

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 June 2013

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department for Education (DfE) for any guidance it had received from the Cabinet Office on the use of private emails for conducting official government business. The DfE refused the request under section 36(2)(b) and 36(2)(c) of FOIA.
2. The Commissioner has investigated the complaint and found that the requested information was exempt from disclosure under section 36(2)(b)(i) of FOIA and the public interest favours maintaining this exemption. The Commissioner requires no steps to be taken.

Request and response

3. On 31 January 2012 the complainant made a freedom of information request to the Department for Education (DfE) for copies of guidance on the use of private email accounts. The request read as follows:

"Under the Freedom of Information Act please provide me with all written and electronic Cabinet Office guidance that has been issued to the Department for Education – either directly or as part of standard guidance issued to each government department – on the use of private email accounts for conducting official government business since 6 May 2010."

"This would include any recorded information that specifically refers to the use of private email accounts and compliance with the provisions of

the Freedom of Information Act. It would also include any updated, or interim, Cabinet Office guidance that has been produced further to the Information Commissioner's ruling of 15 December in which he states FOIA applies to official information in private email accounts (and other media formats) when held on behalf of the public authority."

4. The DfE responded to the request on 6 August 2012 and confirmed that it held information falling within the scope of the request. However, it said that the information was being withheld under the exemption in section 36(2)(b) and (c) of FOIA. The DfE concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure. The DfE was asked to carry out an internal review of its handling of his request and it presented its findings on 29 November 2012 at which point it upheld its earlier decision to refuse the request.

Scope of the case

5. On 1 February 2013 the complainant contacted the Commissioner to complain about the DfE's decision to refuse his request for information.

Reasons for decision

6. The DfE has refused the complainant's request under section 36(2)(b) and (c) of FOIA which provide that information is exempt if in the reasonable opinion of the qualified person disclosure:
 - (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.*
7. When deciding if the exemption is engaged the Commissioner has to first establish that an opinion was given on the application of the exemption by a proper qualified person. In this case the Commissioner has established that a government minister, the Minister for the Cabinet Office Francis Maude MP, gave his opinion on the disclosure of the information in response to an identical request which the complainant had made to the Cabinet Office. The FOIA requires that for government

departments the qualified person is a minister of the Crown. Therefore the Commissioner is satisfied that the opinion of the qualified person was valid and that it was appropriate to rely upon the opinion of the Minister for the Cabinet Office.

8. In order to determine whether the exemption is engaged the Commissioner must then go on to consider:
 - whether the prejudice claimed relates to the specific subsection of section 36(2) that the DfE is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.

9. The Commissioner has recently issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. 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."

10. The information in this case is advice given by an official within the Cabinet Office to the DfE on the handling of FOI requests about the use of private emails by ministers and officials. The information is more a preliminary consideration of the issue rather than formal guidance and, the DfE explains, was not intended to be the final word on the issue. The DfE argues that section 36(2)(b)(i) is engaged because disclosure would undermine the ability to give advice quickly, responsively and candidly in response to enquiries from other officials, including in other departments.
11. The DfE argues that section 36(2)(c) is also engaged because if officials were unable to provide advice in this way it would slow the process because they would want to express themselves more cautiously if they felt that their comments might be made public. They would also wish their comments to be final and complete. Consequently section 36(2)(b)(ii) would also be engaged because advice which is restricted by qualifications is less clear and useful to the recipient and this would impede free and frank discussion rather than facilitating it.
12. The DfE's arguments focus on the prejudice that would be caused to the ability of officials to provide advice. Whilst it has suggested that the

effects of this are such that it would also engage section 36(2)(b)(ii) and 36(2)(c) the Commissioner considers that the arguments surrounding section 36(2)(b)(i) are most persuasive and that therefore it is appropriate to concentrate on this particular element of the exemption in the first instance.

