

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 September 2023

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

Decision (including any steps ordered)

1. The complainant has requested information on ministerial briefings regarding the Labour Party's pledge to introduce sectoral collective bargaining if it had formed a government following the 2017 General Election. DBT refused the request relying on the exemption at FOIA section 36(2)(b)(i) – Prejudice to the effective conduct of public affairs.
2. The Commissioner's decision is that the section 36(2)(b)(i) exemption is engaged but the balance of the public interest favours disclosure.
3. The Commissioner requires DBT to take the following steps to ensure compliance with the legislation.
 - Disclose the information which falls within the scope of the request, as described in the confidential annex to this notice.
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 7 March 2022, the complainant wrote to the Department for Business, Energy and Industrial Strategy ("BEIS")¹ and requested information in the following terms:

"When the 2017 General election was called, civil servants in BEIS would have prepared briefing papers and slides regarding the manifesto pledges of the various parties; these to be given to incoming Ministers from the winning party or parties.

Therefore, given the possibility that the Labour party would form the government, civil servants in BEIS would have produced ministerial briefings on the Labour Party's pledge to introduce on Sectoral collective bargaining.

Therefore, I would like a copy please of the briefing material intended to be given to incoming Ministers from the Labour Party regarding sectoral collective bargaining."

6. DBT responded on 11 July 2022. It stated that it held information in the scope of the request but was relying on section 35(1)(b) to refuse the request.
7. The complainant requested an internal review on the same day (11 July 2022), challenging the exemption. They cited the Commissioner's guidance and explained their view that:

"...given the Labour Party did not form a government, the exemption cannot apply as the purpose of section 35(1)(b) is to protect the operation of government at ministerial level. It cannot be stretched to cover a possible government.

This conflating of the term Minister with a possible Minister is found in the public interest analysis in the 11 July letter. ... The department must accept that the requested information has nothing to do with actual Ministers sharing views."

¹ 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.

8. The complainant contacted BEIS on 11 August 2022 as it had not provided an internal review.

Scope of the case

9. The complainant contacted the Commissioner on 15 August 2022 to complain about the way their request for information had been handled.
10. On 18 August 2022 the Commissioner explained to the complainant that he considers a reasonable time for the provision of an internal review in most cases is 20 working days from the date of the request. However for complex requests he accepts that up to 40 working days is a reasonable timeframe. In this case that date would be 6 September 2022.
11. On 7 September 2022 the complainant contacted the Commissioner to advise him that they were still waiting for an internal review.
12. On 7 September 2022 the Commissioner wrote to BEIS reminding it of its responsibilities in this respect and asking for the internal review to be provided within 10 working days, by 21 September 2022.
13. On 22 September 2022 the complainant contacted the Commissioner and explained that they had not received an internal review nor any correspondence providing an explanation for the delay.
14. The Commissioner wrote to BEIS on 22 September 2022 advising that he had accepted the complaint for substantive investigation without an internal review, that it would be allocated in due course and he expected BEIS to use the time prior to allocation to ensure that it was ready to respond to his investigation.
15. On 29 March 2023 the Commissioner wrote to DBT asking for the withheld information and submissions on the application of the exemption at section 35(1)(b).
16. On 9 June 2023 DBT contacted the Commissioner and explained that it had decided that FOIA section 35(1)(b) was not applicable and it was considering reliance on section 36(2)(b)(i) – prejudice to the effective conduct of public affairs. DBT explained that it would be seeking a Minister's agreement on the engagement of the exemption following which the complainant would be contacted regarding the new exemption.
17. On 13 July 2023 the Commissioner served an information notice on DBT as he was still waiting to be provided with the withheld information and submissions.

