

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 May 2018

Public Authority: Department for Digital, Culture, Media & Sport

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information regarding the decision to change the public authority's official name from the Department for Culture, Media and Sport to the Department for Digital, Culture, Media and Sport. The public authority withheld the information held within the scope of the request relying on the exemptions at section 36(2)(b) FOIA.
2. The Commissioner's decision is that:
 - The public authority was not entitled to withhold the information held within the scope of the request save the information the Commissioner has determined is exempt on the basis of the exemption at section 42(1) FOIA.
 - The public authority failed to comply with the requirement in section 17(1) FOIA to issue a refusal notice within 20 working days.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information save the information the Commissioner has determined is exempt on the basis of section 42(1) FOIA.
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 FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted a request for information to the public authority on 3 July 2017 in the following terms:

"I understand that the department has officially changed its name to "Department for Digital, Culture, Media and Sport" as of today.

I would like to request access to the ministerial submission concerning this decision. I assume that the decision was taken by the Secretary of State, though it may also have been taken by the Prime Minister. If the decision was taken by the Prime Minister, I assume that there was a ministerial submission (or equivalent) concerning a recommendation by the Secretary of State to the Prime Minister concerning this name change. Please provide either.

Secondly, if there was correspondence with the Cabinet Office concerning this departmental name change, please provide it."¹

6. The public authority initially responded on 1 August 2017 further to the provision in section 10(3) FOIA allowing a public authority additional time to conduct the public interest test set out in section 2(2)(b) FOIA. It informed the complainant that it considered the information held within the scope of his request exempt on the basis of "section 36 (Conduct of public affairs)" FOIA.
7. The public authority issued a substantive response on 31 August 2017. It withdrew its reliance on "section 36 (Conduct of public affairs)" and relied instead on the exemption at section 35(1)(a) FOIA as the basis for withholding the information held.
8. The complainant requested an internal review of this decision on 31 August 2017.
9. The public authority wrote back to the complainant on 29 September 2017 with details of the outcome of the internal review. The review upheld the application of the exemption at section 35(1)(a). It also concluded that the information held was additionally exempt on the basis of the exemptions at section 36(2)(b)(i) and (ii) FOIA.

¹ The complainant submitted a similar request to the Cabinet Office on the same day which subsequently also resulted in a complaint to the Commissioner and has been dealt with under case reference FS50699814. The Commissioner's decision in FS50699814 has been issued alongside this decision notice.

Scope of the case

10. The complainant contacted the Commissioner on 29 September 2017 to complain about the way his request for information had been handled. He specifically disagreed with the application of the exemptions.
11. Following his complaint the public authority withdrew its reliance on the exemption at section 35(1)(a) but maintained its reliance on the exemptions at section 36(2)(b).
12. The Commissioner has therefore considered whether the public authority was entitled to rely on the exemptions at section 36(2)(b).

Reasons for decision

Procedural Matter

13. As mentioned, the public authority originally responded to the request on 1 August 2017 pursuant to the provision in section 10(3) FOIA.
14. A public authority may, by virtue of section 10(3), extend the 20 working days limit for responding to a request, until such time as is reasonable in the circumstances, in order to conduct the public interest test set out in section 2 FOIA. However, this does not affect the time by which any notice under section 17(1) FOIA must be given.²
15. Under section 17(1), a public authority claiming that information is exempt is required, inter alia, to notify the applicant of the specific exemption it has relied upon within 20 working days.
16. The public authority notified the complainant that it was specifically relying on the exemptions at sections 35(1)(a) and 36(2)(b) well outside 20 working days following receipt of the request on 3 July 2017.
17. The Commissioner has therefore found the public authority in breach of section 17(1) FOIA.

² The full text of section 10 FOIA can be found here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/10>

Application of exemptions

Withheld information

18. The withheld information comprises of email exchanges between the public authority and the Cabinet office, including an advice note.

Section 36(2)(b)

19. The relevant provisions in section 36 state³:

“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

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

20. The exemptions at section 36(2)(b) can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person who issued the opinion in this case was the previous Secretary of State for the Department for Digital, Culture, Media & Sport, The Rt Hon Karen Bradley MP. The Commissioner is satisfied that at the time of the request, the former Secretary of State for the public authority was a qualified person by virtue of section 36(5)(a) FOIA.⁴

21. The opinion of the qualified person was sought by officials on 14 September 2017 and was provided by the qualified person on 19 September 2017.

