

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2013

Public Authority: Department for Communities and Local Government

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant has requested information relating to a letter he sent to the Cabinet Secretary, Gus O'Donnell. The Department for Communities and Local Government (DCLG) confirmed that the information was held but that the request was being refused under three subsections of the exemption for prejudice to the effective conduct of public affairs (section 36 of the FOIA).
2. The Commissioner's decision is that DCLG has correctly applied the exemptions and that the public interest favours maintaining the exemptions. The information has, therefore, been correctly withheld.
3. The Commissioner does not require the public authority to take any steps.

Background

4. In October 2011 DCLG published records of expenditure incurred on Government Procurement Cards (GPC) during the period April 2004 to April 2006 by a predecessor organisation, The Office of the Deputy Prime Minister (ODPM).
5. The publication of the records was reported in the press and in October 2011 the complainant wrote to the then Cabinet Secretary, Lord Gus O'Donnell, seeking an investigation into some of the published payments and confirmation that he had not personally held a GPC during his tenure at the ODPM.

6. The Cabinet Office responded to the complainant on 18 November 2011 which confirmed that the complainant had not held a GPC and, in relation to concerns about the listed payments, it confirmed that much of the expenditure had been legitimately incurred by the ODPM except for seven transactions amounting to £2000 which were made by cloned credit cards. In relation to this, the response stated *"This money has been recovered and an individual has been disciplined."*
7. The Cabinet Office subsequently issued a further response to the complainant on 22 November 2011 which, whilst confirming that some transactions were the result of cloned credit cards, omitted the reference to an individual being disciplined. A further omission from the second response is a paragraph which explains that, where spend relates specifically to former Ministers, the relevant former Minister should be informed before publication. The initial letter advised that DCLG had been reminded of this process.
8. The complainant has stated that Lord O'Donnell has confirmed that he only had sight of and authorised the first issued response. The complainant's request for information was an attempt to establish on whose authority the changes to the response of 22 November 2011 were made.

Request and response

9. On 24 July 2012, the complainant wrote to DCLG and requested information in the following terms:

"all correspondence you hold relating to my letter to the previous Cabinet Secretary Gus O'Donnell dated October 31 2011.

Please list all correspondence between Michael Edwards from the Cabinet Secretary's Office, Gus O'Donnell, the Cabinet Office and DCLG ministers, DCLG special advisors and DCLG officials between November 18 and November 23 relating to my letter dated October 31 2011.

This should include all correspondence between DCLG Special Advisors, DCLG ministers and DCLG officials between November 18 and November 23.

The requested correspondence between all parties should include e-mails, meetings, phone calls (call logs and/or transcripts) and letters."
10. DCLG responded on 25 September 2012. It stated that the requested information was held but refused the request, withholding the information under the exemptions for prejudice to the effective conduct

of public affairs and inhibition to the free and frank provision of advice/
inhibition to the free and frank exchange of views for the purposes of
deliberation.

11. Following an internal review DCLG wrote to the complainant on 29 November 2012. It stated that it was upholding its original grounds for refusing the request.

Scope of the case

12. On 17 December 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
13. The Commissioner confirmed with the complainant that his investigation would consider whether DCLG correctly applied exemptions to refuse the request.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

14. In refusing the request, DCLG has cited the exemptions set out in the following sections of the FOIA:
 - 36(2)(b)(i) (inhibition to free and frank provision of advice)
 - 36(2)(b)(ii) (inhibition to the free and frank exchange of views)
 - 36(2)(c) (other prejudice to the effective conduct of public affairs)
15. The exemptions provided by section 36 can be cited only on the basis of the reasonable opinion of a specified qualified person (QP). Consideration of these exemptions is a two-stage process; first, it must be established that this exemption was cited on the basis of a reasonable opinion given by the QP that inhibition or prejudice relevant to these exemptions would or would be likely to occur and, secondly, this exemption is qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
16. Turning to whether this exemption is engaged, section 36(5)(a) provides that the QP for a government department is any Minister. In this case DCLG has stated that the opinion was given by the Rt. Hon. Eric Pickles MP, Secretary of State for Communities and Local Government. It has

also supplied to the Commissioner's office a copy of a submission to the QP dated 6 September 2012 seeking his opinion that the information falling within the scope of the complainant's request fell within the exemptions at both section 36(2)(b)(i) and (ii) of the FOIA, as its disclosure would or would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