13. It is important to note that when considering whether section 36 is engaged the Commissioner is making a decision not on whether he agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.
14. Having reviewed all of the information placed before the qualified person the Commissioner is satisfied that the information included the relevant arguments. He was provided with a copy of the withheld information and a submission prepared by his officials, allowing him to form a reasonable opinion on the likely effect of disclosure of the information.
15. The Commissioner has also considered the opinion itself and is satisfied that it was reasonable for the qualified person to conclude that disclosure would inhibit the free and frank provision of advice. This is because the information is written in an informal manner that is not intended for wider publication. The Commissioner agrees with the DfE that disclosure of this type of information would be likely to lead to officials being more inhibited in how they provide advice in future. Moreover, the Commissioner is aware that the issue under discussion, the use of private emails accounts in the context of FOIA, was very much a live issue at the time of the request. The Information Commissioner had himself only recently (in December 2011) issued his own guidance on this issue where he acknowledged that this was an emerging area of FOIA compliance.¹ The Cabinet Office would later commit to publishing its own guidance and at the time of drafting this decision notice the publication of such guidance is understood to be imminent. The DfE has said that the note which makes up the withheld information was only "the very earliest step" in the government's thinking on this issue. The Commissioner accepts that disclosure in these circumstances would be likely to have a greater impact on the free and frank provision of advice.

¹http://www.ico.org.uk/for_organisations/guidance_index/~//media/documents/library/Freedom_of_Information/Detailed_specialist_guides/official_information_held_in_private_email_accounts.ashx

16. The Commissioner is satisfied that the qualified person's opinion was reasonable and that therefore section 36(2)(b)(i) is engaged. Therefore he has gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

The public interest test

Public interest in disclosure

17. In making his request the complainant argued that the public interest favoured disclosure because it allows for scrutiny of the executive. He suggested that the information would allow the public to better understand how the DfE has been interpreting requests for information.
18. For its part, the DfE said that it recognised that there was a general public interest in disclosure of information and that openness in government may increase public trust in and engagement with the government. It acknowledged that that the decisions officials make may have a significant impact on the lives of citizens and therefore there is a public interest in their deliberations being transparent. In particular it said that there was a specific public interest in understanding how government meets its obligations under FOIA and in providing assurance that requests for information are properly dealt with.

Public interest in maintaining the exemption

19. As regards the public interest in maintaining the exemption the DfE said that in its view much greater weight was attached to the public interest in sound administration and in protecting the deliberations of officials at all levels.
20. It argued that it would not be in the public interest for officials to be inhibited when providing advice in future because this would be likely to impair the quality of that advice. It said that where officials are able to discuss matters of public administration fully, frankly and expeditiously this ensures that decisions are of the highest quality and that their implementation of government policy and their legal obligations are informed by an exact understanding of those obligations.
21. The DfE also said that a degree of confidentiality is necessary for its officials to discharge their duties. This is because they must be confident that each step in their deliberations would not be subject to minute inspection and analysis. Disclosure of elements of their discussion would, it argues, make officials accountable for each step in their consideration of a problem rather than the decision they reached.

Balance of the public interest

22. The Commissioner accepts that there is a certain amount of public interest in disclosure in terms of transparency and accountability although, in his view these arguments are more general in nature. There is also, as the DfE acknowledged, a more specific public interest in knowing how it meets its obligations under FOIA. The Commissioner has considered this point but would also say that having reviewed the withheld information there is nothing extraordinary or concerning in the content that would heighten the public interest in disclosure. The Commissioner has therefore given only limited weight to the arguments in favour of disclosure.
23. For the arguments in favour of maintaining the exemption the Commissioner is mindful that the information in question was very recent having been created just four months prior to the request being received. Furthermore, the issue under discussion, the extent to which emails held on private accounts are subject to FOIA, was still very much a live issue at the time of the request. In the Commissioner's view this gives the arguments surrounding the 'chilling effect' on the ability of officials to provide uninhibited advice added weight.
24. As regards the DfE's arguments in respect of the need for its officials to carry out their work with a degree of confidentiality or a 'safe space', the Commissioner has given these some weight when balancing the public interest. In particular, he has had regard to the fact that the withheld information concerned an issue which was still actively under discussion. He accepts that disclosure at that stage would have served as a distraction from the deliberations of its officials and would have hindered their ability to provide further advice.
25. The Commissioner considers that at the time of the request the extent and severity of the inhibition caused by disclosure would be particularly significant. Therefore, taking into account all the circumstances, and having given due weight to the opinion of the qualified person, the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Right of appeal

26. 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

27. 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.
28. 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**