

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 May 2016

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

Decision (including any steps ordered)

1. The complainant requested information relating to briefings prepared for the Home Secretary in April and May 2015 relating to Greville Janner.
2. The Home Office refused to disclose the requested information, citing sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views) and 36(2)(c) (prejudice to the effective conduct of public affairs) of the FOIA as a basis for non-disclosure.
3. The Commissioner's decision is that the Home Office has correctly applied section 36(2)(b)(i) in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
4. The Commissioner requires no steps to be taken.

Background

5. On 16 April 2015 the Crown Prosecution Service (CPS) issued a public statement¹ about its decision not to prosecute Lord Janner in relation to allegations made against him.

¹ http://www.cps.gov.uk/news/latest_news/lord_janner/

Request and response

6. On 3 June 2015, the complainant wrote to the Home Office and requested information in the following terms:

"Please provide copies of all briefings prepared for the Home Secretary in April and May 2015 which relate in any way to Greville Janner".
7. The Home Office responded on 6 August 2015. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:
 - section 36(2)(b)(i) (prejudice to effective conduct of public affairs – free and frank provision of advice);
 - section 36(2)(b)(ii) (prejudice to effective conduct of public affairs – free and frank exchange of views for the purposes of deliberation); and
 - section 36(2)(c) (otherwise prejudice to effective conduct of public affairs).
8. Following the Commissioner's intervention, the Home Office provided an internal review on 30 September 2015 in which it maintained its original position. It confirmed that information within the scope of the request was held but that it was being withheld in full.

Scope of the case

9. Following earlier correspondence, the complainant contacted the Commissioner on 21 December 2015 to complain about the way his request for information had been handled.
10. The complainant told the Commissioner:

"The public interest in this case is so compelling it demands maximum transparency. No evidence has been provided to show that advice would be less free an [sic] frank".
11. He also complained about the timeliness with which the Home Office responded.
12. As is his practice, the Commissioner wrote to the Home Office at the start of his investigation. In the absence of its substantive response, on 3 March 2016 the Commissioner issued the Home Office with an

Information Notice in accordance with his powers under section 51 of the FOIA. By way of that Notice the Commissioner required the Home Office to furnish him with further information about its handling of the request for information in this case.

13. The analysis below considers the Home Office's application of section 36 of the FOIA to the requested information. In correspondence with the complainant, the Home Office described the requested information as:

"advice to Ministers about Greville Janner and issues related to the Inquiry".

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

14. Section 36 can only be cited on the basis of the reasonable opinion of a specified qualified person that the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur.
15. In this case, the Home Office has cited sections 36(2)(b)(i) and (ii) and 36(2)(c) in relation to the requested information. Section 36(2)(b)(i) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank provision of advice. Section 36(2)(b)(ii) provides the same in relation to the exchange of views. Section 36(2)(c) provides an exemption where disclosure would or would be likely to prejudice the effective conduct of public affairs in a manner other than that specified elsewhere in section 36.
16. To find that any part of section 36(2) is engaged, the Commissioner must establish that a qualified person gave an opinion which found that the exemption applied and that the opinion was reasonable.
17. This exemption is also qualified by the public interest, meaning that if the exemption is engaged, the information should nonetheless be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

The qualified opinion

18. For government departments the qualified person is any Minister of the Crown. In this case, an opinion was sought from the Minister for Preventing Abuse and Exploitation – Karen Bradley MP - on 6 July 2015. The opinion on the application of section 36(2) was provided on 5 August 2015. The Commissioner is satisfied that Karen Bradley, as a

Minister of the Crown, is a qualified person for the purposes of section 36.

19. In determining whether the exemption is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
 - whether the prejudice or inhibition relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of, or involvement in, the issue.
20. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. The qualified person's opinion does not have to be the most reasonable opinion that could be held: it only has to be a reasonable opinion.
21. The Commissioner has seen the submission produced by officials at the Home Office and put before the qualified person, upon which the opinion was based. This included a description of the background to the request, an explanation of the section 36 exemption, a discussion of the harm arising from disclosure and an analysis of the public interest arguments both for and against the release of the information. It was recommended that the qualified person agree to the application of sections 36(2)(b)(i) and (ii) and 36(2)(c) of the FOIA.
22. In correspondence with the complainant, the Home Office told him:

"...that it was important to provide a safe space for free and frank provision of advice to ministers, and that disclosure would compromise an ongoing legal process...."
23. The submission to the qualified person similarly explained why the Home Office considers disclosure would have an adverse effect.
24. As a prejudice-based exemption, section 36(2) of FOIA requires the qualified person to decide either that there 'would' be a prejudicial or inhibiting effect or that it 'would be likely' that the prejudicial or inhibiting effect would occur; 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.

25. In correspondence with the complainant, the Home Office told him that releasing the information would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views. It also told him:

"section 36(2)(c) is engaged because releasing the information in question would be likely to prejudice the effective conduct of public affairs by undermining confidence in the Inquiry".

26. However, in its submission to the qualified person and during the course of the Commissioner's investigation, the Home Office confirmed that, with respect to sections 36(2)(b) and 36(2)(c), it considers that prejudice or inhibition, as appropriate, **would** occur if the data was disclosed. In other words, it considers the higher level of likelihood to be relevant.

Is the opinion reasonable?

27. With respect to section 36(2)(b), the submission to the qualified person referred to both 36(2)(b)(i) and (ii). The Commissioner has focussed on the Home Office's application of section 36(2)(b)(i).
28. In relation to section 36(2)(b)(i) the Commissioner considers that the exemption is about the process that may be inhibited, rather than what is necessarily in the information itself.
29. The Commissioner's guidance on section 36 of the FOIA² states:

"Information may be exempt under section 36(2)(b)(i) or (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".

