

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 June 2016

Public Authority: Department of Health (DoH)
Address: 79 Whitehall
London
SW1A 2NS

Decision (including any steps ordered)

1. The complainant has requested information relating to any complaint made by the DoH to the BBC in relation to news coverage in any way since 1 April 2014. The DoH refused to disclose the requested information under section 36(2)(b)(ii) FOIA.
2. The Commissioner's decision is that section 36(2)(b)(ii) FOIA was applied incorrectly to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 36(2)(b)(ii).
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 15 June 2015 the complainant requested information of the following description:

"Please could you provide me with all letters sent by your department to the BBC Head of News or the News Editor of any BBC news programme, or any senior BBC employee since 01.04.2014 where

there is a complaint in relation to the news coverage in any way. Please also provide me with copies of any responses?"

6. On 13 July 2015 the DoH responded. It refused to disclose the requested information under section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA.
7. The complainant requested an internal review on 18 August 2015. The DoH sent the outcome of its internal review on 28 October 2015. It withdrew its application of section 36(2)(b)(i) and section 36(2)(c) FOIA, it did however uphold its application of section 36(2)(b)(ii) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 7 December 2015 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the DoH was correct to apply section 36(2)(b)(ii) FOIA to the withheld information.

Reasons for decision

Section 36(2)(b)(ii)

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
11. The DoH has applied section 36(2)(b)(ii) FOIA to all of the withheld information.
12. In determining whether the exemptions were correctly engaged by the DoH, 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 reasonable.
13. The DoH explained that a section 36 submission was put to the Qualified Person (QP), Jane Ellison, Parliamentary Secretary (Public Health) on 23 October 2015. In response, the Qualified Person gave her reasonable opinion that the Section 36(2)(b)(ii) exemption was engaged as disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation.
 14. It confirmed that the withheld information was provided to the Qualified Person along with the submissions in support of the application of section 36(2)(b)(ii) FOIA.
 15. The DoH did not provide a copy of the qualified person's opinion but provided an email dated 23 October 2015 in which it was confirmed that the Qualified Person had agreed to the application of section 36(2)(b)(ii) FOIA upon the basis of the submission provided to her.
 16. The submissions explains that Ministers should be free to engage with other public bodies with the knowledge that (when appropriate) the contents of that correspondence will remain private. It argued that it is important to ensure that there is a safe space within which Ministers and senior officials are able to discuss issues, freely and frankly. Putting this information in the public domain would mean that Ministers may be impeded from offering future advice or engaging in debate with other public bodies, potentially resulting in poorer decision making and public services.
 17. It added that if Ministers worked under the assumption that all their correspondence was accessible under the FOIA then it is likely to have a profound chilling effect upon frank and open communication within the range of central and local government bodies and other public authorities subject to the Act, as well as on the full and accurate recording of that communication. The expectation that all correspondence could be made public could adversely impact on how Government conducts its day to day business resulting in a reduction of recorded decision making with written decision making and Ministerial input replaced by off the record meetings and conversations.
 18. Although the DoH has not provided a copy of the opinion of the Qualified Person, it has explained that it was based upon the

submissions set out above. The withheld information does contain candid discussion between Ministers/officials and the BBC. Based upon this the Commissioner does consider that the opinion of the Qualified Person is reasonable and therefore the exemption was correctly engaged.

19. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
20. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the exchange of views for the purposes of deliberation.

Public interest arguments in favour of disclosing the requested information

21. The DoH has explained that it believes the following public interest arguments favour disclosure:
 - There is a public interest in openness. There is also a public interest in understanding how the Government interacts with other public bodies.

¹ EA/2006/0011; EA/2006/0013

Public interest arguments in favour of maintaining the exemption

22. The DoH has explained that it believes the following public interest arguments favour maintaining the exemption:

- There is a public interest in Ministers being free to engage with other public bodies with the knowledge that (when appropriate) the contents of that correspondence will remain private.
- There is a very strong public interest in ensuring that there is a safe space within which Ministers and senior officials are able to discuss issues, freely and frankly as in this particular case. Putting this information into the public domain would mean that Ministers may well be impeded from offering future advice or engaging in debate with other public bodies, potentially resulting in poorer decision making and public services.
- If Ministers worked under the assumption that of all their correspondence was accessible under FOI then it is likely to have a profound chilling effect upon frank and open communication within the range of central and local government bodies and other public authorities subject to the Act, as well as on the full and accurate recording of that communication, which it argued is not in the public interest.
- The expectation that all correspondence could be made public could adversely impact on how Government conducts its day to day business resulting in a reduction of recorded decision making with written decision making and Ministerial input replaced by off the record meetings and conversation, which it argued is not in the public interest.

Balance of the public interest arguments

23. The Commissioner considers there is a strong public interest in openness and transparency, in relation to how Government interacts with other public bodies.
24. The Commissioner does however consider that there is a requirement for Ministers and officials to be able to exchange views freely and frankly with other public bodies to ensure robust decision making and operation of public services.
25. However upon viewing the withheld information, the Commissioner notes that the majority of the correspondence dates back to 2014 or early 2015. Therefore by the time the request was made in June 2015,

the issues raised about BBC reporting in 2014 and early 2015 will have moved on. The timing of the request does therefore lend weight to the public interest arguments in favour of disclosure.

26. The DoH has provided very general public interest arguments in relation to safe space and the chilling affect disclosure would have upon discussions between Government and other public authorities. It has argued that it is in the public interest that Ministers are free to engage with other public bodies with the knowledge that (when appropriate) the contents of that correspondence will remain private. It has not however provided any detail, with reference to the withheld information, as to why it deems this would be appropriate in this case. This therefore reduces the weight the Commissioner has afforded to the public interest in favour of maintaining the exemption.
27. The Commissioner has not given any weight to the DoH's arguments that disclosure may inhibit the full and accurate recording of communications and decision making. This is because Minister's and officials, given their position, would be expected to fully and accurately recording communications and decision making.
28. On balance the Commissioner considers that in this case, the public interest arguments in favour of maintaining the exemption is outweighed by the public interest in disclosure. Section 36(2)(b)(ii) FOIA was therefore incorrectly applied in this case.

Right of appeal

29. 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

30. 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.
31. 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

Pamela Clements
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