

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2024

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested a copy of an advice document relating to pension rules from the Cabinet Office. The Cabinet Office refused the request on the basis that section 36(2)(b)(i) and 36(2)(c) of FOIA applied (Effective conduct of public affairs).
2. The Commissioner's decision is that the Cabinet Office was correct to apply the exemptions cited to withhold the information from disclosure.
3. The Commissioner does not require further steps.

Request and response

4. On 3 June 2022, the complainant wrote to the Cabinet Office and requested information in the following terms:

“Please could you send me a copy of SCUD 40, which was issued by the Cabinet Office to Civil Service Pensions in 2018?”
5. The Cabinet Office responded on 28 July 2022. It refused to provide the requested information citing sections 36(2)(b)(i) and 36(2)(c) of FOIA.
6. Following an internal review, the Cabinet Office wrote to the complainant on 12 September 2022. It upheld its previous decision.

Scope of the case

7. The complainant contacted the Commissioner on 30 September 2022 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether the Cabinet Office was correct to withhold the requested information under the exemptions it has cited.

Reasons for decision

9. The request was for a copy of a specific Scheme Compliance Unit Directives, (a 'SCUD'). The Cabinet Office clarified that SCUDS are created by MyCSP and are issued to its staff as guidance for administering the scheme. They are not created or distributed by the Cabinet Office.
10. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
11. The Cabinet Office applied sections 36(2)(b)(i) and 36(2)(c) to withhold the information.
 - Information may be exempt under sections 36(2)(b)(i) if its disclosure would, or would be likely to inhibit the free and frank provision of advice.
 - Section 36(2)(c) may be applied where, in the opinion of the qualified person, a disclosure of the requested information would

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

12. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner must therefore a) determine whether a qualified person provided their opinion that the specified subsections of section 36 apply, and b) whether that opinion was reasonable. If the exemption is engaged, then a public interest test must also be carried out.

Was a qualified person's opinion sought

13. Qualified persons are described in section 36(5) of FOIA with section 36(5)(a) stating that 'qualified person' means 'in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown'.
14. The Cabinet Office clarified that the advice of a Minister was sought, and that they provided their opinion on 12 July 2022 stating that the exemptions specified should be applied and the information withheld from disclosure. The Commissioner is therefore satisfied that the Minister was an appropriate qualified person.
15. The next question is whether the qualified person's opinion is reasonable.

Was the qualified person's opinion reasonable

16. In determining whether these sections are engaged the Commissioner must determine 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 and the timing of the request, for example, whether the request concerns an important ongoing issue on 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.

17. 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 not reasonable 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. Information may be exempted under section 36(2)(c) where its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
18. The Cabinet Office provided the Commissioner with evidence demonstrating the information which was provided to the qualified person in order to make his decision, and the minister's subsequent decision that the exemptions are applicable.
19. The Commissioner is satisfied that the qualified person's opinion was based upon the evidence provided, and relates to the issues engaged by the exemptions cited.
20. The Commissioner therefore accepts that the qualified person's opinion was reasonable, and he is therefore satisfied that the exemption is engaged.
21. The Commissioner must therefore carry out a public interest test as required by section 2(2)(b) of FOIA. The test is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

The public interest in the information being disclosed

22. The complainant has provided arguments in support of a decision that the requested information should be disclosed. The information relates to advice regarding the application of pension rules.
23. The complainant argues that "*Civil Service pension scheme rules are published and available for all scheme members to read and refer to in order to understand their pension arrangements and plan their retirement. They are the rules and as such are unambiguous. The withholding of this type of information does not give scheme members*

confidence that the Cabinet Office's interpretation of the rules is reasonable, fair and lawful. The Cabinet Office should be accountable for directions given to MyCSP staff and open with pension scheme members."

24. The Commissioner recognises that there is a public interest in the rules being clear and unambiguous. It is only in this way that all parties can work within the rules with a clear understanding of their application and effect. There is a public interest in creating surety on the ways in which these rules apply in order to facilitate the long-term planning which pensions necessitate.
25. The Cabinet Office also took into account that there is a public interest in citizens being confident that decisions related to civil service pensions are taken on the basis of the best available advice. It also recognised that there is a public interest in transparency so as to allow public scrutiny of the manner in which such decisions are made.

The public interest in the exemption being maintained

26. The Cabinet Office recognised that there is a public interest in disclosure, but considered that this was outweighed by the public interest in the exemptions in section 36 being maintained in this instance.
27. Whilst it said that it was unable to clarify its reasoning in detail to the complainant, it has provided its detailed arguments for the exemption being maintained to the Commissioner. The Commissioner has considered these arguments. Whilst he is also unable to elaborate upon these within this decision notice, he accepts that they provide strong public interest arguments for the exemptions being maintained in relation to the requested information.
28. More broadly, when considering the application of section 36(2)(b)(i), the Commissioner notes that there is a public interest in full and frank advice being requested and provided within government departments on the interpretation and application of pension rules. This leads to better informed and more robust decision making. Some advice may be sensitive, and a subsequent disclosure of this may have a 'chilling effect' upon civil servants' ability to seek and provide advice in the future. This would lead to less informed decision making.
29. There is also a public interest in ensuring that pensions rules are administered fairly, transparently, and as noted above, with surety in their application. This is in order that members and advisors are clear of the rules when they are working within the scheme, or when planning for their retirement. A disclosure of the information in this case, and the

likelihood of a chilling effect occurring, would serve to deter the free provision of advice and lead to less informed decision making and advice being provided in the future.

30. There is also a public interest in preventing the disclosure of information which would prejudice the effective conduct of public affairs. Section 36(2)(c) is non-specific and is determined by the facts and circumstances of each case.
31. In this case, the Commissioner notes that the concerns expressed by qualified person in applying this subsection are real, and of substance, and he considers that the public interest in this subsection being maintained outweighs that in the information being disclosed.

The Commissioner's conclusions

32. For the reasons outlined above, and within the Cabinet Offices' response to the Commissioner, the Commissioner finds that the public interest in the exemptions being maintained outweighs that in the information being disclosed in this instance.

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.

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