17. DCLG confirmed that, on 19 September 2012 the QP was provided with a further submission which invited him to consider whether the exemption at section 36(2)(c) was also applicable to the withheld information, as disclosure in this case would be likely to prejudice the effective conduct of public affairs in that it would be likely to undermine the support role provided by private offices.
18. The Commissioner has had sight of the submissions made to the QP and notes that the QP was informed which specific limb of the exemptions his opinion was being sought upon, was provided with the information falling within the scope of the request and provided with reasons for those exemptions being engaged or not engaged.
19. The Commissioner accepts, therefore, that in this case the opinion of an appropriate QP was properly sought in relation to the application of the exemptions.
20. The next step is to consider whether this opinion was objectively reasonable. In forming a conclusion on this point the Commissioner has considered the explanation provided by the DCLG of the reasoning for the opinion of the QP and compared this to the content of the information in question.
21. DCLG provided the following grounds for the reasonableness of the QP's opinion:

Section 36(2)(b)(i) and (ii)

22. DCLG's submission to the QP sought his reasonable opinion as to whether the described inhibition *would* occur. 'Would prejudice' means that it is more likely than not (i.e. a more than 50% chance) that prejudice would occur. The degree of likelihood claimed by the public authority is important because it sets the bar for engaging the exemption and then, if demonstrated, is carried forward into the balance of factors in the public interest test.
23. DCLG has stated that the exemptions at section 36(2)(b)(i) and (ii) are more about the processes that may be inhibited rather than what is in the information. DCLG has argued that the nature of the information in this case relates to and describes factual matters about which the record

has publically been set straight. Whilst DCLG considers that the withheld information is not noticeably frank and this fact would have been apparent to the QP, this was not a material factor in the advice or decision to engage the section 36(2)(b) exemptions. DCLG confirmed that the material factor was the need for continued private space at the time of the request.

24. In this respect, DCLG has acknowledged that the timing of a request can often have a significant bearing on whether disclosure would or would be likely to have an inhibiting or prejudicial effect. In this case, DCLG considers that, whilst the relevant information and correspondence was almost a year old at the time of the request, the issue to which it relates was one with a high public profile and very much still "live", as reflected in continuing press attention and questions posed by the complainant¹.
25. DCLG has argued that its considerations about private space in this case touch upon the concepts of "chilling effect" and "safe space", the latter term having been explicitly used in its responses to the complainant. DCLG has acknowledged that, whilst these concepts are not the same and care must be taken to differentiate between them, it considers that both are relevant in this case.
26. The Commissioner's guidance notes that it is sometimes argued that public authorities need a 'safe space', away from public scrutiny, in which to develop policy, debate live issues and reach decisions. This argument is more commonly applied to the development of government policy, and as such it relates to the section 35 exemption. The Commissioner's guidance notes that, apart from the development of government policy, there may be a need for any public authority to have a safe space in which to develop policy or make decisions. For example, in relation to section 36(2)(b), it may be that safe space needs to be protected to allow the free and frank exchange of views or the free and frank exchange of advice².
27. The Commissioner's guidance notes that arguments under s36(b)(i) and (ii) are often based on the concept of a 'chilling effect', i.e. disclosure would inhibit the frankness and candour with which views are exchanged and advice given, and that there is need for such frankness and candour

¹ See, for example: <http://www.guardian.co.uk/politics/2012/jul/21/prescott-cabinet-office-campaign-letter>

² [http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom of Information/Detailed specialist guides/section 36 prejudice to effective conduct of public affairs.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx)

as part of the decision making process. This 'chilling effect' may operate at various levels. Public authorities may argue that disclosure would inhibit the way in which officials discuss the particular issue in question, or other similar issues, or other unrelated issues in the future³.

28. The Commissioner and the Information Tribunal have tended to be more sceptical about any effect on future unrelated discussions but the Commissioner accepts that the chilling effect cannot be dismissed out of hand. Whether it is reasonable to think that it would happen depends on the circumstances of each case, including the timing of the request in relation to the issue discussed. In any case, civil servants and other public officials charged with giving advice are expected to be impartial and robust in discharging their responsibilities and should not be deterred from expressing their views by the possibility of future disclosure.
29. DCLG has argued that the live nature of the issue to which the information relates clearly identifies that there was a need, at the time of the request, for a safe space within which advice could be provided and free and frank views exchanged.
30. DCLG has acknowledged that arguments for the harm of disclosure on the future frankness and candour of advice given and views exchanged should not be drawn too widely. It has also noted that, whether it is reasonable to think such concerns justified is dependent on the circumstances of each case and the issues under discussion. DCLG has argued that, in this case, separate from the concept of safe space, given the ongoing, high-profile and public nature of the issue, it was reasonable to conclude that disclosure would have inhibited the frankness and candour with which officials would have made future contributions to advice and debate about the issue and, in all likelihood, similar high-profile issues in future where senior public figures and media speculation may be concerned.
31. Having considered DCLG's submissions, the withheld information itself and the publically available information regarding the issues in question, the Commissioner accepts that the opinion of the QP that inhibition and prejudice relevant to sections 36(2)(b)(i), (b)(ii) would occur as a result of disclosure of the information in question was reasonable. The exemptions provided by these sections are, therefore, engaged.
32. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in

³ Ibid.

disclosure outweighs that in maintaining the exemption. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the QP, but will also consider the severity, extent and frequency of the inhibition and prejudice that he has accepted would be likely to result through disclosure.

