

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 June 2010

Public Authority: The Ministry of Justice
Address: 102 Petty France
London
SW1H 9AH

Summary

The complainant requested a copy of the minutes of a meeting between a government Minister, David Hanson, and ClearSprings Ltd held on 20 May 2008. The Ministry of Justice confirmed that it held information relevant to the request but refused to provide it on the basis that it was exempt from disclosure by virtue of sections 36(2)(b)(ii) and (c). The Commissioner has concluded that the MoJ was correct to withhold the information on the basis of section 36(2)(b)(ii). However he has also recorded a number of procedural breaches of the Act. The Commissioner does not require the MoJ to take any remedial steps in this case.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The Bail Accommodation and Support Service (BASS) was introduced by the National Offender Management Service (NOMS) in June 2007 to allow Courts to make greater use of bail and Home Detention Curfews by providing rented, shared homes in small flats and houses in the community.

3. The scheme offers an additional support and accommodation resource in England and Wales for eligible people to whom the Courts have granted bail and to those prisoners released on Home Detention Curfew who do not have a home of their own to return to.
4. The contract for the provision of this accommodation was awarded, through a competitive tender process, to ClearSprings Management Ltd, a company providing housing and support to vulnerable people.
5. Minister David Hanson confirmed to the House of Commons on 10 June 2008 that he had met with ClearSprings on 20 May 2008.

The Request

6. The complainant wrote to the Ministry of Justice (MoJ) on 11 June 2008 with the following request:

"I would like a copy of the minutes of the meeting between minister David Hanson and ClearSprings Ltd on 20 May 2008."
7. The MoJ acknowledged receipt of the request on 19 June 2008. However, it was not until 25 February 2009 that the MoJ provided the complainant with its response. In this correspondence, it confirmed that it held information relevant to the complainant's request but that it was exempt by virtue of sections 36(2)(b) and (c) (prejudice to the effective conduct of public affairs).
8. The complainant requested an internal review on 1 May 2009.
9. The MoJ upheld its decision in its internal review response of 29 May 2009, clarifying that it was citing sections 36(2)(b)(ii) and (c).

The Investigation

Scope of the case

10. On 2 June 2009, the complainant contacted the Commissioner to complain about the way his request for information had been handled. In line with his complaint, the focus of the Commissioner's investigation has been to determine whether or not the MoJ was correct to withhold the requested information.

Chronology

11. Unfortunately, due to a backlog of complaints at the Commissioner's office about compliance with the Act, there was a delay of five months before his investigation into this complaint got underway.
12. The Commissioner wrote to the MoJ on 26 November 2009 asking it for further explanation of its reasons for citing section 36 in relation to the request, including its reasons for concluding that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information requested.
13. The MoJ responded on 30 November 2009. In its response, as well as providing further evidence in support of its citing of section 36, which included a copy of the withheld information and the submission to the qualified person, the MoJ also provided the Commissioner with an explanation for its delay in handling the request for information.
14. It advised the Commissioner that, "*this particular case was one of a number that had accumulated over some time in the NOMS [National Offender Management Service] Open Government Unit, creating a build up of unanswered cases*". In this respect, the Commissioner notes that the MoJ, in its correspondence of 25 February 2009, apologised to the complainant for its delay in responding and told him that, '*the delay has been caused by an unusually high volume of requests for information*'.
15. Following an unsuccessful attempt at informal resolution, the Commissioner continued his investigation on 9 March 2010.

