

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 September 2023

Public Authority: Department for Business & Trade ("DBT")
Address: Old Admiralty Building
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant has requested information on correspondence concerning the Institute of Chartered Accountants in England and Wales' (ICAEW) guidance on distributions and distributable profits.
2. The Commissioner's decision is that DBT has appropriately relied on FOIA exemptions 36(2)(b)(i) and (ii) – Prejudice to the effective conduct of public affairs; section 42(1) – Legal professional privilege. The Commissioner finds that the public interest favours maintaining the exemptions. Regarding section 40(2) – Personal information, the Commissioner finds that the exemption has been inappropriately applied to senior staff at external organisations.
3. The Commissioner requires DBT to take the following steps to ensure compliance with the legislation:
 - Disclose the names set out in the confidential annex.
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.

Background

5. The Commissioner notes that the policy paper published in March 2021 "Restoring trust in audit and corporate governance"¹ advises:

"...stakeholder and wider public trust in the credibility of directors' reporting and the statutory audit has been shaken by a succession of sudden and major corporate collapses which have caused serious economic and social damage, including the insolvencies of BHS in 2016 and of Carillion in 2018.

...The government commissioned 3 independent reviews in 2018: Sir John Kingman's Independent Review of the Financial Reporting Council (FRC), the Competition and Market Authority (CMA)'s Statutory Audit Services Market Study and Sir Donald Brydon's Independent Review of the Quality and Effectiveness of Audit. The FRC Review found that the existing regulator lacked the necessary powers and clarity of purpose to hold auditors and directors sufficiently to account and recommended that it be replaced. The Brydon Review concluded that statutory audit needs to become more informative, and that higher expectations should be placed on both directors and auditors to deliver more useful information to the users of reports. The CMA Market Study showed an unhealthy dominance of the statutory audit market for larger companies by a small number of audit firms and called for new measures to increase quality, competition and resilience in the delivery of audit."

6. The Commissioner also notes the report of the BEIS Select Committee of 2019 entitled "The Future of Audit"² published 4 April 2019. He cites the report to provide context for the request. The report states:

"We examined one of the core reporting and audit failures that brought down Carillion— the imprudent payment of dividends out of optimistically booked, and in hindsight unrealised, profits. We recommend that the Government and the Financial Reporting Council urgently produce a clear, simple and prudent definition of what counts as realised profits, and make further recommendations to tighten the UK dividend regime."

7. The Report covers "Capital Maintenance" at Section 3 advising:

¹ <https://www.gov.uk/government/publications/restoring-trust-in-audit-and-corporate-governance>

² <https://publications.parliament.uk/pa/cm201719/cmselect/cmbeis/1718/1718.pdf>

"One of the central purposes of keeping accounts is to determine a company's profits and how much of these are distributable in the form of dividends to shareholders. The laws that foster prudence in the payment of dividends and protect the company's capital form what is known as the 'capital maintenance regime'.

8. The Commissioner understands that there has been debate for some time over capital maintenance and the calculation of realised profits in regard to existing UK company law, international accounting standards and the ICAEW guidance. The ICAEW guidance is guidance which companies rely on for calculating their realised profits and which arguably critics consider takes the same interpretation as the international accounting standards and is at variance with company law.
9. The Commissioner notes the comprehensive information online³ published on 19 July 2023 comprising publications and other material relating to the government's commitment to reform the UK's audit and corporate governance framework. It contains a factual overview of draft regulations that the government laid in Parliament on 19 July 2023, which will – if approved by Parliament – implement certain new corporate reporting requirements that were confirmed in the government response to the White Paper.

Request and response

10. On 9 August 2021 the complainant wrote to BEIS⁴ and requested information in the following terms:

"I make the following request under the Freedom of Information Act. All correspondence, and records of meetings, concerning the Institute of Chartered Accountants in England and Wales (ICAEW) guidance on distributions and distributable profits then published as (TECH 02/17BL), within the Department and with other departments, as well as with, a) the City of London Law Society Company Law Committee, b) the ICAEW, c) the Financial Reporting Council.

