

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2023

Public Authority: Police Federation of England and Wales

Address: Federation House
Highbury Drive
Leatherhead
Surrey
KT22 7UY

Decision (including any steps ordered)

1. The complainant has requested the most recent minutes of meetings for the Police Federation of England and Wales (the PFEW) National Board and Conduct and Performance Sub-committee. The PFEW refused the request, citing sections 36(2)(b)(i) and (ii) (Prejudice to effective conduct of public affairs) of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the PFEW was entitled to rely on sections 36(2)(b)(i) and (ii) to refuse the request. However, the PFEW breached section 17 of FOIA as it failed to provide an adequate refusal notice which included its Public Interest Test (PIT) and details of the qualified person's opinion.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 10 May 2023 the complainant requested information from the PFEW in the following terms:-

"Please accept this request under the Freedom of Information Act. I'm seeking:

- The most recently available minutes of the PFEW National Board.
 - The most recently available minutes of the PFEW conduct and performance subcommittee."
5. The PFEW responded to the complainant on 8 June 2023, stating that it was applying section 36(2)(b)(i) and (ii) of FOIA as a basis for refusing to disclose the requested information.
6. In its undated internal review response to the complainant the PFEW upheld its original decision. No arguments for the PIT or qualified persons opinion were given. It was mentioned that in light of its finding's consideration will be given into how minutes are prepared going forward.

Scope of the case

7. The complainant contacted the Commissioner on 6 July 2023 to complain about how their FOIA request had been handled.
8. The Commissioner has considered the PFEW's handling of the complainant's request, in particular its application of the exemption at sections 36(2)(b)(i) and (ii).

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

9. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person ('QP'), disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
10. The PFEW has applied sections 36(2)(b)(i) and (ii) to withhold the requested information in its entirety. Arguments under the first two sections are usually based on the concept of 'safe space' and a 'chilling effect'. These arguments are that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.

11. The Commissioner's guidance on section 36¹ states that information may be exempt under sections 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly, and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation.
12. The PFEW provided the Commissioner with a copy of its section 36(2)(b)(i) and (ii) arguments along with the QP's opinion.
13. The Commissioner is satisfied that the PFEW's then COO and DPO is authorised as the qualified person under section 36(5) of FOIA and that he gave the opinion that the exemption was engaged on the basis that it is critically important that senior officers can freely and frankly ask for and receive advice, freely and frankly exchange views, and generally effectively conduct and manage the PFEW's affairs. This is only achievable, according to the QP, if the information held by the PFEW relating to these meetings remains confidential, otherwise the objectives of section 36 of FOIA would be seriously undermined and harmed.
14. In determining whether the exemption is engaged, the Commissioner must, nevertheless, consider whether the QP's opinion was a reasonable one.
15. 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 QP'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 QP's position could hold. The QP's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
16. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focusing only on the content of the information.
17. With regard to the limbs of section 36(2)(b), the issue is whether disclosure would inhibit the processes of providing advice or exchanging

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

views. In order to engage the exemption, the information itself does not necessarily have to contain views and advice that are in themselves 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.

18. Therefore, although it may be harder to engage the exemptions if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order not to inhibit the free and frank provision of advice and the free and frank exchange of views. This will depend on the facts of each case.
19. With regard to section 36(2)(c), the Commissioner's guidance states: "..., the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)".
20. The PFEW has argued that disclosure would be prejudicial to the effective conduct of public affairs. The purpose of this exemption is to carve out a safe and confidential space for public authorities to think, discuss and evaluate, to request and receive advice, and to deliberate. In a local authority context, this is particularly important in respect of senior officers and especially in respect of issues of strategic importance and high-level policy discussions. It ensures the most effective use of the PFEW's limited resources and ensures that policy and other decision-making proposals are properly informed.
21. The PFEW states that it also ensures that it is not denied the legitimate space that it needs to privately consider the possible options and the potential advantages and disadvantages and to speak freely. This is essential in ensuring that the potential benefits are not lost or diminished and that a co-ordinated approach is taken to achieve the most effective management and conduct of PFEW business and its other affairs. Essential to safeguarding the effective conduct of the PFEW's affairs is the inherent and operational confidential nature of the National Board and Conduct and Performance Sub-committee. Release of the information requested would clearly and demonstrably harm the interests protected by s36(2)(b)(i) and (ii) and (c).
22. The Commissioner is satisfied that sections 36(2)(b) and (i) are engaged in relation to the withheld information.
23. As section 36 is a qualified exemption, the Commissioner has gone on to consider the public interest.

24. The public interest test is set out in section 2(2) of FOIA, and the Commissioner has considered the arguments both in favour of maintaining the exemption and disclosing the requested information.

Public interest test

25. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has taken account of the age of the requested information and that the National Board and Conduct and Performance Sub-committee afford the PFEW's senior officers the space and confidentiality to think, discuss and evaluate issues of strategic importance and conduct high level policy discussions in a free and frank manner.
26. This process is vital for the operation of the PFEW, so that senior officers can freely and frankly ask for and receive advice, exchange views and generally effectively conduct and manage the PFEW's affairs. This not only supports the internal and formal decision-making processes of the PFEW but ensures that decisions made that directly affect members are properly considered, receive appropriate advice, and are thoroughly debated. This is necessary to support the legal and constitutional framework within which the PFEW operates, to carry out its statutory functions. This is vital for the good governance and operation of the PFEW as a whole.
27. The Commissioner considers the public interest in good decision-making by the PFEW to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency, and greater public understanding of the PFEW's decision-making processes would be served if the information was disclosed, on balance, he finds the public interest in protecting the PFEW's space to discuss high level matters and make important decisions regarding all aspects of how the PFEW operates to be the stronger argument.
28. Consequently, he is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that the PFEW was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to refuse the request.

Other matters

29. The Commissioner wrote to the PFEW to seek its submissions regarding the complaint on 21 August 2023. The PFEW requested an extension for its response until 20 September 2023 but did not respond to the Commissioner until 29 September 2023, after a chaser to respond was sent.

30. While the PFEW did tell the complainant it had considered the public interest test (PIT), it failed to provide its arguments or information regarding whether the opinion of the QP had been sought or considered.

Procedural Requirements

31. The Commissioner considers that the PFEW breached section 17 of FOIA by failing to convey its PIT arguments to the complainant within its response.
32. The Commissioner seeks to remind the PFEW of its obligations under FOIA and the necessity of engaging with the Commissioner in a prompt and timely manner in order to ensure the efficient and thorough consideration of all FOIA complaints.

Right of appeal

33. 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

34. 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.
35. 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

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