22. Although it is clear from the submission to the qualified person that officials were of the view that the information held was exempt on the

³ The full text of the exemption can be found here:

<http://www.legislation.gov.uk/ukpga/2000/36/section/36>

⁴ Section 36(5)(a) states that a qualified person in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.

basis of section 36(2)(b)(i) and (ii), it is less clear whether they additionally considered the information exempt on the basis of the exemption at section 36(2)(c) FOIA. In any event, the public authority is clear in its submission to the Commissioner that it is relying only on the exemptions at section 36(2)(b).

23. The interests covered by section 36(2)(c) are broader than those covered by section 36(2)(b). Furthermore, because the prejudice envisaged when relying on section 36(2)(c) must be different to that covered by the exemptions at section 36(2)(a) or (b), it follows that the prejudice envisaged with respect to section 36(2)(a) or (b) should be generally focussed on the interests covered by these exemptions and not on the broader interests covered by section 36(2)(c).
24. The qualified person was of the opinion that information withheld on the basis of section 36(2)(b) would be likely to inhibit the free and frank provision of advice, and the free and frank exchange of views for the purposes of deliberation. This is because the exchanges represent officials working at pace to try and implement a Ministerial decision outside of the usual course of departmental business. In this type of situation, officials need to be able to communicate quickly to work out the best solution without worrying that their emails will be made public, potentially presenting a false impression of the workings of the department and government. Releasing the withheld information may make it more likely that advice will be given that is materially different because of the possibility of disclosure.
25. The public authority elaborated in its submission to the Commissioner. It argued that releasing the withheld information could reduce the effectiveness of officials as they will seek to avoid asking those questions that might appear trivial for fear of themselves and the department appearing incompetent. Disclosure could discourage officials from discussing their views and opinions on future issues in a free and frank manner especially if those views could be considered controversial or extreme. It may also affect the likelihood of officials discussing options, whilst not considered extreme, are unlikely to be implemented. The cumulative effect would be a department that is fearful of expressing ideas and subsequently does not adapt to the needs of the public.
26. The public authority has also suggested that part of the withheld information marked "as being the personal views" of the author and "not official suggestions or opinion" representing in effect a brainstorming of ideas rather than an official discussion, should not be released on that basis.

Was the qualified person's opinion reasonable?

27. In determining whether the exemptions are engaged, the Commissioner must also consider 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 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. Whether it concerns an important issue which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
28. Further, 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. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. 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.
29. The submission relied upon by the qualified person to form her opinion on the application of the exemption is not the most persuasive submission that the Commissioner has seen. Even less persuasive is the public authority's view that part of the withheld information does not constitute an official view with respect to deliberations pertinent to changing the name of the department. Given that discussions in respect of the name change were taking place in an official capacity, it is completely immaterial whether any of the views were marked to suggest that they were expressed in a personal capacity. Clearly those views would have been expressed with the full intent of contributing to the ongoing debate.
30. Nevertheless, having inspected the withheld information, the Commissioner is prepared to accept it was reasonable for the qualified person to conclude that disclosure would be likely to inhibit the free and frank provision of advice, and the free and frank exchange of views for

the purposes of deliberation, albeit with reservations about some of the factors considered by the qualified person pursuant to providing her opinion. It is an opinion any person in the qualified person's position could hold upon inspecting the withheld information.

31. The Commissioner has therefore concluded that the public authority was entitled to engage the exemptions at section 36(2)(b)(i) and (ii).

Public interest test

32. The exemptions at section 36(2)(b) are subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemptions outweigh the public interest in disclosing the withheld information.
33. The public authority acknowledged that there is a public interest in public authorities being accountable for the quality of their decision making and ensuring that decisions have been made on a sound evidential basis and with due consideration having been given to the views and interests of all the parties involved. It is also recognised that there is a public interest in promoting understanding of how government works.
34. The public authority however argued that there is a stronger public interest in not releasing the withheld information which may inhibit officials from having free and frank discussions generally and particularly in relation to implementing a departmental name change. There is a stronger public interest in preventing the likelihood of a chilling effect on similar deliberations.