³ <https://www.gov.uk/government/collections/audit-and-corporate-governance-reform>

⁴ On 7 February 2023, under a Machinery of Government Change, the Department for Business Energy and Industrial Strategy ("BEIS") began the transition into three separate departments, including the Department for Business and Trade ("DBT"). The request in this case was made to BEIS, however this notice will be served on DBT as the appropriate authority.

The period covered by this request is from 1 January 2016 to 31 July 2021.

"Correspondence" means, all internal and external letters, memoranda, notes of telephone conversations, e-mails and handwritten notes.

"Records of meetings" means records in whatever form.

"Company law" means the requirements of the Companies Act 2006 and common law."

11. BEIS wrote to the complainant on 7 September 2021 and 7 October 2021 advising them that it required further time to consider the public interest test for section 35(1)(a) – formulation or development of government policy.
12. BEIS responded on 2 November 2021. It advised that it was disclosing some information whilst withholding other information in reliance of FOIA section 36(2)(b)(i) and (ii) – Prejudice to effective conduct of public affairs. BEIS also withheld published documents which referenced the ICAEW guidance in reliance of FOIA section 21- Information accessible by other means. BEIS also relied on FOIA section 42 – Legal professional privilege to withhold legal advice provided during the preparation of answers to parliamentary questions. Personal data was redacted from the limited disclosed information in reliance of FOIA section 40(2) – Personal information.
13. The complainant requested an internal review on 10 November 2021. In so doing they made the following points:

"I find it difficult see how there can be prejudice to the conduct of public affairs on this subject matter of the ICAEW Guidance. There are significant issues with the ICAEW and its Guidance in respect of:-

- the inconsistency between the ICAEW Guidance and the law
- the dismissive attitude of the ICAEW towards the law
- the status of that ICAEW Guidance is contested. Ministerial Answers have said one thing, the ICAEW has said the opposite
- the ICAEW Guidance does not deal with the problem it seeks to solve but gives false comfort
- the Financial Reporting Council (FRC) has: a) relied on the ICAEW Guidance b) used the same legal Counsel as the ICAEW, c) applauded the accounts of Carillion plc as an example of best practice, only for Carillion to then collapse shortly after."

The complainant went on to describe in detail their reasoning for the above points.

14. Following an internal review BEIS wrote to the complainant on 1 December 2021. It stated that it was upholding its initial response except for the disclosure of email address suffixes previously withheld under FOIA section 40(2).
15. In responding to the Commissioner's investigation DBT reconsidered the withheld information and determined that further, redacted information could be disclosed. DBT wrote to the complainant on 7 July 2023 with this information.

Scope of the case

16. The complainant contacted the Commissioner on 6 January 2022 to complain about the way their request for information had been handled. They explained their view that BEIS had not addressed any of their points on the public interest test nor made any reference to the points they had raised and evidenced when requesting an internal review. The complainant provided the Commissioner with further comment following their receipt of the redacted information provided by DBT on 7 July 2023.
17. On 3 February 2023 the Commissioner wrote to BEIS asking for copies of the withheld information and its submissions on the application of the specified exemptions.
18. Following repeated correspondence with BEIS, and subsequently DBT, the Commissioner had not received the requested information or responses to his questions. He therefore issued an Information Notice on 1 June 2023
19. As referenced above at paragraph 16 further information was disclosed to the complainant during the Commissioner's investigation. The complainant remained dissatisfied with the disclosures.
20. The complainant did not question the application of section 21 in his request for internal review nor in his complaint to the Commissioner and this will therefore not be included in the scope of this investigation.
21. The complainant advised the Commissioner on 9 August 2023 that they had made a metadata request to DBT regarding their current case. In response to that request DBT had provided information amounting to 171 pages. The complainant highlighted some of the content contained in the disclosure which they believed demonstrated that DBT had not followed the Commissioner's guidance on section 36 with regard to

internal reviews. The guidance states that it is expected that the qualified person would take the opportunity to consider their reasonable opinion again, taking account of any comments from the requester.

22. The Commissioner asked DBT to confirm the circumstances which had taken place at the time of the internal review. DBT confirmed that the qualified person was not asked to consider his opinion again at internal review. DBT explained that it had not reverted to the qualified person in providing its internal review.

