

Freedom of Information Act 2000 (FOIA) Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 21 August 2014

Public Authority: Independent Parliamentary Standards Authority
Address: 7 Floor, Portland House, Bressenden Place
London, SW1E 5BH

Decision (including any steps ordered)

1. The complainant has requested information relating to the proposed increase in MPs' pay.
2. The Commissioner's decision is that Independent Parliamentary Standards Authority (IPSA) has correctly applied section 36(2)(b)(ii) by refusing to disclose the withheld information. He therefore requires no further action to be taken.

Request and response

3. On 12 December 2013, the complainant wrote to IPSA and requested information in the following terms:
 - i. *Please supply the contents of all emails between members of your board concerning the proposed increase in pay of MPs between the period of 1st November 2013 and 11th December 2013.*
 - ii. *Please supply the details of the expense claims of all board members for the period April 2013-October 2013. If these data are not available then please supply the last 6 months' data.*
4. IPSA wrote to the complainant on 10 January 2014 apologising for the delay in its response and advised that it was considering the application of section 36 to the requested information.
5. On 3 February 2014 IPSA responded. It refused to provide the information requested at part i. citing section 36(2)(b) and 36(2)(c) of the FOIA. IPSA stated that the information requested at part ii was

already available and therefore exempt by virtue of section 21 of the FOIA. It provided a website link with regard to part ii of the request.

6. Following an internal review IPSA wrote to the complainant on 13 March 2014 and maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 14 March 2014 to complain about the way his request for information had been handled. The Commissioner has clarified with the complainant that the issue in dispute relates to part i of his request.
8. The Commissioner considers the scope of this case to be to determine whether IPSA has correctly applied section 36 of the FOIA to the withheld information.

Background

9. IPSA was given responsibility for determining MPs' pay in May 2011, and the power to determine pensions in October 2011. In 2012-13 it began a wide-ranging review of MPs' pay and pensions. The review looked at MPs' remuneration in the round and also considered the long-term arrangements for resettlement payments paid to MPs who leave Parliament.
10. Given the complexity of the issues and the level of interest, IPSA decided to extend the subsequent formal consultation period to allow it to consult in two phases: a 'green paper' consultation in the Autumn of 2012, inviting views in response to a wide range of open questions, followed by a more focused consultation on a range of specific options in 2013.
11. The green paper consultation ran between October and December 2012. IPSA received almost 700 responses. The white paper consultation document was published on 11 July 2013, drawing on the engagement and research activities carried out in the previous consultation, and an anonymised survey of MPs. In addition to its recommendations for the pay and pensions arrangements for MPs, the consultation also asked for views on amendments to the MPs' Scheme of Business Costs and Expenses ("the Scheme").
12. The white paper consultation ran until 20 October 2013. IPSA received over 550 written replies, 530 posts on its website and a further 3,450

responses to its online survey, including a number of submissions from MPs. These results were then analysed by IPSA's policy team and subsequently considered and debated by the Board, who are ultimately responsible for the final recommendations. The final report was published in December 2013, and recommended a remuneration package including an increase in the base salary of Members of Parliament. Notably, this was the first time that MPs' salaries were set independent of Parliament. The recommendations are intended for implementation from the start of the next Parliament which is expected in May 2015.

Reasons for decision

13. Section 36(2) of the FOIA states that:

"information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –

(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."

14. Section 36 is also a qualified exemption and is therefore subject to the public interest test.

15. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.

16. IPSA's Qualified Person, as designated by the Secretary of State for Justice, is Sir Neil Butterfield QC, a member of IPSA's board and a former High Court judge. Sir Neil considered the engagement of the section 36 exemption with regards the first part of the request.

17. The Commissioner has reviewed the withheld information, the submissions he received from IPSA and the information that was given to the qualified person in order for him to reach his opinion.

18. As the Commissioner is satisfied that the opinion is the opinion of the appropriate qualified person for IPSA, he needs to consider whether that opinion is reasonable. It is important to highlight at this point that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold.
19. The test of whether an opinion is 'reasonable' is based on the plain meaning of the word. Put simply, an opinion will be considered reasonable if it is an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion and not necessarily the *most* reasonable opinion.
20. In relation to the application of section 36(2)(b)(ii), IPSA confirmed that the qualified person agreed that this exemption was engaged in this case for the following reasons:
 - "a) Releasing this exchange of emails might significantly prejudice the future confidence of IPSA Board Members in engaging in free and frank exchanges of view for the purpose of deliberation on matters of policy. In my judgment there is a strong likelihood that releasing the exchange of emails would adversely affect the ability of IPSA to carry out its functions in a professional, competent and efficient manner and to engage in a robust decision-making process.*
 - b) It is important and in the public interest that there is an effective and trusted working relationship between the members of the Board. In particular the members of the Board must have the freedom to engage in free and frank exchanges of views outside the forum of Board meetings. The release of the emails would, in my judgment, have a significant and detrimental impact on that freedom and on the working relationship within the Board.*
 - c) If members of the Board felt that they were unable to communicate with each other without their email correspondence being put into the public domain that would unquestionably be detrimental to the operation of the IPSA Board."*
21. As a prejudice-based exemption, section 36(2) of FOIA necessitates that a decision is made about whether there '*would*' be a harmful effect as a result of disclosure or whether it '*would be likely*' that the harmful effect would occur; '*would*' imposing a stronger evidential burden than the lower threshold of '*would be likely*'.
22. With regard to section 36(2)(b), the Commissioner considers that the exemption concerns processes that may be inhibited in the future, rather than harm arising from the content or subject matter of the

requested information itself. The key issue in this case is whether disclosure could inhibit the process of exchanging free and frank views for the purposes of deliberation.