Balance of the public interest

35. If the Commissioner finds that the qualified person's opinion was reasonable, she will then consider the weight of that opinion in the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur, but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure. Needless to say, the withheld information will be a significant factor and to some extent, the timing of the request.
36. The discussions focus primarily on the rationale for, and the process of, changing the name of the public authority to reflect the way that its remit has evolved 25 years from when the department was set up. The public authority is correct to note that some of the exchanges may seem trivial in the context of more demanding issues officials have to routinely

consider. However, the seeming triviality of the exchanges is highly unlikely in the Commissioner's view to result in a severe chilling effect on free and frank exchanges including the provision of advice. The chilling effect is highly likely to be very limited and without any significant consequence on candid exchanges with respect to policy deliberations. Put simply, disclosure is highly unlikely to affect the meticulousness with which officials conduct policy deliberations and provide advice. The Commissioner has therefore attached little weight to the public interest in withholding the withheld information in order to prevent a chilling effect on free and frank exchanges with respect to policy deliberations.

37. Furthermore, the fact that the name change had been agreed and announced prior to the request meant that there was also very little public interest in maintaining a safe space for discussions pursuant to agreeing the change. Such deliberations having concluded by the time the request was submitted.
38. On the other hand, in addition to the public interest in openness, transparency and accountability in government, the Commissioner considers that there is a public interest in understanding how the process evolved including the factors considered relevant to implementing the name change. The withheld information would provide some useful insight in that regard. Whilst this specific public interest might not be particularly significant in the circumstances, the public interest in withholding the withheld information is not stronger, and the public interest in openness and transparency in government should not be underestimated.
39. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the withheld information.
40. As mentioned, the Commissioner has considered a similar complaint by the complainant against the Cabinet Office under reference FS50699814. The Cabinet Office withheld one of the emails within the scope of the request submitted by the complainant in that case on the basis of the exemption at section 42(1) FOIA. This same email is part of the information withheld by the public authority in this case. Therefore, although the public authority has not relied on section 42(1), in light of her decision in FS50699814, the Commissioner has exercised her discretion and applied the exemption to the relevant email.

Section 42(1)

41. The relevant email was sent at 10:09 on 1 July 2017.

42. Section 42(1) states:

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

43. The Cabinet Office argued in FS50699814 that this email is protected by legal professional privilege because it was drafted for the sole or dominant purpose of seeking or obtaining legal advice.

Is the exemption engaged?

44. The Commissioner endorses the description of Legal Professional Privilege (LPP) by the Information Tribunal in *Bellamy v the Information Commissioner and the Secretary of State for Trade and Industry*.⁵ The Tribunal described LPP as:

“a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communications or exchanges come into being for the purposes of preparing for litigation.”

45. The Commissioner is satisfied that the email constitutes information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings and consequently that it engages the exemption at section 42(1).

Public interest test

46. The exemption at section 42(1) is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the relevant email.

47. There is a strong public interest inherent in maintaining the exemption due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure full and frank legal advice which in turn is fundamental to the administration of justice. Indeed in the *Bellamy* case, the Tribunal concluded that there

⁵ EA/2005/0023

is a strong element of public interest inbuilt into LPP, and that at least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest. In *Crawford v Information Commissioner and Lincolnshire County Council*⁶, the Tribunal concluded that these considerations must be clear, compelling and specific and at least equal the public interest in maintaining LPP.

48. Some of the factors that the Commissioner will take into account with respect to the balance of the public interest include, but are not limited to, whether the issue under consideration involves a large amount of money, affects a large number of people⁷, whether there was a lack of transparency in the public authority's actions, and whether the legal advice obtained was selectively disclosed or was misrepresented to the public. None of these factors are present in this case.
49. Therefore, in the circumstances, the Commissioner has concluded that there was no compelling justification for disclosing the relevant email in the public interest. She has therefore concluded that on balance, the public interest in maintaining the exemption outweighs the public interest in disclosing the relevant email.

⁶ EA/2011/0145

⁷ Requiring them to take action(s) or resulting in a change to action(s) previously taken.

Right of appeal

50. 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

51. 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.
52. 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

Gerrard Tracey

Principal Adviser

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