23. The Commissioner notes that the Section 45 Code of Practice⁵ advises that:

“It is best practice, wherever possible, for the internal review to be undertaken by someone other than the person who took the original decision. The public authority should in all cases re-evaluate their handling of the request, and pay particular attention to concerns raised by the applicant.”

24. Notwithstanding the thoroughness of the submissions to the qualified person, which also express the government’s position, the Commissioner would have expected DBT to provide the qualified person with the opportunity to revisit the submission alongside the complainant’s request for internal review and some of the pertinent points raised there.

25. The Commissioner, having seen the submissions to the qualified person and the detail and explanation contained there, cannot agree with the complainant that the omission can be extrapolated to his conclusion as set out below:

“This merely confirms my suspicion that Parliament was misled and officials with responsibility for that do not want that brought to the attention of the Minister....this indicates to me that relevant information has been withheld from the Minister, and essentially, he wasn’t passing an opinion, but signing off on essentially ‘spin’ of officials.”

26. The Commissioner would point out that a public authority is entitled to change its reliance on exemptions during its consideration of a request.⁶

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

⁶ While section 17(1) was breached by the late engagement of section 36, that late application does not in itself invalidate the application of the exemption.

Having considered section 35 BEIS was at liberty to finally rely on section 36.

27. The Commissioner therefore considers that the scope of his investigation is to determine whether DBT has appropriately applied the exemptions at section 36, 42 and 40 to continue to withhold the remaining information it holds in the scope of the request.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

28. Section 36(2) of FOIA states:

“(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,

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

29. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person’s opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.
30. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.
31. As a result of the complainant’s metadata request disclosure, referenced at paragraph 22, the complainant expressed concern:

"...what I received doesn't give me comfort that the Minister as the "qualified person" did a) consider the information being placed under s36 b) conduct the public interest test and the s36 test separately as required.

...Clearly, if the Minister isn't looking at the annex, then the Minister isn't considering the specific information he is giving an opinion on.

Further, this extract makes clear that the public interest test isn't being considered according to ICO guidance, as the two tests are conflated to reach the desired conclusion."

32. The Commissioner understands that the complainant interpreted comments in the information⁷ provided to him as confirming that the qualified person did not consider the withheld information and did not consider the application of section 36 and the public interest test separately. The Commissioner does not agree that this can be concluded from the comments made. It is not a requirement for the qualified person to read through all the withheld information in order to reach a reasonable opinion. Having seen the information and the submission to the qualified person the Commissioner does not consider it to have been necessary for all the content to have been scrutinised by the qualified person. The submission to the qualified person is sufficiently detailed to provide understanding of the information and the wider issues concerned to enable a reasonable opinion to be reached.
33. As set out in paragraph 47 below there is no requirement for the qualified person to conduct a public interest test although he may wish to consider it. The qualified person takes a decision on the application of the exemptions contained in section 36 and the level of prejudice attributed. As DBT provided the complainant with the submission prepared for the qualified person they can see that there is no consideration of the public interest contained there.
34. DBT advised the Commissioner that the qualified person in this instance is Lord Callanan who was Parliamentary Under Secretary of State at BEIS from 14 February 2020 to 7 February 2023⁸, and was the BEIS

⁷ The comments highlighted being: "I would not want the Minister to need to look at the annex to have to take a decision." And "...the qualified person's opinion is separate from the public interest test, in reality I think we're doing both steps at once here – because in the Minister's eye, he will be taking the decision on whether to disclose or exempt."

⁸ Lord Callanan was appointed Parliamentary Under Secretary of State (Minister for Energy Efficiency and Green Finance) at the Department for Energy Security and Net Zero on 7 February 2023.

Minister with responsibility for the UK's company law framework at the time of the request.

