

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 January 2012

Public Authority: The Department of Health, Social Services and Public Safety
Address: Castle Buildings
Stormont
Belfast
BT4 3SJ

Summary

The public authority completed a joint study (with its counterpart in Eire) on collaborative work, between the pair, in health and social care. The complainant requested a copy of this report and any other produced, within the last few years, on the same subject. The public authority relied on sections 36(2)(c) to refuse the complainant's request. The Commissioner found that, whilst the exemption was engaged, the public interest required the release of the information. Further the public authority's failure to inform the complainant that it held no other reports on the same subject was a breach of section 1(1)(a) of the Act.

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 Department of Health, Social Services and Public Safety ("the public authority") is a Northern Ireland Department created in 1999 as part of the Northern Ireland Executive by the Northern Ireland Act 1998 and the Departments (Northern Ireland) Order 1999.

3. The public authority and the Department of Health and Children in the Republic of Ireland jointly commissioned a study to develop a strategic framework for taking forward on a North-South basis future collaborative work in health and social care and in planning and delivering health and social care services.
4. The study is titled "North – South Feasibility Report on Co-Operation in Health" ("the report") and was completed on the 18 February 2009.

The Request

5. The complainant made a request to the public authority on 30 September 2010 for a copy of the report and a copy of all other reports created during the last three years which examined the area of cross border co-operation in health care.
6. The public authority provided a response to the complainant on 28 October 2010, it refused to disclose the report on the basis of the exemption contained in sections 36(2)(c) of the Act.
7. The complainant requested an internal review of the public authority's decision on 29 October 2010. On 9 November 2010 the public authority wrote to the complainant with the details of the result of the internal review it had carried out. The review decision was to uphold the original decision.

The Investigation

Scope of the case

8. On 22 November 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The opinion of the qualified person that section 36 was engaged was not a reasonable one.
 - There is no basis for the claim that releasing the information would prejudice the work of the Executive Committee.

Chronology

9. The Commissioner, as part of his investigation into the complaint, obtained a copy of the report from the public authority on 11 March 2011.
10. On 19 April 2011, the Commissioner wrote to the public authority regarding the obtaining of the qualified person's opinion that section 36 was engaged. The Commissioner said -

"Section 36 is a prejudiced based exemption which works in a slightly different way to the other prejudiced based exemptions contained within the Act. Section 36 can only be engaged if in the reasonable opinion of the qualified person disclosure would result in any of the effects set out in section 36(2) of the Act.

"In order for the ICO to determine whether section 36 was correctly applied please 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.

"Furthermore, if in providing such documents, the following is not clear, please provide a response to the following questions:

- *When was this opinion sought and when was it given?*
- *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?*
- *Was the qualified person provided with any submissions supporting a recommendation that the exemption was engaged?*
- *Similarly, was the qualified person in fact provided with any contrary arguments supporting the position that the exemption was not engaged?*

As the DHSSPS is relying on section 36(2) (c) – i.e. 'otherwise prejudice effective conduct of public affairs' – please clarify what the nature of this prejudice is."

11. In reply (dated 9 May 2011), the public authority explained that, on 13 October 2010, civil servants of the public authority provided the qualified person, the minister, Michael McGimpsey, with written advice regarding the giving of his opinion as to whether releasing the report would or would be likely to prejudice the effective conduct of public affairs. On 18 October 2010, the reply from the minister's office was that in his opinion the report was exempt from disclosure by virtue of section 36. It did not specify however whether it was the qualified person's opinion that that prejudice would occur *or* would be likely to occur.
12. The public authority, on 17 June 2011, informed the Commissioner that there were no other reports created during the last 3 years which examined the area of cross border co-operation in health care.

Analysis

Exemptions

13. 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.
14. The public authority's position is that in the view of the qualified person releasing the report would prejudice or would be likely to prejudice the effective conduct of public affairs.
15. The Commissioner notes that section 36 is a unique exemption in that its engagement turns on the qualified person giving a reasonable opinion. The Commissioner's view is that a 'reasonable opinion' for the purposes of section 36 will normally be one which is both objectively reasonable and reasonably arrived at.
16. The Commissioner recognises that there may often be a range of opinions in relation to a particular issue which might properly be considered reasonable. Therefore the 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 report. The Commissioner finds, this was a reasonable opinion.

17. The Commissioner notes that the qualified person was provided with written arguments both for and against the contention that releasing the report “would or would be likely to prejudice the effective conduct of public affairs”. The qualified person’s recorded opinion was that he “agrees it was exempt under section 36”. Having regard to the material the qualified person was provided with, the Commissioner’s decision is that this opinion was reasonably arrived at.
18. The qualified person however did not specify whether his opinion was that the prejudice would occur *or* would be likely to occur. The Commissioner’s position is that where the level of prejudice has not been specified then the lower threshold of prejudice is to apply, unless there is clear evidence that it should be at the higher level. Accordingly, the Commissioner finds that it was the qualified person’s opinion that the prejudice specified by section 36 (2) (c) would be likely to occur. As the Commissioner is also satisfied that the opinion was reasonably arrived at, he agrees that the exemption is engaged.
19. Section 36(2) (c) is a qualified exemption and therefore it is subject to the public interest test. 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.
20. The Commissioner considered the following public interests arguments. These arguments have been advanced by the public authority and/or the complainant and/or are otherwise apparent to the Commissioner.

