

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2013

Public Authority: The Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested correspondence regarding a funding grant by the Department for Education to the charity 'Booktrust' for the financial years 2013-15. The Cabinet Office withheld this information on the basis that it was all exempt on the basis of section 36(2)(b)(i) of FOIA (effective conduct of public affairs) and that some of it was exempt on the basis of section 40(2) (personal data). The Commissioner has concluded that all of the requested information is exempt from disclosure on the basis of section 36(2)(b)(i) and that the public interest favours maintaining the exemption.

Request and response

2. On 3 December 2012 the complainant wrote to the Cabinet Office and submitted the following request:

'Could I please make a Freedom of Information request for all Cabinet Office correspondence relating to the award of Department for Education funding for the Booktrust charity for the 2013-2015 financial period.'

3. The complainant contacted the Cabinet Office again on 6 December 2012:

'Further to my FOI request, dated 03/12/2012, reference FOI317261, I would like to make my request more specific.'

In particular, I would like to request:

1) All emails/correspondence between Matt Sanders and the Education Department Press Office regarding funding for Booktrust and related issues.

2) All emails/correspondence between Matt Sanders and the Education Department Private Office regarding funding for Booktrust and related issues.

3) All emails/correspondence between Matt Sanders and the Private Office at the Cabinet Office, including all correspondence with Susan Acland-Hood.'

4. The Cabinet Office responded on 1 February 2013 and confirmed that it held information falling within the scope of the request. However, the Cabinet Office explained that it considered this information to be exempt from disclosure on the basis of section 36(2)(c) of FOIA.
5. The complainant contacted the Cabinet Office on 5 February 2013 in order to ask for an internal review of this decision.
6. The Cabinet Office informed the complainant of the outcome of the internal review on 18 March 2013; the review upheld the application of section 36(2)(c).
7. During the course of the Commissioner's investigation, the Cabinet Office contacted the complainant again on 24 June 2013 to explain that its early responses were incorrect to suggest that section 36(2)(c) was being relied upon. The Cabinet Office explained that its previous responses should have stated that it was in fact seeking to rely on sections 36(2)(a)(i) and 36(2)(b)(i). The Cabinet Office confirmed that of these two exemptions it was now actually only seeking to rely on section 36(2)(b)(i). The Cabinet Office also explained that it was seeking to rely on section 40(2) to withhold some of the requested information.

Scope of the case

8. The complainant contacted the Commissioner on 20 March 2013 in order to dispute the Cabinet Office's decision to withhold the information he had requested. In light of the Cabinet Office's letter to the complainant of section 24 June 2013, the Commissioner has considered whether this information is exempt from disclosure on the basis of sections 36(2)(b)(i) and 40(2) of FOIA. The complainant advanced a number of arguments as to why he believed that this information should be disclosed. The Commissioner has referred to these in his analysis below.

Reasons for decision

Section 36 – effective conduct of public affairs

9. The Cabinet Office argued that the withheld information was exempt from disclosure on the basis of section 36(2)(b)(i) of FOIA.

10. 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-...

...(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice,'

11. In this case, the Minister for the Cabinet Office, Francis Maude, provided the opinion in relation to the application of section 36(2)(b)(i). The Commissioner is satisfied that Francis Maude is a qualified person as section 36(5) of FOIA provides that the qualified person for a government department is any Minister of the Crown.

12. The qualified person's opinion did not clearly specify which level of prejudice the section 36(2)(b)(i) exemption was engaged at, i.e. the lower threshold that disclosure, 'would be likely' to result in the prejudicial consequences the exemption was designed to protect, or the higher level that disclosure, 'would' result in the prejudicial consequences. The Commissioner has therefore considered only whether the exemption is engaged at the lower threshold of likelihood.

13. In determining whether this exemption is 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.

14. Further, 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.
15. The qualified person argued that section 36(2)(b)(i) was engaged because disclosure of the requested information would significantly inhibit officials and advisers from providing free and frank advice. This would be the case not only for the individuals named in the request, but also others in Ministerial private offices and the Number 10 Policy Unit who would be less willing to offer advice, engage in discussions and solicit information from other departments as part of the process of reaching decisions if they believed that such discussions would be disclosed.
16. With regard to the reasonableness of this opinion, the Commissioner notes that the withheld information contains candid and frank exchanges that were clearly conducted with the expectation that they would be treated confidentially. Furthermore, the Commissioner recognises that at the time of the request the information was less than a year old. Taking these factors into account the Commissioner is satisfied that it was reasonable for the qualified person to find that disclosure of the withheld information would have been likely to result in a 'chilling effect' and thus potentially inhibit the contributions of individuals when providing advice to other departments in the future.

Public interest test

17. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the section 36(2)(b)(i) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

18. The Cabinet Office recognised that there was a general public interest in openness and that greater transparency makes government more accountable to the electorate and increases trust. It also noted that there was a public interest in improving public understanding of the respective roles of ministers and officials in taking decisions on government grants to voluntary organisations such as the Booktrust. The Cabinet Office acknowledged that the decisions taken may affect the lives of citizens. In this case the decision taken may have an effect on the educational opportunities for children. There is a public interest in the processes that lead to such decisions being transparent.
19. The complainant argued that in cases where there is a question mark over the transparency of decision making involving taxpayers' money there is a strong public interest in relevant information being released. In terms of this case, the complainant argued that serious questions had been raised about the means by which the Booktrust charity received its funding. In particular, he argued that 'internal emails' indicate that initial plans for the government to make the charity compete for a grant on an equal footing with other charities were abandoned after an adviser to Nick Clegg told the Department for Education that the Deputy Prime Minister – whose wife has links with the charity – wanted Booktrust to receive its money automatically. Furthermore, the complainant argued that the Cabinet Office's concerns over the harm to the conduct of government which would be caused by disclosure of the requested information had been exaggerated.