35. The Commissioner is satisfied that, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA.
36. DBT explained that the submission to the qualified person, dated 7 October 2021, sought the Minister's approval for the use of FOIA section 36(2)(b)(i) and (ii) to withhold the information in scope of the request which comprised email exchanges within BEIS, and between BEIS and the ICAEW and (separately) the Financial Reporting Council (FRC) and a briefing for BEIS ministers and senior officials. Lord Callanan approved the application of section 36(2)(b) on 13 October 2021. DBT confirmed that the Minister was provided with the information and the Commissioner has seen the submission to him and his response. The Commissioner is satisfied that, as a BEIS Minister at the time, Lord Callanan meets the definition of a qualified person set out by section 36(5) of FOIA.
37. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person could hold and not whether it is the most reasonable opinion. As stated, the critical issue is that the arguments being advanced by the qualified person not only link to the factors described in the exemption but also relate to the information to which the exemption has been applied.
38. In seeking the advice of the qualified person, BEIS prepared submissions which quoted the request, provided some context to the requested information, explained the operation of the exemptions cited and gave recommendations that supported the application of the exemptions to the different categories of information and suggesting that the prejudice described would be likely to occur. By agreeing to the application of the exemptions, the qualified person effectively supported the arguments included in the submissions, including the acceptance that the prejudice described in sections 36(2)(b)(i) & (ii) would occur through disclosure. The "would" level of prejudice means that it is more likely than not (i.e. a more than 50% chance) that prejudice would occur.
39. The Commissioner notes that these exemptions are about the processes which would or would be likely to be inhibited, rather than the specific content of the information. He considers that the issue is whether disclosure would or would be likely to inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank.

40. The submission explains which of the two limbs applies to the different categories of information held, for example emails within BEIS on capital maintenance policy or emails covering parliamentary questions, and the reasoning for that application.
41. BEIS explained that there are three categories of information held. Emails within BEIS and between BEIS and ICAEW and the FRC on capital maintenance policy; emails within BEIS and between BEIS and the FRC covering parliamentary questions ("PQ") and thirdly briefing and advice provided to BEIS Ministers, Permanent Secretary and Business Framework Director at the time.
42. The first category is withheld under section 36(2)(b)(ii) as the emails show exchanges of views between BEIS officials and the ICAEW and the FRC on the operation of UK's capital maintenance regime and the content of material to be published. BEIS considered that disclosure of this information would inhibit the ICAEW from engaging freely with BEIS on similar preliminary discussions and publication initiatives in the future. The Commissioner notes the explanation and reasoning of this inhibition, included in the submission, to demonstrate this concern.
43. The second category of information is withheld under both limbs of section 36(2)(b)(i) & (ii). The exchanges include views about the UK's capital maintenance regime and the role of the ICAEW guidance as part of developing an approach to PQ' answers. BEIS considered that disclosure of this information would inhibit BEIS and the FRC from engaging freely on similar discussions on how best to answer questions in the future. The Commissioner would point out that he is considering the circumstances at the time of the request, when BEIS was a department, and although BEIS no longer exists such arguments can be applied to any successor department. BEIS added that disclosure of preparatory advice and options regarding PQs would undermine the right and duty of Ministers to decide on and present the definitive answer to PQ for the public record.
44. The third category comprises the briefings and advice provided to former BEIS Ministers, Permanent Secretary and Business Framework Director and is being withheld under both limbs of section 32(2)(b). BEIS considered that disclosure would similarly inhibit future exchanges with the ICAEW and "hamper policy officials in the future from providing free and frank advice to senior officials."
45. The Commissioner is satisfied that the arguments presented are ones that relate to the activities described by the exemptions cited. He also considers the opinion that disclosure of the information would result in the prejudice being claimed, to be one that a reasonable person could hold. He has therefore found that sections 36(2)(b)(i) and (ii) are engaged.

Public interest test

46. Section 36 is a qualified exemption, which means that, even when the qualified person has given their opinion that the exemption is engaged, the public authority must still carry out a public interest test. The purpose of the public interest test is to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The public interest test is separate from the qualified person's opinion. The qualified person need not carry out the public interest test themselves, but may do so.
47. The Commissioner's guidance explains that the qualified person's opinion will affect the consideration of the arguments for withholding the information, and appropriate weight should be given to their opinion that the prejudice or inhibition would or would be likely to occur. The weight attached to the qualified person's opinion will be greater if they have decided that disclosure 'would' prejudice or inhibit, as in this case, rather than if they have concluded that disclosure 'would be likely' to prejudice or inhibit.
48. Notwithstanding this the Information Tribunal in *Guardian Newspapers Ltd and Brooke v Information Commissioner & BBC*⁹ (EA/2006/0011 and EA/2006/0013, 8 January 2007) said at paragraph 92:

"However, in order to form the balancing judgment required by s2(2)(b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which inhibition of the free and frank exchange of views for the purposes of deliberation will or may occur."