Analysis

Exemptions

Section 36 Prejudice to effective conduct of public affairs

16. Section 36(2) states that:

"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-

- (a) would, or would be likely to, prejudice-*

- (i) *the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
 - (ii) *the work of the Executive Committee of the Northern Ireland Assembly, or*
 - (iii) *the work of the Cabinet of the Welsh Assembly Government,*
 - (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, or*
 - (c) *would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs”.*
- 17. The MoJ has confirmed that it held information relevant to the complainant’s request. However, it has claimed that the information is exempt from disclosure, citing sections 36(2)(b)(ii) and (c) of the Act, those being the free and frank exchange of views for the purposes of deliberation and the effective conduct of public affairs. The Commissioner notes that the MoJ is citing both these exemptions in relation to the same information.
- 18. The Commissioner considers it acceptable to claim more than one limb of section 36(2) for the same information, as long as arguments can be made in support of the claim for each individual subsection.
- 19. Sections 36(2)(b)(ii) and (c), respectively, are engaged when, in the reasonable opinion of the qualified person, disclosure would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation or would otherwise, or would be likely otherwise to, prejudice the effective conduct of public affairs.
- 20. In relation to the likelihood of prejudice the MoJ has advised that, in this case, *“the qualified person considered that disclosure ‘would’ inhibit the free and frank exchange of views for the purpose of deliberation, and ‘would’ otherwise prejudice the effective conduct of public affairs”*. The qualified person therefore concluded that in this instance it is more probable than not that the identified prejudice would occur if the withheld material was disclosed.

21. The term 'inhibit' is not defined in the Act. The Commissioner's view is that, in the context of section 36, it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
22. With regard to the meaning of 36(2)(b)(ii), this being one of the two limbs of the exemption that the MoJ is citing, the Commissioner considers that, in the context of the exemption, 'deliberation' tends to refer to the evaluation of competing arguments or considerations that may have an influence on a public authority's course of action. It will include expressions of opinion and recommendations.
23. With respect to section 36(2)(c), the other limb of the exemption being cited by the MoJ, the Commissioner considers that some prejudice other than that protected by another limb of section 36 must be shown in order for it to be engaged.
24. The first condition for the application of the exemption at section 36 is the qualified person's reasonable opinion. In this case the Commissioner has begun by considering the exemption in section 36(2)(b)(ii). When assessing the qualified person's opinion the Commissioner will consider the following:
 - whether an opinion was given;
 - whether the person who gave that opinion is the qualified person for the public authority in question;
 - when the opinion was given; and
 - whether the opinion is reasonable.

The opinion of the qualified person

25. The MoJ has stated that the opinion that inhibition or prejudice would result was given by Mr Shalid Malik, who was appointed to the role of Justice Minister in October 2008. The Commissioner is satisfied that this was the appropriate 'qualified person' as laid down in section 36(5) of the Act. The MoJ also confirmed that the opinion was sought on 10 February 2009 and given on 20 February 2009.
26. Section 36(5)(a) provides that the qualified person for a government department will be any Minister of the Crown. It has been established, therefore, that an opinion was given, that this opinion was given by a qualified person for the MoJ and that this opinion was given on 20 February 2009.
27. The next step is to consider whether the opinion is reasonable. The Commissioner will generally take into account two main factors here: what the qualified person took into account when forming his opinion and the content of the withheld information itself.

What is a reasonable opinion?

28. In determining whether or not the opinion is reasonable, the Commissioner will consider the extent to which the opinion is both reasonable in substance and reasonably arrived at.
29. Regarding whether or not the process of arriving at the decision was reasonable, the Commissioner will take into account what the qualified person had in front of him when forming his opinion. In this respect, he will consider to what extent all the relevant factors were taken into account.
30. In this case, the Commissioner notes that the qualified person was provided with a submission at the time the initial response to the complainant's request was being prepared.
31. In relation to the submission, the MoJ has advised the Commissioner that the qualified person had the withheld information in front of him, together with arguments in favour of disclosure as well as contrary arguments in favour of maintaining the exemption. The qualified person also gave his opinion in advance of the refusal notice being issued to the complainant. In view of this the Commissioner is satisfied that the qualified person's opinion was reasonably arrived at in this case.
32. In citing section 36(2)(b)(ii), the free and frank exchange of views for the purposes of deliberation, the MoJ is claiming that, in the reasonable opinion of a qualified person, disclosure would inhibit the ability of public authority staff and others, when deliberating, to express themselves openly, honestly and completely or to explore extreme options.
33. The Commissioner is further satisfied that the qualified person's opinion is reasonable in substance. In reaching this decision, he has taken into account the nature and content of the withheld information, the evidence provided to the qualified person in support of the view that disclosure would inhibit the free and frank exchange of views for the purposes of deliberation and the circumstances that existed at the time of the request.

