Reference: FS50742951

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **6 November 2018**

Public Authority: **Independent Parliamentary Standards Authority**
Address: **4th Floor**
30 Millbank
London
SW1P 4DU

Decision (including any steps ordered)

1. The complainant has requested copies of the information provided to the Independent Parliamentary Standards Authority (IPSA) by the European Research Group (ERG) in relation to the 2015-2016 Assurance Review of Pooled Services undertaken by IPSA and the report update of June 2017. IPSA originally withheld the information under section 43(2) – prejudice to commercial interests. However during the internal review of its handling of the request, IPSA withdrew its reliance on section 43(2) and instead withheld the information under section 36(2)(c) – prejudice to the conduct of public affairs.

2. The Commissioner's decision is that IPSA is entitled to rely on section 36(2)(c) to withhold the information.

3. The Commissioner does not require the public authority to take any steps in respect of this matter.

Request and response

4. On 22 February 2018 the complainant requested information of the following description:

> "Please provide copies of all materials provided to IPSA by the European Research Group in relation to the following IPSA report:

Assurance Review: Pooled Services - Assessment of risks, controls and compliance, 2015-16

Please include all materials provided in relation to the report update in June 2017."

5. On 23 February 2018 IPSA responded. It withheld the information citing section 43 – prejudice to commercial interests, as the basis for doing so.

6. The complainant requested an internal review on 26 February 2018. IPSA sent him the outcome of its internal review on 22 May 2018. IPSA revised its position and withdrew its reliance on section 43. However IPSA continued to withhold the information, now citing section 36(2) – prejudice to the conduct of public affairs.

Scope of the case

7. The complainant contacted the Commissioner on 2 May 2018 to complain about the way his request for information had been handled. At this stage IPSA had not yet completed its internal review despite it being later than the 40 working days which the Commissioner considers to be maximum time public authorities should need to do so. The Commissioner reminded IPSA of its responsibilities under the FOIA and once the review was completed on 22 May, the complaint was accepted for investigation.

8. The Commissioner considers the matter to be decided is whether IPSA is entitled to withhold the requested information under section 36(2)(c) on the basis that its disclosure would prejudice the conduct of public affairs.

Background

9. IPSA was established in 2010. Under the Scheme of MPs' Business Costs and Expenses (the Scheme) it is responsible for regulating MPs' business costs and expenses and for providing financial support to MPs in carrying out their parliamentary functions. Under the Scheme money is available to support Parliamentary work, but not for party political purposes.

10. Where a group of MPs share a particular interest and require research and briefing papers on that topic, they are able to pool their resources and collectively pay for that service. Under the Scheme MPs can claim for the costs of subscribing to such services. There are currently five such services, one of which is the European Research Group (ERG),

which provides briefings to Conservative MPs on issues relating to the UK's relationship with the European Union.

11. IPSA carries out regular assurance reviews of different areas of spending to assure itself, and the public, that the claims made under the Scheme are in accordance with its conditions, including that it is spent on parliamentary work, not for party political purposes. The request relates to an assurance review of all five pooled services that was conducted in 2016 and the further review that was conducted in September 2017, following which the earlier report was updated. As part of the assurance review IPSA was supplied with samples of the briefing materials produced by the pooled services, including ERG.

12. The updated report was published on IPSA's website. In respect of ERG the report concluded that the cost of the services it provided were eligible costs under the Scheme, that the service did not constitute party political work and that the costs of the service did not constitute campaign expenditure.

Reasons for decision

Section 36(2)(c) – prejudice to the conduct of public affairs.

13. So far as is relevant section 36(2) of FOIA states that information is exempt if its disclosure would,

    (2)(b) would be likely to inhibit –
    (i) the free and frank provision of advice, or
    (ii) the free and frank exchange of views for the purpose of deliberation, or

    (2)(c) would otherwise prejudice, or be likely to prejudice, the effective conduct of public affairs.

14. Section 36(2) is unique in that it depends on the reasonable opinion of the qualified person in order to be engaged.

15. When considering the application of section 36 the Commissioner will:

    - Establish that an opinion was given;
    - Ascertain who was the qualified person;
    - Ascertain when the opinion was given;
    - Consider whether the opinion was reasonable.

16. In the case of IPSA the qualified person as designated by the Lord Chancellor/Secretary of State for Justice is a member of its board, Sir Robert Owen QC. Around the time of this particular request, IPSA received another request which, although phrased slightly differently, sought the exact same information as the complainant's request which is the subject of this notice. The other request was received on 23 March 2018. IPSA sought the qualified person's opinion as to whether section 36(2)(c) applied to the 23 March request and then also used that opinion as the basis of the decision to refuse the complainant's request. However the Commissioner considers such an approach to be flawed. It is an important safeguard to the application of such a potentially wide ranging exemption as section 36(2)(c), that it can only be engaged on the opinion of the qualified person, a senior figure within the public authority. Officers other than the qualified person have no discretion to apply an opinion obtained in respect of one request to other requests even if they both capture the exact same information. Furthermore when considering the application of section 36(2) it is important that the qualified person has regard for all the circumstances of the case. Although there is only two months between the complainant's request and that of 23 March 2018, it is conceivable that the circumstances may have changed over that period.