18. On 2 August 2023 DBT wrote to the complainant with, in effect, an internal review now relying on section 36(2)(b)(i). At the same time DBT provided submissions to the Commissioner.
19. The Commissioner considers that the scope of his investigation is to consider the application of FOIA section 36(2)(b)(i) to withhold the information.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

20. 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,

21. 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.
22. 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.
23. DBT advised the Commissioner that the qualified person in this instance is Kevin Hollinrake MP who was appointed Parliamentary Under Secretary of State at the Department for Business and Trade on 7 February 2023. He was previously Parliamentary Under Secretary of State at the Department for Business, Energy and Industrial Strategy between 27 October 2022 and 7 February 2023.
24. The Commissioner is satisfied that, as a Minister in DBT, the person consulted about the application of section 36 meets the definition of a qualified person set out by section 36(5) of FOIA.

25. DBT explained that the submission to the qualified person, dated 14 July 2023, sought the Minister's approval for the use of FOIA section 36(2)(b)(i) to withhold information relating to briefing material prepared in advance of the 2017 General Election for potential incoming Labour Party ministers.
26. 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 arguments being advanced by the qualified person should not only link to the factors described in the exemption but also relate to the information to which the exemption has been applied.
27. In seeking the advice of the qualified person, DBT prepared submissions which quoted the request, provided some context to the requested information, explained the operation of the exemption cited and gave recommendations that supported the application of the exemption.
28. By agreeing to the application of the exemption, the qualified person effectively supported the arguments included in the submissions, including the acceptance that the prejudice described in section 36(2)(b)(i) would occur through disclosure. The "would" level of prejudice means it is more likely than not (i.e. a more than 50% chance) that prejudice would occur.
29. The Commissioner notes that the section 36(2)(b) exemptions are about the processes which would, or would be likely to, be inhibited, rather than simply 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 advice or views that are in themselves notably free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views.
30. DBT explained:

"We consider that the release of the material would inhibit the free and frank provision of advice. Releasing advice intended for incoming Labour Ministers (should they have won the 2017 General Election) would inhibit officials' ability to prepare and provide free and frank advice for incoming Ministers in future."
31. Following receipt of DBT's letter of 2 August 2023, which explained the change in reliance from section 35 to section 36, the complainant made the following points to the Commissioner:

"I don't believe that the decision is reasonable given the circumstances. Firstly the information requested does not concern an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice. We are dealing with matters over six years old concerning advice on a specific issue that is not controversial or indeed topical.

We are dealing here with a non-live issue concerning advice that was never considered by a real Minister. If the advice was given to me then it would have no prejudicial effect whatsoever."

32. The Commissioner understands the complainant's comments due to the age of the information and the fact that the advice was not used because a Conservative government was formed following the 2017 General Election. However, as set out above at paragraph 29, the engagement of this exemption essentially relates to a process rather than simply the content of the information itself. The Commissioner must consider whether he agrees that the qualified person's opinion is one which a reasonable person could hold.
33. The Commissioner is satisfied that the brief arguments presented in the submission to the qualified person, and in submissions to the Commissioner, are ones that relate to the activities described by the exemption cited. The Commissioner has considered the level of likelihood of prejudice attributed by the qualified person. He is not convinced that the threshold of 'would' prejudice has been evidenced in the circumstances of this case. He notes that the withheld information dates back to 2017 and was not required at the time. In this circumstance, and having viewed the content of the information, he is not satisfied that disclosure 'would' inhibit the processes of providing advice. His view is that the lower threshold of 'would be likely to' prejudice has been met as there is a real chance of prejudice occurring. He therefore accepts that the qualified person's opinion is reasonable in respect of the lower threshold.

Public interest test

34. 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.

35. The Commissioner's guidance explains that the qualified person's opinion will nevertheless affect the consideration of the arguments for maintaining the exemption, and appropriate weight should be given to their opinion that the prejudice or inhibition would or would be likely to occur. The Commissioner, having accepted that prejudice would be likely to occur, will attach the appropriate weight in his considerations.
36. The Commissioner will go on to consider the severity, extent and frequency of prejudice or inhibition in forming his own assessment of whether the public interest test favours disclosure.

The public authority's view

37. DBT acknowledged that there is a public interest in greater transparency assisting the understanding of how potential incoming ministers are briefed following an election.
38. Balanced against this DBT considered:

"However, it is important that civil servants have a safe space to be able to prepare for the arrival of new Ministers from whichever political party is successful at an election and to provide free and frank advice for such Ministers."

