

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 October 2012

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information relating to correspondence between the Archbishop of Canterbury and the Prime Minister. The Cabinet Office disclosed one item of correspondence, and relied on section 36(2)(b)(ii) to withhold the remainder. The complainant asked the Commissioner to consider whether that information was correctly withheld and to consider the way in which the disclosed information was provided to him.
2. The Commissioner's decision in this case is that the exemption under section 36(2)(b)(ii) is engaged and that the public interest in maintaining the exemption outweighs the public interest in favour of disclosing the information.
3. With respect to one item of correspondence, the Commissioner requires the public authority to reconsider its response and either disclose the information or issue a valid refusal compliant with section 17 of FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant wrote to the Cabinet Office on 13 June 2011 and requested information in the following terms:

"I am writing to request copies of any and all written correspondence between the Archbishop of Canterbury and the Prime Minister/his office between the dates of 11/05/2010 and 13/06/2011."

6. In other words, he requested information about correspondence between the two parties between the day on which David Cameron became Prime Minister and the date of the request.
7. The Cabinet Office responded on 11 July 2011 confirming that it holds information within the scope of the request. It advised that it was extending the time for responding as it needed to consider the public interest test. The Information Commissioner (the Commissioner) is concerned to note that it was not until 15 September 2011 that the Cabinet Office provided its substantive response. On that date, it stated that it was withholding the requested information under the exemption in section 36(2)(b)(ii) of FOIA (prejudice to effective conduct of public affairs).
8. Following an internal review the Cabinet Office wrote to the complainant on 21 February 2012 upholding that decision in relation to most of the information. However, it provided the complainant with one item of correspondence that it no longer considered engaged the section 36 exemption.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He told the Commissioner that he disagreed with the Cabinet Office's withholding of the requested information:

"Firstly, the request would not severely, frequently or to a great extent inhibit the quality of exchanges between the Archbishop and the Prime Minister or his office. Secondly, there is a strong and pressing public interest case for the information being released".
10. The complainant also queried the way in which the information that was provided was disclosed to him.
11. The Commissioner considers the scope of his complaint to be the Cabinet Office's citing of the prejudice to the effective conduct of public affairs exemption. He has also addressed the issue of the manner in which the disclosed information was provided.

Reasons for decision

12. Section 36 is the only exemption in FOIA that requires a determination by a 'qualified person'. The exemption will only apply if, in the reasonable opinion of a qualified person, one of the forms of adverse effect specified in paragraph 2 would follow from disclosing the information.
13. Section 36(2) of 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".
14. In correspondence with the Commissioner, the Cabinet Office confirmed that it is relying on section 36(2)(b)(ii) in relation to all of the withheld information.
15. In correspondence with the complainant, the Cabinet Office argued that, in its view, disclosing the requested information in this case "*would*" inhibit the future exchange of views between the Prime Minister and the Archbishop of Canterbury for the purposes of deliberation.
16. 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. In the Commissioner's view, the Cabinet Office did not clearly explain to the complainant how or why it considered disclosure in this case would inhibit the process of exchanging views.

The opinion of the qualified person

17. In support of its reliance on section 36, the Cabinet Office provided the Commissioner with a copy of the submission that was provided to the qualified person, on 11 July 2011, in relation to this request for information. The Commissioner is satisfied that the correct qualified person was involved in this case - that is, Francis Maude, MP, Minister for the Cabinet Office.

18. In the Commissioner's view, section 36 depends crucially on the qualified person's exercise of discretion in reaching their opinion. This means that they must consider the circumstances of the particular case before forming an opinion.
19. The Commissioner has considered both the submission provided to the qualified person in this case and their response. In the Commissioner's view, the submission falls short of what he would expect to see demonstrated regarding the likelihood of inhibition or harm occurring as a result of disclosure. For example, he does not consider that it gives a clear indication of whether the risk of any inhibition occurring was considered to be one that 'would be likely to' occur, or whether the risk met the higher test of 'would' occur. Furthermore, in his view, the arguments in the submission refer to the public interest test, an issue which properly falls to be considered after the decision has been taken that the exemption is engaged.
20. In other words, the Commissioner is not satisfied that the submission evidences that relevant factors – for example the circumstances at the time of the request - were taken into account in forming the opinion. However, he accepts that it was reasonable in this case to reach the opinion that the exemption was engaged: in essence, the arguments in relation to the opinion carry through to the public interest test.
21. He also acknowledges that, by virtue of their role in promoting the Government's open data agenda, the Minister for the Cabinet Office, the qualified person in this case, would have understood their role and responsibilities with respect to FOIA.
22. Notwithstanding the fact that the quality of the submission in this case makes it harder to decide whether the opinion given was reasonable, focussing on that opinion the Commissioner is satisfied that it is not unreasonable to reach such an opinion in the circumstances of the case.

The public interest

23. Section 36 is a qualified exemption. This means that, even if the exemption applies, the Cabinet Office must still disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

24. The Cabinet Office recognises that there is a general public interest in knowledge of whom the Prime Minister corresponds with. It acknowledges that disclosure could allow more informed debate.