17. The Commissioner drew IPSA's attention to this problem and gave it the opportunity to obtain a fresh opinion from the qualified person which related specifically to the complainant's request. In response IPSA provided the Commissioner with a written record of an opinion obtained from, and signed by the qualified person dated 23 October 2018. Although obtained in October the Commissioner is satisfied that such an opinion is capable of considering the position as at January 2018.

18. In light of the above the Commissioner finds that the conditions set out in the first three bullet points listed in paragraph 15 have been met.

19. The qualified person can engage section 36(2) on the basis that the prejudice 'would' occur or, the lower threshold, that the prejudice is only 'likely' to occur. The Commissioner interprets the record of the qualified person's opinion as being that the prejudice would occur. IPSA has confirmed that this is also their understanding. Obviously no one can say with complete certainty what will happen in the future therefore the term 'would' is taken to mean that the likelihood of the prejudice arising is more probable than not.

20. It is now necessary to consider whether the qualified person's opinion was a reasonable one. When considering reasonableness the Commissioner relies on the Oxford English Dictionary definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable

opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person can hold.

21. The record of the qualified person's opinion shows that when forming his opinion he considered all the documents which the ERG has submitted to IPSA during the assurance review.

22. The opinion references a pro-forma which sets out the arguments in favour of engaging the exemption together with more limited arguments against its application. The record of the opinion itself, which runs to just over three pages, also demonstrates that the qualified person had a sound understanding of the issues. In broad terms the opinion is based on the argument that ERG provided IPSA with samples of its briefing materials in confidence and on a voluntary basis. Furthermore IPSA has no powers to compel any of the providers of pooled services to cooperate with its assurance reviews. Therefore to disclose the information in the face of an expectation of confidence would seriously undermine the working relationship between IPSA, ERG and other pooled services.

23. The Commissioner considers this to be a reasonable opinion. The exemption is engaged.

Public interest test

24. Section 36 is subject to the public interest test as set out in section 2 of the FOIA. Its application means that although the exemption is engaged, the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.

25. When considering the public interest in favour of maintaining section 36 the Commissioner will give some weight to the opinion of the qualified person. This means that the Commissioner accepts that it is more probable than not that there would be some prejudice to the conduct of public affairs. However under the public interest test the Commissioner will go on to consider the severity, extent and frequency of that prejudice before weighing that against the value in disclosing the information.

26. The main impact of the prejudice to IPSA's assurance reviews would be to its relationship with ERG. In order to assess whether the material produced by ERG and circulated to its subscribers is party politically neutral and represents good value for money, it is necessary for IPSA to review that material. IPSA has advised the Commissioner that it has no

legal powers to compel ERG to provide it with samples of the material it distributes. It therefore argues it has to rely on the voluntary supply of that material. In order to obtain that voluntary cooperation it offers assurances to the pooled services that their information will be treated as confidential.

27. This approach makes sense when it is remembered that IPSA's statutory function is to oversee MPs' business costs and expenses. It is not actually tasked with regulating the output of those organisations which have been established to offer pooled services to MPs, merely whether any claims made by MPs for the costs of accessing those materials are eligible under the Scheme. The pooled services are a third party to the regulatory process.

28. The Commissioner therefore anticipates that if the materials volunteered by ERG on the understanding they would remain confidential were to be disclosed to the world at large there would be some damage to the working relationship between ERG and IPSA. There would be some reluctance to cooperate with IPSA in the future and this could frustrate the ability of IPSA to carry out robust assurance reviews in an efficient manner.

29. However the Commissioner considers that in the case of ERG this reluctance will be tempered by a couple of factors. From the published assurance review it appears that almost all ERG's income is generated by the research services it provides to MPs. It would therefore not serve ERG's interests or those of the subscribers it was set up to serve, if it hindered a review that ultimately had a bearing on whether its subscribers would have their costs reimbursed. As well as this very practical incentive to cooperate with IPSA, it could be difficult for its subscribers if ERG was seen to be hindering a body which was established following the MPs expenses scandal of 2009 to ensure only eligible expense claims were paid. It should also be noted that the ERG is governed by a board of two MPs.

30. The Commissioner considers that it would be very difficult for ERG to completely refuse requests from IPSA for samples of the material it produces for the reasons given above. Nevertheless the Commissioner does accept that ERG could become less cooperative and that any failure to engage fully with IPSA's review processes would present problems. The Commissioner accepts that as a consequence there could be a marked prejudice to IPSA's ability to perform its duties and its principal function of overseeing MPs' business costs and expenses.