30. The issue for the Commissioner to determine is whether it was objectively reasonable for the qualified person to hold the opinion that disclosure in this case would inhibit the free and frank provision of advice.

² https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

31. The Commissioner has reviewed the content of the information and notes that this is of a free and frank nature. While it is not necessary for the information in question to itself be a record of free and frank advice for this exemption to apply, this is a relevant factor to take into account when considering how disclosure of this information may affect the provision of advice to Ministers.
32. After reviewing the withheld information, the Commissioner has concluded that it was reasonable for the qualified person to hold the opinion that disclosure would result in the inhibition relevant to section 36(2)(b)(i) and therefore the exemption is engaged.

The public interest

33. The fact that the exemption is engaged by the qualified person's opinion does not automatically mean that the information should be withheld. The public interest test is separate from the qualified person's opinion.
34. The Commissioner has gone on to consider, in accordance with section 2(2)(b) of FOIA, whether the public interest requires disclosure, despite the valid application of the exemption.

Public interest arguments in favour of disclosing the requested information

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

"As is clear, the information relates to briefings for the Home Secretary about Greville Janner. The time period covers the period before and after the DPP's announcement was made. There have been questions about the timing of the announcement...which was made when parliament had been dissolved. There is a compelling public interest in disclosure of information showing whether there was any forewarning for the Home Secretary, what was known and when and how the Home Secretary was briefed to respond etc..".

36. Referring to claims of cover-up, the complainant told the Home Office:

"...the Home Office is in a position to dispel any notion of cover-up by being totally open and transparent about the briefings given. The public must have confidence that those elected to serve are acting in their best interests and revealing all possible information regarding such serious cases".

37. The complainant considers that the Home Office failed to evidence how disclosure in this case would inhibit the free and frank provision of advice. In his view:

"There is simply no evidence that, by discharging their duties in an honest, impartial and professional manner, civil servants have to fear disclosure. And there is certainly no evidence that this argument outweighs the compelling interest in disclosure".

38. The Home Office recognised the public interest in disclosure, telling the complainant:

"We recognise that there is public interest in openness and transparency in all aspects of government and that there is a particular public interest in information about Greville Janner, in the light of DPP handling of his possible prosecution".

Public interest arguments in favour of maintaining the exemption

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

"The information requested consists of advice to Ministers about Greville Janner and issues related to the Inquiry. It is not in the public interest to disclose information which compromises the safe space in which officials provide advice to Ministers and therefore inhibits the free and frank provision of such advice. ...".

40. It also explained that:

"The Goddard Inquiry has undertaken to examine and review the conduct of all institutions that have played a role in the Janner case and ascertain whether the allegations against him were dealt with appropriately at the time. ...".

41. The Home Office provided the complainant with details of the relevant website for the Inquiry. In its view, the Inquiry:

"will satisfy the public interest in ascertaining whether the allegations in question were dealt with appropriately, consequently the public interest in disclosure of the disputed information is not strong".

42. In its correspondence with the Commissioner, the Home Office expanded on its public interest arguments, confirming its view that it would not be in the public interest to disclose information that could compromise the safe space in which officials provide advice to Ministers and therefore inhibit the free and frank provision of such advice. The Commissioner is necessarily restricted in what he is able to say about those arguments without disclosing the nature of the information.

Balance of the public interest

43. The Commissioner has considered the public interest arguments presented in this case and has recognised significant public interests both in favour of and against disclosure.
44. Having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, the Commissioner must give weight to that opinion as a valid piece of evidence in his assessment of the balance of the public interest.
45. However, in order to form the balancing judgment required by section 2(2)(b) of FOIA, the Commissioner is entitled, and will need, to form his own view as to the severity, extent and frequency of that detrimental effect.
46. In forming a view on the balance of the public interest, the Commissioner has taken into account the general public interest in the openness and transparency of the Home Office as well as the public interest factors that apply in relation to the specific information in question.
47. The Commissioner accepts that there will always be some public interest in there being transparency in the ways public authorities conduct their business. He recognises that disclosure in this case could increase confidence in how advice is provided to the Home Secretary.
48. He also recognises that the subject matter of the information under consideration carries weight in favour of disclosure. It remains the case that, despite his death, matters relating to Lord Janner are a topic of public interest.
49. The Commissioner acknowledges that, both at the time of the request and at the time of writing, the withheld information relates to sensitive and live issues.
50. In respect of the requested information relating to issues that were recent at the time of the request, the Commissioner accepts that 'safe space' arguments are relevant in this case. The impact of disclosing the information on the processes set out in section 36(2)(b) must be carefully considered.
51. With respect to the timeframe of the request, the Commissioner acknowledges that it covers the period before and after the DPP's announcement was made. He therefore gives weight to the public interest in maintaining the space for the free and frank provision of advice around that time.
52. In balancing the public interest, he considers that this adds weight to the public interest arguments in favour of maintaining the exemption.

53. Taking all the above into account, the Commissioner has concluded that, in this instance, the public interest in avoiding that prejudice outweighs the public interest in disclosure. Therefore the public interest in maintaining the exemption outweighs that in the disclosure of the withheld information and so the Home Office was not obliged to disclose the information withheld by virtue of section 36(2)(b)(i).
54. Having reached this conclusion, it has not been necessary to go on to consider the Home Office's application of section 36 (2)(b)(ii) or 36(2)(c) to the same information.

Other matters

55. The request in this case was made on 3 June 2015 but it was not until 6 August 2015 that the Home Office responded. The delay in this case will be recorded.

Right of appeal

56. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

57. 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.
58. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF