

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 21 March 2011

Public Authority: Scotland Office
Address: Dover House
Whitehall
London
SW1A 2AU

Summary

The complainant made a request to the Scotland Office for information held by it regarding the creation of a British football team to compete in the 2012 Olympic Games. Whilst the public authority released most of the information, it withheld the small remainder by relying on the exemptions under sections 35(1)(d) and 36(2)(c) of the Act. The Commissioner's decision is that both exemptions are engaged and the public interest (in both instances) favours the maintenance of the exemption. The Commissioner did however identify a number of procedural breaches.

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.

The Request

2. The complainant made a request to the Scotland Office on 18 February 2009 for information held by it regarding the creation of a British football team to compete in the 2012 Olympic Games.

3. The public authority provided its substantive response to the complainant on 3 June 2009, in which it disclosed the majority of the information requested but withheld the small remainder of the information by reference to the exemptions provided by sections 35(1)(d) and 36 of the Act.
4. The complainant requested an internal review of the public authority's decision on 16 June 2009.
5. On 19 August 2009 the public authority replied to the complainant that the outcome of the review was to uphold the original decision.

The Investigation

Chronology

6. On 1 September 2009 the complainant contacted the Commissioner to complain about the way his request for information had been handled, specifically, the withholding of information under the aforementioned exemptions. Regrettably, due to the volume of complaints referred to the Commissioner's office, there was a delay of eight months before his investigation began.
7. The Commissioner began his substantive investigation by writing to the public authority on 7 May 2010 requesting that it provide him with a copy of the withheld information and further explanation of its reliance on the exemptions, including confirmation of the particular provision of section 36 it was relying on. In particular, as regards the qualified person's opinion required by section 36 of the Act, the Commissioner asked the public authority to:

"...provide a copy of the submissions given to the qualified person in order for them reach their opinion **and** a copy of the opinion which was subsequently provided. If either the submissions or opinion were not written down please describe the nature of the submissions and the opinion itself."
8. The Commissioner also requested that if, in providing such documents, the following is not clear, responses should be provided to him in relation to the following questions:
 1. "When was this opinion sought and when was it given?"

2. What information did the qualified person have access to when giving this opinion? For example, did the qualified person have access to the information itself or just a summary of the information that had been withheld?
 3. Was the qualified person provided with any submissions supporting a recommendation that the exemption was engaged?
 4. Similarly, was the qualified person in fact provided with any contrary arguments supporting the position that the exemption was not engaged?
 5. ...If the Scotland Office is relying on section 36(2)(c) – i.e. 'otherwise prejudice the effective conduct of public affairs' – please clarify what the nature of this prejudice is."
9. On 22 July 2010 the public authority wrote to the Commissioner providing him with a copy of the withheld information. In relation to section 36, it confirmed that it was relying on section 36(2)(c), and in reply to the Commissioner's queries regarding the qualified person's opinion the public authority said;
- "There was no formal written submission given to the Minister and no formal written opinion was subsequently provided. The Minister's personal secretary provided him with a brief note on 3 June 2009 advising him that, after taking advice from Clearing House at the Ministry of Justice, Scotland Office officials had recommended that one sentence of the note should be withheld under Section 36 as its release was considered likely to prejudice the effective conduct of public affairs as it was inaccurate. The Minister's decision to proceed on that basis was conveyed to officials by email from his personal secretary the same day and the letter of response was issued to [the complainant] also on 3 June."
10. On 1 October 2010 the Commissioner asked the public authority to provide him with a copy of the "brief note" given to the Minister on 3 June 2009 and the email from his office (on the same day) confirming what his opinion was. The public authority provided the requested material to the Commissioner on 4 October 2010.