The public interest test

34. Having concluded that the exemption in section 36(2)(b)(ii) is engaged the Commissioner has gone on to consider the public interest test. In the case of *Guardian & Brooke v The Information Commissioner & the BBC* [EA/2006/0011 and EA 2006/0013], the Information Tribunal

acknowledged that the application of the public interest test to the section 36 exemption, "*involved a particular conundrum,*" noting that although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public interest, "*it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice*" (para 88).

35. In the Tribunal's view, the reasonable opinion is limited to the *degree of likelihood* that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion, "*does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant*" (para 91).
36. Taking into account the Tribunal's comments above, whilst the Commissioner will give due weight to the reasonable opinion of the qualified person when assessing the public interest, he will also consider the severity, extent and frequency of the inhibition to the free and frank exchange of views for the purposes of deliberation.

Public interest arguments in favour of disclosing the requested information

37. The MoJ acknowledged the strong public interest "*in ensuring that the public are aware of the method behind decision taking – in this instance that those affected by the housing of offenders are able to understand why particular recommendations were suggested or adopted or rejected*".
38. Further, it accepted that, "*by increasing public knowledge, the debate surrounding government decisions in respect of operational matters will be improved, possibly adding public trust and confidence in the decision making process*". The Commissioner understands the reference to 'operational matters' to mean the provision of accommodation for offenders by ClearSprings.
39. At the internal review stage, the MoJ considered further arguments in favour of disclosure. In this respect, it advised the complainant that:

"The minutes give an insight into the process and workings of government, which is an important part of practising democracy".
40. The Commissioner also considers that there is a public interest in ensuring that the MoJ is transparent and accountable for its decisions about the management of accommodation provision for people on bail.

Public interest arguments in favour of maintaining the exemption

41. The MoJ argued that if any of the attendees at the meeting, officials or representatives of ClearSprings, suspected that deliberations at meetings that were understood to have been confidential would be disclosed to the public, they would be less candid in expressing opinions. This in turn would restrict the government's ability to engage constructively and appropriately with third party contractors when it needed to do so.
42. The MoJ also told the complainant that, in its view, disclosure:
"would be likely to damage the long term manner in which the government conducts its business".
43. The MoJ also argued in its initial refusal notice that it is in the public interest that, *"officials are fully able to provide clear advice and form well-considered views without premature disclosure"*.
44. The Commissioner accepts that in this case there was a public interest in preserving a safe space in which officials and third parties could deliberate regarding the accommodation service provided by ClearSprings. However he has disregarded the point regarding advice as this is relevant to the exemption in section 36(2)(b)(i) as opposed to section 36(2)(b)(ii) which is claimed in this case.

Balance of the public interest arguments

45. In balancing the opposing factors in this case, the Commissioner is mindful of the fact that, subject to the public interest test, section 36(2)(b)(ii) allows for the exemption of information if its disclosure would inhibit the ability of public authority staff and others, when deliberating, to express themselves openly, honestly and completely.
46. The Commissioner notes that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, he must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
47. However, as noted above, in order to form the balancing judgment required by section 2(2)(b) of the Act, the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur.
48. In this case the Commissioner gives significant weight to the argument that people attending meetings would be inhibited from expressing

themselves freely and frankly if the withheld information were disclosed. He notes that the individuals present at the meeting appear to be relatively senior. In many instances he considers that such individuals would be less likely to feel inhibited, given their seniority and associated responsibilities. However in the particular circumstances of this case, he accepts that disclosure would severely inhibit the candour of discussions. He has reached this view given that the fact that there were concerns about the way in which ClearSprings was fulfilling its contract was in the public domain at the time of the request. Given this context, and the particular need for candour when addressing issues of this sensitivity and seriousness, the Commissioner considers this argument to have significant weight.