31. IPSA and its qualified person believe that disclosing the information in response to the information request would have a wider effect. ERG is one of only five pooled services that provide research services for MPs.

IPSA argue that these other pooled service providers would interpret any disclosure of ERG's material as a signal that their material could also be disclosed. This would result in the other pooled service providers becoming reluctant to cooperate with IPSA. The Commissioner accepts that this a very real possibility and that therefore the extent of the prejudice is greater than to just ERG's reaction to a disclosure.

32. It is worth noting that the use of pooled services is itself a cost saving innovation in that research is only paid for once, rather than individual MPs having to commission individual pieces of research that may simply duplicate work already undertaken on behalf of their colleagues. There is therefore a public interest in the Scheme allowing the use of pooled services.

33. IPSA has provided the Commissioner with a copy of the withheld information. The Commissioner notes that at the time of the request many of the briefing documents were 18 months to 2 years old. The Commissioner has considered whether this reduces the sensitivity of the information and therefore the response that ERG and the other pooled service providers would have to its release. The Commissioner notes that IPSA's decision to withdraw its reliance on section 43 was partly based on the fact that with the passage of time some of the issues addressed by the briefing material had lost its immediate topicality and therefore any commercial value in it had decreased. Nevertheless the issue that underpinned the production of these briefing materials was, and still is, very much a live issue with the UK's planned leaving of the EU imminent. Although there will always be a time lag between IPSA collecting materials from pooled services and the publication of any assurance review, the potential for speculative requests being made, which could capture more current material, could not be ruled out. Furthermore the Commissioner notes that MPs subscribing to ERG are able to request research on specific issues and ERG may be reluctant to share information with IPSA as it is conceivable that MPs would feel inhibited from requesting such research if there was the potential for it to be disclosed more widely.

34. Therefore the Commissioner is satisfied that despite the age of some of the information there are grounds for considering that disclosing the information would result in ERG being less willing to cooperate with future assurance reviews and that this would also be the reaction of other pooled services.

35. In terms of the frequency of the prejudice, IPSA has informed that Commissioner that assurance reviews of pooled services usually take place every three years. In addition there is also the potential for interim reviews to be conducted if any issues arise between planned reviews. Therefore the Commissioner is satisfied that although the

prejudice may be limited to IPSA's relationship with pooled service providers and so may not be an everyday problem for IPSA, it would be still be a regular and ongoing occurrence.

36. The Commissioner will now consider the public interest in favour of disclosure.

37. The MPs who subscribe to ERG all belong to a group of Conservative MPs which is itself known as the European Research Group. It is a large group and includes senior MPs. According to IPSA, collectively, its members have had a significant influence on shaping the government's Brexit policy. Given the importance of Brexit and its impact on the future economic, legal and security relationship with Europe there is an undoubted public interest in scrutinising the research work produced by the ERG pooled service provider in order to better understand how these influential opinions were formed.

38. IPSA also acknowledges that the public interest in transparency of the work carried out by ERG is heightened by the fact that it is almost entirely funded by public money, in that the subscriptions paid by MPs are reimbursed in accordance with the Scheme.

39. There is also a public interest in allowing access to information that would allow scrutiny of IPSA's performance in overseeing the claims made by MPs and, in effect, whether it assurance review of pooled services in respect of ERG was robust and its findings as to the nature of the material produced by ERG were sound. Clearly, if there was any credible suspicion that the assurance review was not thorough and objective there would be a greater public interest in the disclosure of the information. Although there may have been some controversy in the media about the role of the ERG pooled services and discussion of the influential role played by MPs subscribing to that service, the Commissioner is not aware of any criticism of the performance of IPSA. Nor is there anything within the withheld information which suggests cause for concern with the findings of the assurance review. The publication of the assurance review itself goes some way to meeting the public interest in providing confidence that the expense claims submitted by MPs for ERG's Services were made in accordance with the Scheme and that public money was spent appropriately.

40. In balancing the public interest for and against maintaining the exemption the Commissioner acknowledges that there is a real and weighty public interest in disclosing the requested information. Disclosure would allow scrutiny of the quality of the research and briefing notes on which an influential group of MPs seek to steer government policy and the public debate on the very important issue of Brexit. It would also provide greater transparency over the work of IPSA

itself. However there are also weighty public interest arguments in favour of maintaining the exemption. The Commissioner accepts that disclosure would seriously undermine the ability of IPSA to carry out its important function of ensuring that public money is only spent on meeting eligible expense claims submitted by MPs. There is clearly a very strong public interest in ensuring that such oversight is as thorough as possible, not only to safeguard the public purse but also as part of the process of continuing to rebuild public confidence in MPs and the expenses they are able to claim. The Commissioner therefore finds that on balance the public interest in maintaining the exemption outweighs the public interest in disclosure. IPSA is entitled to rely on the exemption provided by section 36(2)(c).

Right of appeal

41. 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: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.

43. 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

Rob Mechan
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