The complainant's view

49. The complainant's request for internal review detailed their view on the balance of the public interest as follows:

"It is clearly in the public interest to determine whether BEIS officials and ministers have been challenging the ICAEW position properly (as Parliament has) rather than protecting it or being taken in, being bamboozled essentially.

The ICAEW is a lobbyist for its members who are audit firms. It cannot be in the public interest for "secret law" to be made by the ICAEW. The

⁹ <https://informationrights.decisions.tribunals.gov.uk/Public/search.aspx>

ICAEW has lost most of its regulatory powers over the last two decades.”

The public authority’s view

50. At the time of the Commissioner’s investigation DBT reviewed its response to the complainant. It determined that there was not an over-riding public interest in continuing to withhold most of the information in the first category, as set out above at paragraph 43, between BEIS and the ICAEW and the FRC. DBT therefore disclosed this information on 7 July 2023.

51. DBT advised the Commissioner that it recognised that:

“...there is a public interest in understanding how policy is developed within Government departments, and the interest of some external stakeholders in this particular issue.”

52. DBT went on to explain:

“we believe that there is a stronger public interest in officials being able to assess possible new policy options from first principles, involving the widest range of possible reform, without the consideration that any exchanges, no matter how frank, could be made public.”

53. DBT explained that it is important for Ministers to have access to free and frank advice from officials and from relevant expert partner bodies before deciding how to respond to PQs. It considers that inhibiting both Departmental officials and the FRC from engaging freely could undermine the quality and reliability of advice on PQ answers for ministerial consideration and ultimately the quality of the PQ answers to Parliament. It advised:

“We believe that the public interest in understanding how PQ answers are considered and drafted is outweighed by the public interest in Ministerial answers to Parliament being authoritative and well-informed after having been assembled in a private space in which options on possible answers can be considered openly as part of the free and frank exchange of views.”

54. With respect to the third category of information DBT acknowledged the public interest in how the public positions, which Ministers and senior officials communicate to Parliament and stakeholders, are developed. However, it added:

“Officials involved in ongoing briefing on these and other issues in the department would be made aware that this previous briefing had been disclosed and would, we believe, take this disclosure into account when preparing future briefing.”

55. The Commissioner asked DBT to comment on the issues raised by the complainant regarding the ICAEW guidance with respect to the public interest. DBT explained that it does not agree with the complainant's characterisations of the ICAEW or its guidance on distributable profits. It explained:

"There are arguably some differences between the guidance and UK company law which arise from the fact that, while the guidance seeks to define what is meant by "accumulated realised profits, from which any dividends or other distributions must be made, the Companies Act 2006 simply says that "accumulated realised profits" should be determined based on accounting principles generally accepted at the time, which most UK companies take to mean the ICAEW guidance.

The Government does not accept that this gives rise to significant issues with the guidance that over-ride the public interest in withholding from disclosure information that would inhibit the free and frank exchange of views and provision of advice."

The Commissioner's view

56. The Commissioner considers that there is always public interest in government departments operating in an open and accountable manner. He believes that greater transparency leads to better public understanding of particular issues and enables the public to participate in the decision making process where possible. It therefore follows that transparency of government departments' actions must carry weight when balancing the public interest.
57. The Commissioner has considered the complainant's comments and understands that their interest and concern regarding the issue is substantial and has been on-going for a number of years. The detailed scrutiny applied by them to all the constituent issues surrounding the request demonstrates the complainant's efforts in pursuing and challenging the use of the ICAEW guidance, including accusations of Parliament being misled. The Commissioner consequently has no doubt that the complainant is convinced that there is an overwhelming public interest in disclosure of the requested information and has made a strong case for doing so.
58. The Commissioner considers that DBT has also made a strong case in favour of withholding the requested information. He accepts that disclosure of the withheld communications concerning possible options to reform the UK's capital maintenance regime would result in inhibiting free and frank exchange of views which would not serve the public interest. He accepts that a forthright exchange of views is important to achieve well-considered policy.

59. The Commissioner understands the importance of ministers having access to free and frank advice and views before deciding on responses to PQs. He considers that the preparation of advice should not be inhibited or undermined to the detriment of the public interest in providing the most well-informed answers to Parliament.
60. The Commissioner notes that civil servants are expected to be robust in meeting their responsibilities and not easily deterred from expressing their views or sharing information by the possibility of future disclosure of information. Nevertheless he accepts that civil servants providing briefings to ministers, be that in preparation for select committees or in response to PQs, may be more guarded in their briefings. Such inhibition or reluctance to engage would not assist with successful interaction allowing for the fullest briefing of ministers.
61. The Commissioner is aware that DBT continues to engage in the matters set out in the background section of this notice. The information already in the public domain and the continued discussion of audit reform and the issue of capital maintenance and distributable profits, as referenced in paragraph 10 above, assists in serving the public interest.
62. After careful consideration the Commissioner has found the public interest for both limbs of section 36(2)(b) to be finely balanced in this case. However, he has focussed on the withheld information and the potential benefit to the general public of disclosure. In doing so he has determined that, by a narrow margin, the public interest is best served by maintaining the exemption.

Section 42 – Legal professional privilege

63. 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.”

64. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting legal professional privilege (“LPP”) for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.
65. There are two types of LPP; advice privilege and litigation privilege. The Commissioner’s view is that for legal professional privilege to apply, the information must have been created or brought together for the dominant purpose of litigation, or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant

purpose of seeking or providing legal advice. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.

66. DBT confirmed that it had used section 42 to withhold information on the basis of legal advice privilege.
67. DBT advised that it was satisfied that privilege had not been lost as the content of the withheld material comprises communications between the client and lawyers for the sole purpose of providing legal advice in a professional capacity. DBT confirmed that this advice had not been made available to the public or shared more widely.
68. The Commissioner has viewed the information which comprises primarily of advice from BEIS Legal (part of the Government Legal Department) to BEIS officials regarding the preparation of advice on PQs. The information sent by email is clearly identified as sent from lawyers to clients.
69. The Commissioner accepts that the withheld information represents the legal advice provided to BEIS by its in-house lawyers and therefore legal advice privilege is attached. The Commissioner is therefore satisfied that section 42(1) is engaged.

The public interest

70. Section 42(1) is a qualified exemption and therefore the Commissioner must consider the public interest and whether, in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
71. DBT acknowledged the public interest in understanding how legal advice contributes to the preparation of PQs and matters of policy development. It also identified a general public interest in transparency making government more accountable thereby increasing trust.
72. It advised the Commissioner that it considers that the public interest in government lawyers providing officials and Ministers with advice on the preparation of PQ answers and policy development carries greater weight. It explained that disclosure would compromise the ability of DBT to assess the legal implications of different courses of action.
73. The complainant has not specifically raised any points with the Commissioner regarding the public interest in this exemption. However, the Commissioner notes their request for internal review and the comments made there. The complainant referenced the Commissioner's guidance on exemptions regarding evidence of wrongdoing and its impact on the public interest. They quote:

"If there is a plausible suspicion of wrongdoing on the part of the public authority, this may create a public interest in disclosure. And even where this is not the case, there is a public interest in releasing information to provide a full picture.

...Even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin'."

74. The complainant's opinion is that the above consideration is the circumstance in this case. They stated:

"I believe that this threshold has been met by a considerable margin. I would include in that assessment the inconsistent and incorrect information given to Parliament for which the ICAEW is a central party.

The BEIS Select Committee concluded that the ICAEW was not following the law because it disagreed with it. The Committee was also clear that it saw the law as sound and did not wish for the law to be changed to suit the ICAEW position."

The complainant goes on to advise that "regulatory actors", such as the FRC, not complying with the law, only need to be:

"...running with a system that carries a risk of non-performance with the law for that system to be illegal....The conclusions of the BEIS Select Committee report do seem to point in that direction and nothing has been done to fix it.

I believe a reasonable person would regard that as a very serious wrongdoing, and that the role of the ICAEW in any policy making or advice giving thereafter is a significant matter as is the position of BEIS legal advice in the light of that."