23. Section 36(2)(c), on the other hand, refers to the prejudice that would be likely *otherwise* to apply. The Commissioner considers that if section 36(2)(c) is used in conjunction with any other exemption, the prejudice envisaged must be different to that covered by the other exemption.
24. The Commissioner is satisfied in this case that the qualified person's opinion that section 36(2)(b)(ii) is engaged is a reasonable opinion to hold. The opinion given addresses the relevant issues and expresses a clear, reasoned view on the likely impact of disclosure. He has therefore concluded that this exemption does apply in this particular case. However, he does not consider section 36(2)(c) to be engaged as the arguments relied upon by the qualified person relate only to section 36(2)(b)(ii). No other prejudice to the conduct of public affairs is identified.

Public interest test

25. Section 36(2)(b)(ii) is a qualified exemption so the public interest test set out in section 2(2)(b) must be applied. The requested information, though exempt, can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.
26. The Commissioner notes that it was the qualified person's opinion that disclosure of the withheld information "would be likely" to have the effects set out in sections 36(2)(b)(ii), as opposed to that it "would" have those effects. In his view this means that there is a real and significant chance of the prejudice occurring, even though the probability may be less than fifty per cent. The Commissioner has taken this into account in assessing the public interest arguments in favour of maintaining the exemption.
27. In *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Tribunal noted the distinction between the consideration of the public interest under section 36 and the consideration of the public interest under other qualified exemptions contained within the Act:

'The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to

make the required judgement without forming a view on the likelihood of inhibition or prejudice'.

28. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so –

"...does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant."

29. Therefore, in the Commissioner's opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the likely inhibition on the free and frank provision of advice, the free and frank exchanges of views for the purposes of deliberation and the likely prejudice to the effective conduct of public affairs.

30. IPSA considered the following factors against disclosure;

- The Final Report on MP's pay and pensions, which was published prior to the request, set out in detail the rationale for the conclusions reached by the Board. The emails between members of the Board contain discussion on the content of the Final Report, which was then in draft.
- There is a strong need to create a 'safe space' for Board members and senior staff to carefully deliberate, consider the evidence and arguments, formulate their conclusions and make decisions. There is clearly a strong public interest in allowing public authorities, such as IPSA, to consider various options and to discuss and deliberate these options to ensure that their decisions are robust and appropriate; there is a strong public interest in allowing senior public officials to consider and to discuss matters freely and frankly without fear that their discussions would subsequently be disclosed to potential opponents;
- It would be detrimental to the effective management of IPSA's functions (namely, to review and determine MPs' salaries), and therefore to the public interest, if Board members were inhibited from addressing difficult issues and expressing the necessary and frank views in relation to them. This would be the case if they knew there was a real likelihood that their comments would be made public, therefore inhibiting Board members future participation in such debates;

- The request was received on the same day that the final report was published, and referred to emails exchanged just a month previously, strengthening the argument a subsequent 'chilling effect' would be likely; and
- Although the content being discussed in the emails and the subsequent recommendations published in December 2013 constituted the 'final report', they remain subject to a statutory review following the next general election, and as such there is a real possibility of further discussions by the Board on the issue. Were Board members to be inhibited in future debate as a result of the aforementioned 'chilling effect', this would undermine the quality and nature of such debates.

31. In considering the factors in favour of disclosure the Commissioner notes that:

- there is a significant public interest in MPs' salaries and the process by which they are set. The remuneration and expenses regime for MPs has been the subject of much scrutiny in the media and in the courts in recent years. Public concern led to the creation of IPSA to independently regulate MPs' business costs and expenses, pay and pensions. There is therefore a significant public interest in how it undertakes its work.
- disclosure would reveal the nature and extent of the views or concerns expressed in emails by IPSA Board members during the period immediately prior to the publication of the salary proposals.
- disclosure of the withheld information might shed light on the extent to which a range of critical comments made on publication of IPSA's recommendations for MPs' pay was justified.

Balance of the public interest

32. The Commissioner has given the arguments for and against disclosure detailed and careful consideration. He has considered the severity and frequency of the likely prejudice and inhibition IPSA has argued would be likely to arise if the requested information were disclosed.

33. Section 36(2)(b)(ii) provides an exemption to protect public authorities against inhibition on the ability of its members and officers to deliberate freely and frankly in order to reach robust decisions. It is not generally in the public interest to encourage scrutiny of detailed email traffic which forms part of a free and frank exchange at the climax of a particular deliberative process and which has taken place with an expectation of confidentiality, within the necessary private space for sensitive decision making. Disclosure could well hinder the public

authority's ability in the future to consider its options free and frankly, ultimately resulting in potentially poor decision making.

34. While the Commissioner considers there should be a high degree of transparency of and accountability for public authorities, he does not consider this should extend to include all correspondence between board members regardless of content. IPSA routinely publishes all MPs' expenses and costs, and responses to its consultations for the public to see on its website. This largely satisfies the public interest in transparency and accountability.
35. Although the complainant's request was made after the decision had been considered by IPSA and at a time when the proposal had been approved, the Commissioner notes that it was only very shortly afterwards. This increases the likelihood of future inhibition, which is contrary to the public interest. IPSA has also explained that the decision is subject to further review after the next general election in 2015. The Commissioner acknowledges that this is a factor of significant weight.
36. The Commissioner has concluded that, in all the circumstances of the case, the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. IPSA was therefore entitled to withhold the requested information.

Right of appeal

37. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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
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