information in question for the purposes of section 36.

20. As to whether and when these opinions were given, the QP's opinion was sought in a submission dated 20 September 2012. The response to this submission confirming the opinion of the QP was dated 26 September 2012 and has been evidenced through an email supplied to the Commissioner. On the basis of the evidence supplied to him, the Commissioner accepts that an opinion was given by the appropriate QP.

21. Turning to whether these opinions were reasonable, the approach of the Commissioner here is that if the opinion that disclosure of the information in question would be likely to result in inhibition or prejudice is in accordance with reason and not irrational or absurd, then it is reasonable.

22. The reasoning for the QP's opinions is set out in the submission provided to him. It focusses on the importance of a free and frank exchange of views and a free and frank provision of advice during the audit process and the adverse effect that disclosure might have on that. It also refers to the adverse consequences to the success of any audit process where officials feel constrained by what they contribute to that. As such, disclosure would otherwise give rise to prejudice to the effect conduct of that process. This can be summarised as raising concerns about the chilling effect on officials' candour in the future and a detrimental impact on the safe space in which reviews are conducted in the future.

23. Having reviewed the withheld information the Commissioner is satisfied that this does engage the issues referred to in the submissions and overall that the QP's opinion that inhibition would be likely to result was reasonable. The Commissioner is also satisfied that the QP's opinion is reasonable with regard to the prejudice to the effective conduct of public affairs that would otherwise arise, namely prejudice to the audit process. In reaching this view the Commissioner was also conscious of how recently the information was produced.

24. In reaching this view, the Commissioner has taken into account the fact that the opinion was not arrived at in a timely manner. However, this does not detract from the reasonableness of the opinion insofar as the opinion is one that a reasonable person could hold.

25. Having found that sections 36(2)(b)(i) and (ii) and section 36(2)(c) are engaged, the next step is to go on to consider the public interest test. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the QP, but will also consider the severity, extent and frequency of the inhibition and prejudice that he has accepted would be likely to result through disclosure. The Commissioner has first considered the exemptions set out in section 36(2)(b), namely section 36(2)(b)(i) and section 36(2)(b)(ii).

26. As to the frequency of inhibition, the Commissioner accepts that the provision of advice from officials to Ministers, and between officials, plays an important role in the functioning of the Cabinet Office. It follows, therefore, that such advice is provided frequently. The

Commissioner would not, however, accept that the frequency of the inhibition here would be as high as in every case where advice is provided by officials to Ministers.

27. He accepts the Cabinet Office's argument, however, that individual officials could be identified by their colleagues where disclosure is made in this case, given the small cohort of staff working on FOIA at the Cabinet Office. He agrees that similarly small teams in the Cabinet Office may also feel inhibited in the contributions they make to the detriment of any reviews of process and procedure that are carried out in the future.

28. On the issue of the severity and extent of the inhibition, the Commissioner accepts that it is important for the Cabinet Office to be able to run effectively any programme of assessment as to its operations. This is particularly relevant where the Cabinet Office is seeking to comply with its legal obligations such as those required by the FOIA. He accepts that FOIA obligations include an inherent duty to make information available to the public. This inevitably creates a tension between disclosure and inhibition where access is sought to the information requested in this case.

29. Given this, the Commissioner finds that the inhibition arising from disclosure would be sufficiently severe that it contributes significant weight in favour of maintenance of the exemptions.

30. Turning to those factors that favour disclosure of the information the Cabinet Office suggested that there is a public interest in openness and in improving public understanding of how the Cabinet Office handles FOIA requests - and how it monitors and audits this process. It had particular regard for the fact that the Cabinet Office had been the subject of some criticism from the Commissioner in its handling of FOIA requests. It recognised that this added weight to the public interest in disclosure.[1]

31. It argued, however, that this was lessened somewhat by the fact that information about this subject was already proactively put into the public domain in the form of the Ministry of Justice's quarterly performance statistics and the Commissioner's own website which publishes information about its monitoring activity.[2]

32. The complainant has argued that there is a compelling public interest in learning more about how the Cabinet Office has tackled

[1] http://www.ico.org.uk/enforcement/undertakings#foi
[2] http://www.justice.gov.uk/downloads/statistics/mojstats/foi-statistics/foi-stats-bulletin-q3-2012.pdf

acknowledged deficiencies in the way it handles FOIA requests, for example, via the publication of internal audit reports. He observed that Cabinet Office handles some of the most important information which is created and held by Government. The need for openness and transparency about how the Cabinet Office seeks to comply with its information access obligations adds particular weight to the public interest in disclosure.

33. The Commissioner acknowledges that the factors on both sides are strong but he has concluded that the public interest in maintaining each of the exemptions outweighs the public interest in disclosing the information. Whilst the Commissioner has recognised strong public interest arguments in favour of disclosure, the arguments in favour of maintaining sections 36(2)(b)(i) and (ii) are stronger, in the circumstances of the case. In reaching this view he has had particularly regard to the severity of inhibition that would be likely to arise and the public interest in allowing the Cabinet Office the space to assess frankly any shortcomings that have arisen in meeting its legal obligations.

34. The Cabinet Office is not, therefore, required to disclose the information in question. As this conclusion has been reached on sections 36(2)(b)(i) and (ii) it has not been necessary to also consider the public interest as regards section 36(2)(c).

Other matters

Internal Review

35. Whilst there is no explicit timescale laid down by the FOIA for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner believes 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.

36. The Commissioner is concerned that in this case, it took 42 working days for an internal review to be completed. The Commissioner does not believe that any exceptional circumstances existed to justify that delay, and he therefore wishes to register his view that the Cabinet Office fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the Cabinet Office of the expected standards in this regard and recommends that it aims to

complete its future reviews within the Commissioner's standard timescale of 20 working days.

Right of appeal

37. 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

38. 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.

39. 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 .....

Alexander Ganotis
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