Balance of the public interest

75. The inherent public interest in maintaining the exemption provided at section 42 lies in protecting the confidentiality of communications between client and lawyer. The Commissioner has considered whether disclosure of this information would undermine this confidentiality, leading to future legal advice being guarded or generic.
76. The Commissioner notes the principle of LPP is a long standing, fundamental principle of English law. The principle exists to ensure that a legal person, including a Secretary of State (incorporating their government department), may obtain legal advice in confidence.

77. There is, therefore, a strong public interest in maintaining the exemption due to the importance of this principle in safeguarding candidness in all communications between client and lawyer to ensure full and frank legal advice which in turn is fundamental to the administration of justice.
78. The Commissioner acknowledges the complainant's argument that there is a strong public interest in ensuring that public authorities are transparent in their actions. He also notes that the complainant is passionate in their pursuit of matters involving the ICAEW and its guidance on distributable profits and the consequences, which they see as a result of the ICAEW "acting against the position of the law".
79. In addition to the complainant's personal position the Commissioner understands there to be a clear public interest in achieving and understanding a clear, settled position on distributable profits.
80. The Commissioner is not satisfied that he has been provided with evidence or plausible suspicion of 'wrongdoing' on behalf of DBT which could weigh sufficiently to overturn the inherent public interest in protecting the confidentiality of communications between clients and lawyers. The findings of the BEIS Select Committee referenced by the complainant do not conclude wrongdoing on behalf of BEIS (or DBT).
81. The Commissioner has viewed the limited withheld information and does not consider that disclosure would significantly further the public's understanding of the issues concerned, beyond the information already in the public domain and disclosed in response to this request.
82. In reaching his decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to LPP. He has also had regard to the content of the withheld information.
83. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of LPP is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.
84. In all the circumstances of this case, however, the Commissioner is not satisfied, from the evidence he has seen, that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.
85. The Commissioner has therefore concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure.

Section 40- Personal information

86. Section 40(2) of FOIA states that information is exempt information if it is the personal data of another individual and disclosure would contravene a data protection principle.
87. DBT advised that it redacted names and contact details of the more junior employees, that is those with less seniority/responsibility and employees of external organisations. Members of BEIS Senior Civil Service names were disclosed.
88. The Commissioner is satisfied that the names, contact details and job roles of the junior employees, as contained in the withheld information, constitutes their personal data. The information relates to and identifies individuals.
89. The Commissioner is also satisfied that, at the time of the request, disclosure of the names, contact details and job roles of the junior employees in this case would breach data protection principles¹⁰.
90. The Commissioner's guidance¹¹ accepts that the names of junior employees are usually withheld from FOIA disclosures. The Commissioner notes that there is nothing about the circumstances of this case to merit taking a different approach. Junior employees therefore have a reasonable expectation that their names and/or job roles will not be made public in response to FOIA requests, even though it might be more standard practice to disclose the names and job roles of senior employees.
91. In this case, as explained in paragraph 15, DBT changed its initial position at internal review and determined to disclose email address suffixes which enabled the identification of the organisations concerned. This allowed the complainant to identify the organisations and department as sender or recipient which the Commissioner considers weakens any case for disclosure of the email prefixes.
92. The Commissioner has considered the redaction of the employees of external organisations in the information provided to the complainant and notes that they hold senior positions in their respective organisations.

¹⁰ <https://ico.org.uk/media/for-organisations/documents/2619056/s40-personal-information-section-40-regulation-13.pdf>

¹¹ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

93. In accordance with his guidance at page 21; "Representatives of other organisations" he considers that it would not breach the data protection principles in this case to release the names of these individuals. The names and the context in which they appear are such that the legitimate interests (whether a legitimate interest is being pursued in the request for information) and necessity (whether disclosure of the information is necessary to meet the legitimate interest in question) tests are met. In balancing the legitimate interests in disclosure against the impact of disclosure on the data subjects concerned, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed.
94. The Commissioner notes that these senior post holders' names are already in the public domain in the context of their work. They should have a reasonable expectation that their names could be disclosed. The Commissioner does not, therefore, consider that disclosure of the withheld information is likely to cause any significant distress to the individuals in question. He therefore considers disclosure to be fair.
95. The Commissioner has therefore determined that DBT was not correct to apply section 40(2) to these names. The names to be disclosed are set out in the confidential annex attached to this notice.

Right of appeal

96. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

97. 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.

98. 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

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF