

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 30 January 2014

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

Decision (including any steps ordered)

1. The complainant requested information relating to the first award from the Contestable Policy Fund. The Cabinet Office refused to provide the information citing provisions of section 36 (prejudice to the effective conduct of public affairs and section 43 (prejudice to commercial interests) as its basis for doing so. After internal review it upheld its use of section 36 and section 43 and introduced reliance on section 40 (unfair disclosure of personal data) and section 41 (information received in confidence). During the course of the Commissioner's investigation, it revised its position in part and disclosed some of the requested information.
2. The Commissioner's decision is that the Cabinet Office is entitled to rely on the provisions of section 36 that it has cited as a basis for withholding the remainder of the requested information.
3. No steps are required.

Background

4. According to the Cabinet Office's webpages:

"The Civil Service Reform Plan announced the creation of a centrally-resourced Policy Contestability Fund for ministers to use to seek policy advice from beyond Whitehall. Ministers are able to bid directly for funding to commission specific pieces of policy development from external organisations. They must match any funding they receive from the central fund with funding from their department. The Cabinet Office acts as a secretariat to the process. The Fund will run for three years, subject to evaluation after a year".

5. The webpages also explain:

"The first contract was awarded from the contestable policy fund in September 2012, to carry out a review into how other civil services work, with a particular focus on accountability systems".¹

Request and response

6. On 20 September 2012, the complainant requested information of the following description:

"This is an FOI request relating to the first award from the Contestable Policy Fund.

Please send me the following:

1. A copy of the winning bid from the IPPR [Institute of Public Policy Research]
 2. A list of those who made an initial expression of interest
 3. A list of those who submitted bids at the final stage
 4. A copy of all the other bids submitted at the final stage
 5. A copy of all correspondence (including emails) relating to the fund between the Cabinet Office and the IPPR
 6. A copy of all correspondence (including emails) relating to the fund between the Cabinet Office and other bidders."
7. On 19 October 2012, the Cabinet Office wrote to advise that it needed further time to consider the balance of public interest in relation to the application of section 43 (commercial interests exemption). It gave a target date for response of 20 November 2012.
8. On 13 November 2012, the Cabinet Office sent its refusal notice to the complainant. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
- section 36(2)(b) and (c) – Prejudice to the effective conduct of public affairs
 - section 43(2) – Prejudice to commercial interests

¹ <https://www.gov.uk/contestable-policy-fund>

9. The complainant requested an internal review on 13 November 2012. He also submitted two additional requests as follows:

"a) How many organisations submitted an initial expression of interest?
b) How many organisations submitted bids at the final stage?
(However, if you now answer questions 2 and 3 in my original request, then there is clearly no need to answer these two questions)."
10. The Cabinet Office initially handled these two requests separately to the requests of 20 September 2012 and, in a letter of 11 December 2012, it explained that it needed further time to consider the balance of public interest in relation to section 36. It undertook to respond by 11 January 2013.
11. The complainant chased a response to both sets of requests on 18 January 2013. The Cabinet Office acknowledged this on 21 January 2013 and undertook to respond by the end of that month. On 31 January 2013, it wrote to explain to the complainant that he would get a response by mid-February. On 21 February 2013, it wrote to advise that he would get a response as soon as possible.
12. On 16 May 2013, the Cabinet Office sent the complainant the outcome of its internal review. It upheld its use of section 36 and section 43 and introduced reliance on section 40 (unfair disclosure of personal data) and section 41 (information received in confidence). It also explained that the information the complainant had requested on 13 November 2012 was caught by the scope of the 20 September 2012 request.

Scope of the case

13. The complainant contacted the Commissioner on 4 June 2013 to complain about the way his request for information had been handled. He argued that the public interest in this matter favoured disclosure and drew particular reference to the fact that the Contestable Policy Fund introduced a new approach to policy development.
14. During the course of the Commissioner's investigation, the Cabinet Office made a further disclosure to the complainant. It provided all the information caught by the scope of Request 2. It made partial disclosure of information caught by the scope of all the other requests. This was information not as closely connected to the detail of the final bids. The Commissioner has excluded this information from further consideration in this case.

15. The Commissioner has considered whether the Cabinet Office is entitled to rely on the four exemptions it has cited as a basis for continuing to withhold the remainder of the information described in the request. These are:
- section 36(2)(b)(i) and (c) – Prejudice to the effective conduct of public affairs
 - section 43(2) – Prejudice to commercial interests
 - section 41 – Information provided in confidence
 - section 40(2) – unfair disclosure of personal data

Reasons for decision

Section 36(2)

16. The Cabinet Office had cited the exemptions provided by subsections 36(2)(b)(i) and section 36(2)(c) as its basis for refusing to provide certain information within the scope of the request.
17. The provisions of section 36(2)(b)(i) apply where disclosure of the requested information would, or would be likely to, inhibit the free and frank provision of advice.
18. Section 36(2)(c) applies where disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
19. Consideration of these provisions is a two-stage process. First, the exemptions must be engaged, and secondly, the exemptions are qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemption in question does not outweigh the public interest in disclosure.
20. Covering first whether these exemptions are engaged, the exemptions provided by section 36 can be cited only on the basis of the reasonable opinion of a specified qualified person (QP). Reaching a conclusion as to whether these exemptions are engaged involves establishing whether an individual authorised to act as QP has given an opinion and whether, if such an opinion was given, that opinion was reasonable. If these conditions are met, the exemptions are engaged.
21. Section 36(5)(a) provides that the QP for a government department is any Minister of the Crown. The Cabinet Office has provided evidence that, in this case, the Rt Hon Francis Maude, Minister for the Cabinet Office, was QP and that the opinion on the use of these exemptions was given on 9 November 2012.

