

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 February 2013

**Public Authority:** Office of Communications (Ofcom)

**Address:** Riverside House  
2a Southwark Bridge Road  
London, SE1 9HA

#### Decision (including any steps ordered)

---

1. The complainant has requested information relating to the potential consequences of Scotland becoming an independent country.
2. The Commissioner's decision is that Ofcom has correctly applied section 36(2)(b).
3. The Commissioner does not require the public authority to take any steps.

#### Request and response

---

4. On 11 August 2011, the complainant wrote to Ofcom and requested information in the following terms:  
*"A copy of all material held by your department or organisation which relates to the potential consequences of Scotland becoming an independent country. This should include any risk assessments, risk registers, scenario planning exercises, legal advice or internal briefings".*
5. Ofcom responded on 14 August 2012. It stated that the information requested was being withheld under section 36(2)(b) of the FOIA.
6. Following an internal review Ofcom wrote to the complainant on 23 August 2012. It stated that it considered section 36(2)(b) had been correctly applied and in addition, that section 36(2)(c) also applied. It therefore maintained its original position.

## Scope of the case

---

7. The complainant contacted the Commissioner on 5 September 2012 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this request to be to determine if Ofcom has correctly applied the exemptions it has cited to withhold the information requested.

## Reasons for decision

---

9. Section 36 is the only exemption in the FOIA that requires a determination by a 'qualified person'. The exemption will only apply if the reasonable opinion of a qualified person is that one of the forms of adverse effect cited in subsection 2 would follow from disclosing that information.
10. Section 36(2) of the FOIA 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-*  
  
*(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.*
11. Section 36(2) is expressed in broad terms, and in order for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. The term 'inhibit' is not defined in the FOIA. 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.
12. Information may be exempt under section 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, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority.

### **The opinion of the qualified person**

13. The first condition for the application of the exemption at section 36 is the qualified person's reasonable opinion. In this case, Ofcom explained that the qualified person was Graham Howell, the Secretary to the Corporation.
14. In support of its reliance on section 36, Ofcom stated that the qualified person had access to all the information within the scope of the request and was provided with oral submissions. Ofcom also provided the Commissioner with a copy of Mr Howell's opinion dated 14 August 2012.
15. The Commissioner is satisfied that Mr Howell is the qualified person for Ofcom and that his opinion was given at the relevant time. He has gone on to consider whether that opinion was reasonable.

### **Is the opinion reasonable?**

16. In reaching a view on whether the opinion is reasonable the Commissioner will consider the plain meaning of the word 'reasonable' – i.e. whether the opinion is in accordance with reason, not irrational or absurd.
17. The Commissioner has considered the information provided by Ofcom regarding the oral submissions to the qualified person, and their response.
18. Having considered the withheld information, the Commissioner accepts that it was reasonable for the qualified person to conclude that disclosure would inhibit the free and frank provision of advice in the future as well as the free and frank exchange of views for the purposes of deliberation. This is because individuals may feel less free to discuss their views and advice openly for fear of this being disclosed into the public domain.
19. It follows that the Commissioner finds that the exemption is engaged with respect to Ofcom's citing of the exemption in section 36(2)(b)(i) and (ii).

### **Public interest arguments in favour of maintaining the exemption**

20. Ofcom argued that as a sector regulator, it depends heavily on its on-going relationship with stakeholders. Stakeholders would be less willing to come forward and discuss necessary policy issues with Ofcom employees, and would be less willing to be open in any discussions, if they knew that what they said would be made public.