49. In this case, the Commissioner also gives significant weight to the argument that it is in the public interest to ensure that officials and third parties are able to discuss openly matters of importance to government, such as bail accommodation, in a safe space. This is particularly because the issues specific to the ClearSprings contract remained live at the time of the request. In such circumstances there is a public interest in maintaining a private space for open and thorough discussion and consideration of difficult and sensitive issues away from public scrutiny in order to ensure effective management of this relationship and service delivery. Furthermore as the issues particular to ClearSprings were still being actively resolved and further meetings were likely the Commissioner considers that the inhibition identified would have occurred on a reasonably frequent basis.
50. Having concluded that the arguments in favour of maintaining the exemption have significant weight the Commissioner has gone on to assess the arguments in favour of disclosure. In his view the public interest arguments that disclosure would ensure accountability and transparency as well as inform public debate are also worthy of some weight in this case. The degree of public concern about the standard of ClearSprings' service at the time of the request, is illustrated by the significant number of questions raised in the House of Commons in relation to, "the siting of bail accommodation and support services", as well as substantial media coverage about ClearSprings' contract with the Ministry of Justice.
51. In reaching the view that the arguments in favour of disclosure have some weight the Commissioner has considered the content of the withheld information and he is satisfied that it would provide the public with additional details about the way in which the MoJ were managing the ClearSprings' service provision. In his view this would likely have increased public confidence in the actions and decisions taken. The fact that the issues remained live at the time of the request also means

that the information could have genuinely informed the ongoing debate about bail accommodation.

52. The Commissioner has carefully balanced the arguments on both sides in this case. Whilst he is mindful of the weight that he has attributed to the arguments in favour of disclosure, given the level of public concern about this particular contract, he has nevertheless concluded that the arguments in favour of maintaining the exemption in section 36(2)(b)(ii) have greater weight in this instance. In reaching this decision he has taken into account the fact that he has accepted that the MoJ has demonstrated that the inhibition is more probable than not to occur. He has also been mindful that, in his view, inhibition would have resulted in severe prejudice given the importance of candour when discussing the matters relevant to this case and the relative frequency of harm given that the issues at hand were live and ongoing at the time of the request.
53. As the Commissioner has concluded that the withheld information is exempt by virtue of section 36(2)(b)(ii) he has not gone on to consider section 36(2)(c) further in this decision notice.

Procedural Requirements

Section 10 - Time for compliance

54. Section 10(1) of the Act provides that:

'Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.'

55. In this case, the complainant made his request for information on 11 June 2008 but the MoJ did not issue its refusal notice until 25 February 2009. In failing to confirm to the complainant that it held information falling within the request within the statutory timescale the Commissioner finds the MoJ in breach of section 10(1) of the Act.

Section 17 – Refusal of request

56. Section 17(1) provides that:

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) *states that fact,*
- (b) *specifies the exemption in question, and*
- (c) *states (if that would not otherwise be apparent) why the exemption applies”.*

57. The Commissioner notes that, in taking more than 175 working days to issue its refusal notice, the MoJ was clearly in breach of the statutory timescale. He therefore finds a breach of section 17(1).

The Decision

58. The Commissioner’s decision is that the public authority did not deal with the following elements of the request in accordance with the requirements of the Act:

- it breached section 10(1) by not confirming to the complainant within the statutory timescale that it held the requested information; and
- it breached section 17(1) by not providing the complainant with a valid refusal notice within the statutory timescale.

59. However the Commissioner has concluded that the MoJ was correct to refuse to comply with section 1(1)(b) in this instance on the basis that the withheld information was exempt by virtue of section 36(2)(b)(ii).

Steps Required

60. The Commissioner does not require the MoJ to take any steps in this instance.

Right of Appeal

61. 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
Arnhem House
31 Waterloo Way
Leicester
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 1st day of June 2010

Signed

**Jo Pedder
Group Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“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-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (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, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(5) provides that –

“In subsections (2) and (3) “qualified person”-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,
- (d) in relation to information held by the House of Commons, means the Speaker of that House,

- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-
 - (i) a Minister of the Crown,
 - (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
 - (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."