22. The Commissioner accepts, therefore, that these exemptions were cited on the basis of the opinion of an authorised QP. The next step is to consider whether the opinion of the QP was reasonable. The important point to consider here is not whether this is the only opinion that could reasonably be held, or the most reasonable of a range of reasonable opinions that could be held. He has considered simply whether it is a reasonable opinion. In forming a conclusion on this point the Commissioner has considered the explanation provided to the QP in a submission prepared to assist him in the formation of his opinion, a copy of which was supplied to the ICO.
23. The view of the QP related to the sensitivity of the information in question. Emphasis was given to the newness of the policy to outsource policy development activity. The opinion also emphasised the importance of providing a flow of advice between the provider, civil servants and the Minister in question that was not inhibited. It argued that there was a further likely prejudice (beyond inhibition to the free and frank flow of advice). It referred to the likely and negative impact on the effective operation of this new policy making approach in future were a disclosure to be made in this case.
24. Having viewed the withheld information, the Commissioner accepts that it was reasonable for the QP to hold the opinion that disclosure would be likely to have a detrimental effect upon this new approach to policy making. The Commissioner therefore accepts that the opinion of the QP was reasonable and so the exemptions provided by sections 36(2)(b)(i) and section 36(2)(c) of the FOIA are engaged.

Public interest

25. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in disclosure is outweighed by the public interest in maintaining the exemption. 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 that he has accepted would result through disclosure.
26. The Cabinet Office put forward the following arguments in favour of maintaining the exemption at section 36(2)(b)(i):

“There is a strong public interest in the government being able to consider advice provided from external providers in a safe space and away from unwelcome pressures and influences. In particular there is a public interest here in government being able to consider the advice

provided free from the pressures and distortions that would accompany premature disclosure of that advice.

Disclosure of the remaining information would inhibit the provision of frank analysis and advice to Ministers. Ministers and their officials need to be able to think through all the implications of particular opinions. In particular, they need to be able to undertake rigorous and candid assessments of the risks to the policy recommendations put forward by the external provider”.

27. The Cabinet Office put forward the following arguments in favour of maintaining the exemption at section 36(2)(c):

“Loss of faith in the Government’s willingness to protect information relating to the procurement and contract could inhibit the Government’s ability to engage effectively with the successful provider (and future potential suppliers). This could adversely affect the effective conduct of public affairs, both in the working of the Contingency Policy Fund in future projects and the broader collaborative approach to policy making and delivery set out in the Civil Service reform plan”.

28. It asserted that this was contrary to the public interest.

29. It went on to argue that “Disclosure of the remaining information would or would be likely to impair the relationships built with the successful provider”.

30. The Cabinet Office set out the following arguments in favour of disclosure:

31. “There is a public interest in transparency, to allow public scrutiny of matters in which Government commissions external advice. There is a public interest in accountability, to allow the public to determine whether commissioning external advice is of public benefit and whether the advice given is of high quality and represents value for money”.

32. As noted above, the complainant argued that the public interest in this matter favoured disclosure and drew particular reference to the fact that the Contestable Policy Fund introduced a new approach to policy development.

The balance of public interest

33. The Commissioner notes that the contract was newly agreed at the time of the request. In his view, the prejudicial outcome described by the QP is likely to be more severe because the information was recently created. This contract is the first agreed as part of the new approach to policy making envisaged by the Coalition Government. He accepts the QP's view that the process had yet to be fully embedded. As such, he agrees that there is a compelling public interest in allowing the process to become embedded and that this would be undermined by disclosure in this case.
34. As to the extent and frequency of this inhibition, the Commissioner is satisfied that the inhibition would be likely to arise on a regular basis where this new approach is adopted, at least in the short term.
35. The Commissioner recognises that the new approach is a departure from previous policy making exercises and this, of itself, has given rise to controversy. Arguably, there is a public interest in accessing the requested information to improve understanding of the new approach by way of a practical example.
36. However, the Commissioner does not find this argument to be sufficiently compelling in the case. In the Commissioner's view, insufficient time has passed since the inception of this new policy-making approach such that greater weight can be given to the public interest in disclosure. He recognises that there is a strong public interest in allowing a free and frank exchange of views about the work that has been commissioned. He also accepts that there is a strong public interest in allowing the approach to become embedded. That said, he recognises that the balance of public interest may very well change with the passage of time.
37. The Commissioner therefore finds that the public interest in maintaining the exemptions cited from section 36 outweighs the public interest in disclosure. In reaching this view, the Commissioner has had particular regard for the relative age of the information and the policy making approach with which it is connected.
38. Given the Commissioner's view on the application of section 36, he has not considered whether any other of the exemptions cited apply in this case.

Other matters

39. 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.
40. The Commissioner is concerned that in this case, it took 126 working days for an internal review to be completed. The Commissioner does not accept that exceptional circumstances existed which would justify such a 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

41. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.

43. 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
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SK9 5AF**