Public interest arguments in favour of disclosing the requested information

- The public interest in ensuring transparency in the activities of public authorities
- The public interest in increasing the public’s knowledge about what policy issues are or were being considered regarding provisions for its health care.
- The public interest in knowing about the inter-action between the governments north and south of the border.

Public interest arguments in favour of maintaining the exemption

- Disclosure would have a negative impact on future policy development in relation to north south collaboration on health and social care services

- Disclosure would prejudice the work of the Executive Committee of the Northern Ireland Assembly
- Good government depends on a full consideration of all the options without fear of disclosure.
- Disclosure of the report might create a precedent for government.
- Disclosure of the information would affect the interest of the government in Dublin and so disclosure may affect future co-operation.

Balance of the public interest arguments

21. 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)*. The report was completed on 19 February 2009 and requested by the complainant on 30 September 2010.
22. The Commissioner notes that he should give due weight to the reasonable opinion of the qualified person when assessing the public interest, and should consider the severity, extent and frequency of prejudice to the effective conduct of public affairs. By accepting that a prejudice-based exemption is engaged it is also accepted, in the application of the public interest test, that the prejudice is not trivial or insignificant and that the prejudice, in this instance, would be likely to occur.
23. The Commissioner appreciates there is a degree of merit in the public authority's postulation that disclosing the report may hamper the obtaining of the views of the government in Dublin for future cross border deliberations due to the fear of disclosure. However, the merit is significantly diminished by the fact that the Act provides exemptions (where appropriate) from the duty of disclosure in order to facilitate relations between the United Kingdom and any other State.
24. The Commissioner does not believe that the public interest argument (for maintaining the exemption) that disclosure of the report might create a precedent for government is strong. Decisions on the release of information under the Act are reached by applying the provisions of the Act to the information itself, taking account of all the relevant circumstances. In this case, the release or non-release of the report does not set a precedent for any future reports.

25. The assertion that good government depends on a full consideration of all the options without fear of disclosure is too wide a generalisation. It may equally be said that good government depends on a full consideration of all the options in the knowledge that the public will (at some stage) know fully what options were considered and so be able to fully scrutinise the decision and how it was reached.
26. The public interest in the delivery of health care, by way of the National Health Service, is very great indeed. The public provision of health care has major implications for individuals, both in financial terms, through taxation, and in personal terms, through access to health care services for themselves and their families. It is in the public interest that this report, being concerned with the possible future arrangements for the provision of the health and social care, is in the public domain. This facilitates the public's ability to engage in the political discussions, and thus potentially affect political decisions, regarding the provision of health care to the public.
27. The positive developments in recent years in collaborative North-South work in this area is a further public interest factor which, in the Commissioner's view, supports the public interest in favour of disclosure.
28. On balancing the varying public interest arguments, it is the Commissioner's view that the balance weighs significantly in favour of disclosing the information. The provision of health care is a matter of the highest importance to the public. The public, through taxation, also has a financial interest in how their money is spent by their governments on health care. The Commissioner must acknowledge, by finding that the qualified person's opinion was a reasonable one, that releasing the information would be likely to prejudice, the effective conduct of public affairs. However, the severity, extent and frequency of that prejudice do not appear to the Commissioner to be such as to outweigh the benefit to the public in releasing the requested information.

Procedural Requirements

29. The Commissioner has considered the part of the complainant's request that sought from the public authority "a copy of all other reports created during the last 3 years which examined the area of cross border co-operation in health care". The Commissioner, finding no evidence to the contrary, accepts the public authority's assertion (see paragraph 12 above) that no such reports are held. The report which the public authority has presented to the Commissioner as the withheld information appears to be a stand-alone document. The public

authority's failure to confirm to this to the complainant places it in breach of sections 1 (1) (a) and 10 (1) of the Act.

The Decision

30. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it
- Incorrectly withheld information on the basis that although the exemption at section 36(2) (c) was engaged, the public interest in maintaining the exemption did not weigh that in disclosure.
 - By failing to confirm it did not hold some of the requested information it breached sections 1(1)(a) and 10 (1) of the Act

Steps Required

31. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- To communicate to the complainant a copy of North – South Feasibility Report on Co-Operation in Health.
32. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

33. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Right of Appeal

35. 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

36. 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.
37. 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
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."

Section 10(1) 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."

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-

- (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.