Analysis

Exemptions

11. The withheld information is contained in two documents. The first document is a hand written note of a meeting attended by the Secretary of State for Scotland, the Secretary of State for Culture, Media and Sport, and a representative from the International Federation of Association Football ("FIFA"); this information is withheld by reference to section of 35(1)(d) of the Act. The withheld information in the second document consists of one sentence of the typed meeting note communicated internally following the meeting and this information is withheld by reference to section 36(2)(c) of the Act.

Section 35(1)(d) – The operation of any Ministerial private office

12. Section 35(1)(d) states that:

'Information held by a government department....is exempt information if it relates to -

(d) the operation of any Ministerial private office.'

13. Section 35 is a class based exemption. Therefore if information falls within the scope of a particular provision of section 35(1) then this information will be exempt. There is no need for the public authority to demonstrate any prejudice arising from disclosure.

14. The public authority in correspondence to the Commissioner dated 22 July 2010 stated that;

"Taking hand written notes at meetings is part of the 'operation' of a private office and ensures that quick records can be kept of the many and varied meetings and discussions that occur. The definition of "Ministerial Private Office" in section 35(5) of FOIA includes providing "personal administrative support to a Minister of the Crown". Taking hand written notes at a meeting attended by a Minister would be included within this definition. Additionally, it is clear from the personal style of the hand written note that it was taken for private office use and was neither placed on file, nor shared with others in the office. It was not formally circulated or agreed by the other attendees at the meeting. It is considered that disclosure of this note would have a negative impact on the operation of the private office and could inhibit private office officials from taking notes at future meetings. Section 35(1)(d) exists to protect civil servants and to respect the

convention that advisers advise on policy but only Ministers can decide and dispense that policy."

15. In the Commissioner's opinion, what constitutes the operation of a ministerial private office for the purposes of section 35(1)(d) should be interpreted narrowly, thereby limiting the scope of exemption to only include practical matters such as routine emails, procedures for handling ministerial papers, travel expenses, staffing and logistical issues. However, the term "relates to" is broad, so the exemption can cover a wide range of information connected with those practical matters.
16. The Commissioner's view is that the hand-written note taken by the minister's private secretary clearly relates to the operation of a ministerial private office. Taking a hand written note is a purely administrative task, being the necessary first step towards the production of the official note of the meeting. The content of the hand-written note is therefore clearly exempt under section 35(1)(d).
17. However, section 35(1)(d) is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. That the releasable information falls within the class specified in the exemption is not, however, of relevance to the balance of the public interest. This is in line with the approach taken by the Information Tribunal in *DfES v the Commissioner & the Evening Standard (EA/2006/0006)*, where it stated in connection with section 35(1)(a) that "the weighing [of the public interest] exercise begins with both pans empty and therefore level" (paragraph 65).
18. The Commissioner will, when considering the application of the public interest test, do so in the context of the time the information request was made. This view reflects that taken by the Information Tribunal in *DBERR v the Information Commissioner and the Friends of the Earth (EA/2007/0072)*.
19. As to the application of the public interest test (applied to the two items of withheld information) the public authority in its letter to the Commissioner dated 22 July 2010 said as follows;

"The Scotland Office took into consideration the fact that there was likely to be a certain amount of public interest and media attention in relation to discussions regarding a GB football team. The general public interest in the openness of government has also been considered. On balance, the conclusion to withhold the information

was taken on the basis that to have released it would have been to provide a false account of the meeting's conclusions....To release into the public domain an inaccurate account of a meeting attended by other Ministers and outside groups would not be in the public interest. Clearly the public interest was in favour of releasing the majority of the meeting notes. It is important to note that the substantive conclusion of the meeting has been released.However, in relation to the one line that was inaccurate [the second item, withheld under section 36(2)(c)], the decision was to withhold it... to release inaccurate information would prejudice, or be likely to prejudice, the conduct of public affairs."