Public interest arguments in favour of maintaining the exemption

20. The Cabinet Office explained that there was a clear public interest in Ministers and being able to inform themselves about how the implementation of government policy might affect the government as a whole, whether or not the policy falls within their Ministerial brief. This process involves Ministers and their advisers being able to seek advice from other departments. This was particularly important for the Prime Minister and Deputy Prime Minister who must have an overview of the government's activities. The Cabinet Office argued that the effectiveness of such inter-departmental discussions relies on the assumption that those involved understand that their discussions will be treated confidentially and any advice they offer will not be exposed to public scrutiny or comment. The Cabinet Office argued that disclosure of information about such discussions, soon after they took place, would undermine the presumption of confidentiality and thus would lead officials to be less forthcoming with each other in the future. The Cabinet Office emphasised that the free flow of advice on operational issues across departments is essential to good government, particularly

because it provides Ministers with the advice they need in order to have an overview on operational matters. Any infringement on the free flow of this advice would make it harder for Ministers to monitor and manage the day to day implementation of policies. Such a consequence would not be in the public interest.

21. The Cabinet Office argued that these considerations are clearly relevant to the information that is within the scope of this request. The Cabinet Office provided the Commissioner with detailed reasons to support this position which directly referenced the content of the withheld information. The Commissioner cannot replicate the content of this reasoning in its entirety here without referring to the withheld information itself. However, the Cabinet Office argued that the frank and candid nature of the information, the complexity of issues discussed, and the fact that the requested information dated from only a short period prior to the request being made all added significant weight to the public interest in maintaining the exemption.
22. The Cabinet Office emphasised that it was firmly of the view that if any of this information were disclosed it would suggest that officials would not be able to conduct their conversations in this way in the future. Any future exchanges would be much more formal, more guarded and their statements would be caveated to the degree that could obscure their intended meaning.

Balance of the public interest test

23. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
24. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and - with the exception of special advisers - impartial when giving advice. They should and not easily be deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is finalised, the

arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

25. In this case, the Commissioner recognises that at the point the request was submitted the decision to award a grant to Booktrust for 2013-2015 had already been taken and thus the decision making could not said to be live. Furthermore, the Commissioner recognises that the Cabinet Office's line of argument suggests a particularly broad chilling effect as a result of the withheld information being disclosed. However, despite these factors, the Commissioner is satisfied that the chilling effect argument needs to be given significant weight in the particular circumstances of this case for two reasons.
26. Firstly, given the direct and frank manner in which the advice in the withheld information is shared and expressed the Commissioner is persuaded that its disclosure would be very likely lead to officials who offer advice in similar circumstances in future being more reserved in the way they express themselves. The Commissioner agrees that such similar situations would involve, as the Cabinet Office suggests, discussions between private offices and No 10 about particular operational issues. These are likely to be significant issues of national interest. Secondly, although the decision making had been completed prior to the request, in the Commissioner's view the fact that the more recent communications contained in the withheld information were only exchanged a number of months prior to the request being submitted adds credence to the argument that disclosure of such information would lead to future discussions being inhibited. In other words, the Commissioner accepts that it is logical to argue that those who had exchanged such recent communications would still expect them to be treated confidentially. The Commissioner considers that, in the circumstances, that would be a reasonable expectation.
27. Furthermore, not only does the Commissioner believe that the chilling effect argument needs to be given notable weight, he also accepts that it is logical for the Cabinet Office to argue that the consequences of such a chilling effect would undermine effective government decision making in the manner its suggests. That is to say, the Commissioner accepts that decision making across government clearly depends on the free flow of information and that any significant infringement on the free flow of information would be contrary to the public interest.
28. Turning to the arguments in favour of disclosure, the Commissioner believes that the public interest arguments identified by the Cabinet Office should not be dismissed lightly. The Commissioner agrees that there is a clear public interest in ensuring that the processes by which the government reaches decisions is open and transparent. In this case,

disclosure of withheld information would certainly further inform the public as to how decisions had been reached in relation to the decision to award Booktrust with funding for the financial years 2013-15.

29. Furthermore, the Commissioner accepts that the public interest in ensuring such transparency in this case is increased given the specific circumstances of this case which the complainant has highlighted. In other words, the Commissioner agrees that there is genuine public interest in the disclosure of information which would inform the public as to whether or not there has been any impropriety in the awarding of these funds.
30. However, the logical consequence of that argument is that any allegation of impropriety, whether justified or not, would support disclosure. The Commissioner is clear that that cannot be the intended consequence of FOIA. In this case the Commissioner has reviewed the withheld information and is satisfied that the public interest in disclosure in order to rebut any allegation of impropriety is outweighed by that in maintaining the exemption.
31. In conclusion the Commissioner has found that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In reaching this finding the Commissioner has placed particular weight on the fact that consequences of disclosure risk undermining the effectiveness of communications between officials in different departments on a range of different issues. This is not to dismiss the potential benefits of disclosing the withheld information in order to provide insight into the way in which this particular issue was handled, but to give greater weight to the negative impact of disclosure in decision-making in government which would follow.
32. In light of this decision, the Commissioner has not gone to consider the Cabinet Office's application of section 40(2) although he recognises that some of the withheld information is likely to be covered by that exemption as well.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
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