Public interest in favour of disclosure

33. DCLG has argued that, in general, the public interest is served by making available information held by public authorities; that this is the central principle underpinning the right of access enshrined in the FOIA. Disclosure would promote the accountability and transparency of government which, in turn, builds public trust and confidence in good government.
34. DCLG has also acknowledged that there is a degree of public interest served in this case by understanding what internal discussions took place to inform the then Cabinet Secretary's reply and why it was considered necessary for an amended reply to be subsequently issued.

Public interest in maintaining the exemption

35. DCLG has argued that there is little public interest in further information relating to this issue being made available as information already in the public domain provides a clear explanation of the relevant facts. DCLG confirmed in its response to the complainant that the reasons for the difference between the two responses issued to the complainant by the Cabinet Secretary had already been explained and were a matter of public record. DCLG has argued that the requested information would only confirm these reasons and explanations, thus lessening any public interest in disclosing the information.
36. DCLG's internal review reinforced and expanded upon this line of reasoning, directing the complainant to a statement made to Parliament by Lord Wallace (made prior to DCLG's internal review) which, in response to a question submitted by the complainant, said:

"A factual error in the Cabinet Office reply of 18 November 2011, incorrectly suggesting that departmental civil servants had been disciplined for the use of the Government Procurement Card under the previous Administration, was removed from the version of 21 November. In fact, the fraud stemmed from seven transactions on a cloned credit card. A second paragraph was also deleted from the version of 18

*November in error. The Cabinet Secretary has written to the noble Lord to explain the background.*⁴

37. DCLG considers that it is, therefore, in the public domain that the suggestion in the Cabinet Secretary's letter of 18 November 2011 that departmental staff had been disciplined for fraudulent use of the GPC was a factual error, making it necessary for the issuing of the subsequent response of 22 November 2011. Similarly, DCLG confirmed that it was also a matter of public record that the omission of a further paragraph from the response of 22 November 2011 was an administrative error.
38. DCLG also directed the Commissioner to the Ministry of Justice's guidance in relation to the application of section 36, in particular the following section:

*"...if for example there is already a lot of information in the public domain about an issue, and releasing this information would not substantively add to that knowledge but would still pose a risk of prejudice, then the public interest is likely to favour non-disclosure."*⁵

Balance of the public interest

39. In considering complaints regarding section 36, where the Commissioner finds that the QP's opinion was reasonable, he will consider the weight of that opinion in 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.
40. Having accepted the opinion of the QP as reasonable in this case, the Commissioner, placing weight on the timing of the request, recognises that this inhibition and prejudice would be likely to result with some frequency; potentially in any situation where an official provides advice to or has an exchange with a Minister on an issue concerning matters reported in the press.

⁴ Lords Hansard, 24 Sep 2012 : Column WA317

<http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/120924w0005.htm>

⁵ <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-exemption-s36.pdf>

41. In relation to the severity of the inhibition, the Commissioner considers that the live nature of the issue intensifies the impact of disclosure on the processes described by the exemptions, namely the free and frank provision of advice and exchange of views for the purposes of deliberation. The high-profile status of the complainant and the previous interest shown by the press in this matter combine to make it more probable than not that disclosure would result in the safe space identified by DCLG being invaded.
42. In relation to the public interest in disclosure and the complainant's wish to know who was responsible for authorising the changes to the letters issued by the Cabinet Office, the Commissioner accepts that there is a general public interest in knowing that public authorities have made decisions inappropriately and in accordance with standards expected by those in public life. However, the Commissioner has not been provided with any evidence in this case that differences between the letters in questions are the result of anything more sinister than administrative errors.
43. The Commissioner accepts that there is a strong public interest in public authorities being held accountable for use of public funds and, in this particular example, for knowing that GPCs are being used for valid purposes. However, the Commissioner does not consider that the disclosure of the withheld information would contribute to this public understanding and, whilst it may be of interest to the complainant, would not add anything to the facts which have already been placed in the public domain.
44. The Commissioner has given due weight to the QP's opinion and the fact that the timing of the request contributes to the severity and frequency of the inhibition described within section 36(2)(b). The Commissioner finds that the public interest in disclosure in this case does not carry much weight and is counterbalanced by the public interest in maintaining the exemption.
45. As the Commissioner has concluded that DCLG has correctly applied the exemptions at section 36(2)(b)(i) and (ii) and that the public interest favours maintaining the exemption, he has not gone on to consider DCLG's application of section 36(2)(c).

Right of appeal

46. 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

47. 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.
48. 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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