21. In addition, to regulate effectively, Ofcom needs to be able to think through all the implications of particular policy options and undertake without prejudice rigorous and candid assessments.
22. Ofcom further argued that a consequence of disclosure would be that stakeholders would be less likely to come forward and discuss important policy issues, and be less open, with Ofcom. Ofcom would therefore be less able to gauge stakeholders' views as to how effective its regulation is. Also to disclose internal correspondence would mean that Ofcom employees would be less likely to discuss policy issues openly and explore all possible regulatory options. These factors would in turn lessen Ofcom's ability to meet its statutory obligation to ensure its regulation is effective and appropriate.
23. The withheld information covers meeting minutes, private letters and summaries of documents which include opinions of both Ofcom staff and external stakeholders.
24. Ofcom stated that the information within the scope of the request represents early thinking, advice and discussions on the proposals for and the consequences of Scottish independence in the context of the regulation of the communications sector. These deliberations are on-going and the discussion outlined in these papers in no way represent final views. It is important that Ofcom and the relevant Stakeholders have a protected space in which to consider a variety of views and scenarios and come to considered positions.
25. Ofcom believed that section 36(2)(b) was engaged in two respects, firstly that the release of the withheld information would have a 'significant and weighty' effect on both Ofcom's and the wider government's discussions of the possible implications of Scottish independence. With the referendum yet to happen, these considerations are still in their relative infancy and the possibility of the release of early opinions and advice would both inhibit the candidness of these on-going discussions and as a result will affect their utility. There is also a danger that releasing preliminary discussion and advice could distort the public debate.
26. Ofcom further believed that the disclosure of the withheld information will have a 'significant and weighty' effect on Ofcom's and wider government's candid deliberations on other policy discussions at a similar stage of development. When formulating policy and investigating options, public sector bodies need a full range of opinions and that their views evolve as they hear opinions and review information. The disclosure of the information would likely jeopardise the willingness of people to give frank opinions on all topics and therefore hinder the functioning of Ofcom.

### **Public interest arguments in favour of disclosing the requested information**

27. Ofcom recognises the desirability of the public being confident that decisions are taken on the basis of the best available information and therefore acknowledges the importance of transparency and openness in how it conducts its business.
28. Ofcom also recognises that disclosing the withheld information would allow the public to better understand and have a more informed debate on the process and operation of Ofcom in general and in particular in understanding the consideration and exploration of the issues and opinions expressed on this important subject matter. Furthermore knowledge that the arguments relating to a debate may be disclosable may improve the quality of those arguments.

### **Balance of the public interest**

29. In finding that the above exemption is engaged, the Commissioner has already accepted that the disclosure of this information is likely to result in the inhibition set out in the exemption. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any inhibition that would or might occur. He has considered the nature and content of the withheld information and the timing of the request.
30. Given the nature of the withheld information and the timing of the request, the Commissioner considers that significant prejudice would be likely to occur if the withheld information were to be disclosed. Discussion and exploration of options is an on-going process. Therefore those involved need time and space for free and frank discussions regarding the best and most appropriate way to carry out processes and functions and to decide upon options.
31. The Commissioner also accepts that if the withheld information were to be disclosed, this would be likely to inhibit the effectiveness of the discussions which could result in poorer decision making and perhaps inhibit some individuals from participating in the discussion process altogether. The Commissioner accepts that such inhibition would be a likely effect of disclosure and would be likely to disrupt the effectiveness of the on-going process.
32. The Commissioner has attributed some weight to the general arguments for transparency and openness particularly given the public interest in the subject. However, in the circumstances of this case, given the timing of the request and the stage at which discussions were at he attributes more weight to the ability of those involved to have free and

frank exchanges and discussions on the consideration of options and processes in relation to this particular issue.

33. After weighing the public interest arguments, the Commissioner has determined that the public interest factors in not prejudicing Ofcom and allowing it to be able to enter into free and frank discussions with stakeholders, away from the public spotlight, outweigh the public interest factors in favour of disclosure.
34. The Commissioner's conclusion is that, in all the circumstances of the case, the public interest in maintaining the exemption set out in section 36(2)(b) of the FOIA outweighs that of the public interest in disclosing the withheld information.
35. As all the information within the scope of the request can be considered exempt under section 36(2)(b) the Commissioner has not gone on to consider section 36(2)(c).

## Right of appeal

---

36. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

37. 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.
38. 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 .....**

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**