25. Arguing in favour of disclosure, the complainant brought to the Commissioner's attention details of a speech by the Archbishop and the fact of his guest-editorship of a publication, facts which, in his view, show:

"an Archbishop politically prepared to question government".

26. As Archbishop of Canterbury, Rowan Williams is the senior bishop and principal leader of the Church of England. In putting his arguments in favour of disclosure to the Commissioner, the complainant said, with reference to the Church of England:

"In no other organisation is there a comparable interest in understanding how it puts pressure on government".

27. He disputed that disclosure would have the detrimental effect described by the Cabinet Office, arguing that, were the withheld information to be disclosed:

"It is incredibly unlikely the Archbishop will cease providing advice and pressure of comparable quality and use to government, and, moreover, the nature of the Archbishop's faith and role make it ever less probable that disclosure would obstruct exchanges in future".

Public interest arguments in favour of maintaining the exemption

28. In favour of maintaining the exemption, the Cabinet Office told the complainant it considered that it is in the public interest for the Prime Minister and the Archbishop of Canterbury to be able to have a confidential dialogue about areas of mutual concern, including issues which are sensitive in nature.

29. Commenting more widely on the public interest in dialogue between the Prime Minister and religious leaders, it went on to argue that disclosure in this case:

"would undermine the quality and nature of this dialogue in the future".

30. Similarly, in correspondence with the Commissioner, the Cabinet Office argued strongly that:

"erosion of safe space to exchange views could lead to an absence of debate between important stakeholders and Government Ministers which would be to the serious detriment of the conduct of public affairs".

Balance of the public interest arguments

31. In weighing the public interest factors, the Commissioner must take into account the likelihood of disclosure restraining, decreasing or suppressing the freedom with which views are exchanged. In doing so, the Commissioner has considered the content and sensitivity of the information and timing of the request as well as the arguments put forward by the complainant and the Cabinet Office.
32. With respect to the timing of the request, the Commissioner notes that by virtue of the wording of the request, the scope of the request necessarily relates to a time when the Prime Minister was newly in post.
33. The Commissioner accepts that, in cases where there is a suspicion of wrongdoing, that adds weight to the public interest in disclosure. However, with respect to the content of the withheld information in this case, the Commissioner is satisfied that there is no evidence that the views being expressed can be considered to be favouring the Church of England or guiding policy.
34. The Commissioner accepts that there is merit in the argument that disclosure in this case would provide greater transparency in the relationship between the Archbishop and the Prime Minister: in this case by demonstrating the topics on which correspondence is exchanged.
35. He also accepts that there is a strong general public interest in the Prime Minister and religious leaders, including the Archbishop of Canterbury, being able to have an exchange of views without fear of disclosure. Given the particular perspective of religious leaders on a range of issues, there is a strong need for information to be shared in a free and frank way to enable the parties to express their candid opinions in relation to matters of mutual interest, including those of a sensitive nature.
36. In the Commissioner's view, 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 a valid piece of evidence in his assessment of the balance of the public interest.
37. Having accepted the qualified person's opinion that the free and frank provision of views would be inhibited as a result of disclosure, the Commissioner recognises that the impact of this inhibition could be severe given the importance of the relationship between the Prime Minister and the Archbishop – that is between the head of Government and the senior bishop and principal leader of the Church of England. He

recognises the expectation of trust and confidentiality on which dialogue within such a relationship is based.

38. Taking all the circumstances of the case into account, the Commissioner considers that the desirability for openness and transparency through disclosing the withheld information does not equal or outweigh the harm that disclosure would cause. The Commissioner therefore concludes that the public interest in maintaining the exemption at section 36(2)(b)(ii) outweighs the public interest in disclosing the information.

Section 1 General right of access

39. Section 1(1) of FOIA states that any person making a request for information to a public authority is entitled to be informed in writing if the authority holds the information and, if that is the case, to have that information communicated to them. With respect to the item of correspondence that was disclosed, the complainant told the Commissioner that, in disclosing the item of correspondence, the Cabinet Office provided him with:

"a typed-in copy of the body text of the correspondence from the Archbishop. I had expected the Cabinet Office would scan-in the letter and redact any sensitive details as necessary.....Firstly, copying the text of the letters can be expected to be more labour-intensive, and thus expensive for the Cabinet Office....Secondly there is a risk that an error might be made during the copying of the text...Thirdly, scanned-in copies of the letters allow the public and myself to be very reasonably confident of the veracity of the information provided and removes the possibility that the Cabinet Office could exclude minor details that give a better context of depth to the letters".

40. The Commissioner raised this with the Cabinet Office. The Cabinet Office supplied him with a copy of the information in its original form and a copy of the version provided to the complainant.
41. Having viewed both versions of the correspondence the Commissioner considers that the Cabinet Office holds further, contextual, information within the scope of the request. It follows that he is not satisfied that the Cabinet Office complied with its obligations under section 1(1) of FOIA in respect of that correspondence
42. The Commissioner requires the Cabinet Office either to disclose that small amount of information to the complainant or provide the complainant with valid reasoning as to why it will not be disclosed.

Right of appeal

43. 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

44. 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.
45. 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

Steve Wood
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