20. In addition to the arguments advanced by the public authority the Commissioner takes cognisance that the public interest in maintaining the exemption is around maintaining the private space for the affairs of the private office to be conducted in an efficient and effective manner. In terms of taking notes of meetings, the nature of the process is such that speed is of the essence. Therefore a note-taker should not feel constrained by writing down what he or she hears for fear that it might subsequently be disclosed. That could lead to editing the exchanges which take place, rather than taking a full and accurate note. Clearly that would be contrary to the public interest in running an effective and efficient ministerial office.
21. In this particular case, upon balancing the various public interest arguments for and against disclosing the information withheld by reference to section 35(1)(d), the Commissioner's decision is that those for maintaining the exemption outweigh those for releasing the information.

Section 36(2)(c) – Prejudice to the effective conduct of public affairs

22. Section 36(2)(c) 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-

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

23. As stated above, the withheld information to which this exemption was applied is a sentence of the typed meeting note communicated internally following the meeting. The public authority has stated that, in the view of the qualified person, prejudice would be likely to arise to the effective conduct of public affairs because the sentence is

inaccurate. To release it would be to provide a false account of the meeting's conclusions. This would have been prejudicial to the conduct of the interests of the public authority, the other government department involved and others attending the meeting.

24. The Commissioner notes that section 36 is a unique exemption in that its engagement turns on the qualified person giving a reasonable opinion. The qualified person in this case was the then Secretary of State for Scotland, Jim Murphy MP.
25. The Commissioner recognises that there may often be a range of opinions in relation to a particular issue which might be considered reasonable. Therefore fact that the Commissioner might have reached a different conclusion himself, is not in itself a sufficient ground for finding the exemption is not engaged. In this case the qualified person clearly took the view that adverse consequences to the conduct of public affairs would flow from the disclosure of the inaccurate sentence. On that basis the Commissioner accepts that *in the circumstances of this case*, the qualified person's opinion was not unreasonable, so the exemption is engaged.
26. However, section 36(2) is a qualified exemption and therefore is subject to the public interest test. Consequently, the remarks and observations on the public interest test, at paragraphs 17 to 20 above, are relevant here.
27. In the Commissioner's view, although he is prepared to accept that section 36(2)(c) is engaged, he does believe that the prejudice to the effective conduct of public affairs which would arise from disclosure is of limited impact. There may be some embarrassment in revealing the inaccurate statement and marginal prejudice to the government's relations with sporting bodies and other organisations involved in the relevant discussions. Furthermore, the Commissioner recognises that the context of the preparations for the UK hosting the Olympic Games in 2012 is one which attracts significant media attention and public interest. However, the inaccuracy is acknowledged and a factually correct statement of the outcome of the meeting has been issued.
28. On the other hand, the public interest in disclosing an inaccurate extract of a meeting note, when the main operative part has been disclosed is very limited indeed, if not non-existent. The Commissioner's decision is therefore that in all the circumstances the public interest in favour of maintaining the exemption outweighs that in favour of disclosing the withheld sentence.

Procedural Requirements

29. The Commissioner finds the public authority in breach of section 17(1) of the Act for taking longer than 20 working days to provide the complainant with a refusal notice regarding the information it withheld. He also finds the public authority in breach of section 17(1) for not specifying the subsection of section 36 it was relying on in its refusal notice.
30. The Commissioner finds the public authority in breach of section 10 for taking longer than 20 working days to confirm that the requested information was held, and also for taking longer than 20 working days to disclose the information to which it did not apply an exemption.

The Decision

31. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act, save for the following procedural breaches:
 - It breached section 10(1) in failing to disclose information within twenty working days.
 - It breached 17(1) for taking longer than 20 working days to issue its refusal notice and for not specifying in that refusal notice the subsection of section 36 on which it sought to rely.

Steps Required

32. The Commissioner requires no steps to be taken.

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,
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

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.

Dated the 21st day of March 2011

Signed

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

Legal Annex

General right of access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (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."

Time for compliance

Section 10(1) provides that –

...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.

Refusal of request

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."

Formulation of government policy

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Prejudice to effective conduct of public affairs

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.