The balance of the public interest

39. The Commissioner considers that there is always a public interest in government departments operating in an open and accountable manner. He believes that greater transparency generally leads to better public understanding of particular issues and enables the public to assist in the decision making process where possible. It therefore follows that transparency of government departments' actions must be afforded weight when balancing the public interest.
40. The Commissioner understands the importance of in-coming ministers having access to free and frank advice from civil servants. He considers that the preparation of advice should not be inhibited or undermined to the detriment of the public interest in preparing ministers for their roles.
41. However, the Commissioner notes that civil servants are expected to be robust in meeting their responsibilities and not easily deterred from providing advice or sharing information by the possibility of future disclosure of information.
42. In this case the Commissioner has seen the withheld information in scope of the request, which is included in a larger briefing document. The advice is not attributed to any particular civil servant and no names appear within the relevant information or the document as a whole.

43. The Commissioner does not consider there to be strong public interest arguments in favour of maintaining the exemption in this particular case. The age, current relevance and actual nature of the withheld information do not support maintaining the exemption. The Commissioner therefore considers that, by virtue of the arguments in favour of maintaining the exemption being weak, there is a stronger public interest in disclosure for transparency of government and understanding of how the Labour Party's manifesto was considered by civil servants.
44. The Commissioner agrees that civil servants should not be deterred from providing the most thorough advice possible without inhibition or distraction. However, he must also consider this request in the specific circumstances of this case. Disclosure of advice which is current or relevant to an elected government is a different circumstance to disclosure in this case. He is not convinced that DBT's 'safe space' statement applied to the creation of future briefings carries significant weight in favour of maintaining the exemption in the circumstances of this case.
45. In reaching his conclusions the Commissioner has taken into account the specific nature of the withheld information in terms of the free and frank provision of advice, on which he will expand in the confidential annex. Although the Commissioner accepted, at paragraph 33, that 'would be likely to' prejudice is a reasonable opinion in the circumstances of this case, he does not consider it to be sufficiently weighty to tip the balance of the public interest in favour of maintaining the exemption given his assessment of the withheld information and its context.
46. The Commissioner does not consider that DBT has made a sufficiently compelling case to withhold the requested information. He therefore finds that the balance of the public interest favours disclosure of the requested information.

Procedural matters

Section 17(1) & 17(3)

47. Section 1(1) of FOIA provides that any person making a request for information to a public authority is entitled, subject to the application of any exemptions:
 - “(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.”

48. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
49. Where a public authority is seeking to rely on a qualified exemption it must notify the requester of this within 20 working days.
50. Under section 17(3) a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest. In the Commissioner's view² it should take no more than an additional 20 working days to consider the public interest, unless there are exceptional circumstances.
51. Any public authority claiming an extension will still be obliged to issue a refusal notice explaining which exemption applies and why, within 20 working days. The notice must explain that it requires more time to consider the public interest test, and provide an estimate of the date on which a final decision is likely to be made.
52. In this case the complainant wrote to BEIS on 7 March 2022 to request information. BEIS acknowledged receipt of his request on 8 March 2021. The complainant chased their response on 6 May 2023. BEIS did not write to the requester to claim an extension of time. A refusal notice was issued on 11 July 2022 after 87 days.
53. The Commissioner considers that taking 87 days to substantively respond is unreasonable as there are no exceptional circumstances to justify this in this case. He notes that the complainant was not notified until then of the exemption relied on or about extra time to consider the public interest. He therefore considers that the DBT has breached section 17(1) for failing to notify the requester within 20 working days that it wished to rely on a qualified exemption and section 17(3) of FOIA in taking an excessive length of time to carry out the public interest test.

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/time-limits-for-compliance-under-the-freedom-of-information-act-section-10/>

Other matters

54. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice³ explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
55. The complainant asked for an internal review of the outcome of his request on 11 July 2022. DBT did not provide a response until 2 August 2023, over 12 calendar months later, which was as a result of the Commissioner's investigation. Clearly the Commissioner finds this length of time to be unacceptable.

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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

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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

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