

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 May 2022

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information relating to Accounting Officer Advice regarding the selection of towns for the Towns Fund.
2. The Department for Levelling Up, Housing and Communities (DLUHC) confirmed it held relevant information but refused to disclose it, citing sections 36 (prejudice to effective conduct of public affairs) and 42 (legal professional privilege) of FOIA.
3. The Commissioner's decision is that the DLUHC has failed to demonstrate that either section 36 or 42 applies.
4. The Commissioner requires the DLUHC to take the following step to ensure compliance with the legislation:
 - disclose the withheld information to the complainant.
5. The DLUHC must take this step 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 FOIA and may be dealt with as a contempt of court.

Background

6. The summary of advice to the then Ministry of Housing, Communities and Local Government's (MHCLG) Accounting Officer regarding the selection of 101 towns for Town Deals, was published on 14 January 2021.
7. This summary can be found at the following link:
<https://www.gov.uk/government/publications/towns-fund-selection-summary-of-accounting-officer-advice>

Request and response

8. At the time of the request, the public authority in this case was known as the Ministry of Housing, Communities & Local Government (MHCLG). The department is now called the Department for Levelling Up, Housing and Communities (DLUHC).
9. On 18 November 2020, the complainant wrote to the MHCLG and requested information in the following terms:

"This is a freedom of information request for a full copy of the accounting officer's assessment of the Towns Fund".
10. The MHCLG acknowledged receipt of the request on 19 November 2020. It subsequently advised the complainant, on 17 December 2020, that it needed further time to consider the public interest test and that it would try to respond by 20 January 2021.
11. The MHCLG provided its substantive response on 15 January 2021, in which it confirmed it holds the requested information but refused to provide it, citing section 35(1)(a) (formulation of government policy etc) of FOIA.
12. The complainant requested an internal review on 15 January 2021.
13. Following the Commissioner's intervention, the MHCLG sent him the outcome of its internal review on 26 April 2021. It revised its position, confirming its application of section 35(1)(a) and additionally citing sections 36(2)(b)(i), (b)(ii) and (c) (prejudice to effective conduct of public affairs) and section 42(1) (legal professional privilege) of FOIA.

Scope of the case

14. Following earlier correspondence, the complainant contacted the Commissioner on 27 April 2021 to complain about the way his request for information had been handled.
15. He disputes the DLUHC's refusal to disclose the requested information. He considers that the public interest favours disclosure.
16. Although not required to do so, he explained that his request "sought to establish the scale of ministerial involvement in the Towns Fund after concerns were raised by a number of independent bodies about political bias in the allocation of funding".
17. In subsequent correspondence, he expressed concern that he had learned that a minister had made the decision not to release the information he had requested. He told the Commissioner that he considers that the involvement of a minister "raises further concerns of political bias and leads to further questions about how this FOI was handled".
18. During the course of the Commissioner's investigation, while acknowledging that it had cited section 35 in its correspondence with the complainant, the DLUHC clarified its application of exemptions to the requested information. It confirmed that it considers sections 36(2)(b) and (c) (prejudice to effective conduct of public affairs) apply to the withheld information in its entirety. It also confirmed that it considers section 42(1) (legal professional privilege) applies to some of the information in the scope of the request.
19. Accordingly the Commissioner progressed his investigation on that basis.
20. The analysis below considers the DLUHC's application of sections 36(2)(b) and (c) of FOIA to the requested information in its entirety. If the Commissioner considers that it has been incorrectly cited, he will then consider whether section 42(1) applies to the subset of information withheld by virtue of that exemption.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

21. Section 36(2) of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs.

22. Of relevance in this case, section 36(2) states:

“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, or

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

23. In respect of the exemptions contained at section 36(2)(b), the Commissioner would emphasise that these exemptions are about the processes that may be inhibited, rather than what is in the information.

24. For section 36(2)(c) to be engaged, some prejudice other than that to the free and frank expression of advice or views has to be shown.

25. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person’s opinion must also be a “reasonable” opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if he finds that the opinion given is not reasonable.

26. Under the heading ‘Recording the opinion’, the Commissioner’s guidance on section 36¹ states:

“In order for the qualified person to form a reasonable opinion, the public authority should provide them with all relevant material, eg the information itself or a description of it, together with arguments and any evidence on what the effects of disclosure would be. In the ICO’s view it will be difficult for the qualified person to reach a

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

reasonable opinion if they are not aware of the nature of the information and the relevant factors (and only the relevant factors) that need to be taken into account. It is also important that it is clear what information the opinion relates to”.

27. In dealing with a complaint, the public authority will be expected to provide the Commissioner with evidence of the qualified person’s opinion and how it was reached. The guidance explains:

“...The purpose of obtaining evidence is not to assess the quality of the qualified person’s reasoning process, but to help us to decide whether the substantive opinion could be considered reasonable ...”.

28. The Commissioner’s guidance also refers to a form which he has produced to assist public authorities provide a signed statement from the qualified person recording their opinion. The Commissioner acknowledges that the DLUHC used that form in this case.

29. The Commissioner’s notes on completing the part of the form that relates to the subsections of section 36 state:

“This lists the subsections of section 36 which the qualified person decided were engaged. Please tick the relevant subsection(s), and in each case indicate whether the prejudice or inhibition would or would be likely to occur and the reasons for this”.

The qualified person’s opinion

30. To find that any part of section 36(2) is engaged, the Commissioner must establish that a qualified person gave an opinion which found that the exemption applied and also that the opinion was reasonable.

31. Therefore, in order to use section 36, the public authority must establish who their qualified person is. In that respect, the Commissioner’s guidance states:

“The qualified person is not chosen by the authority itself. Section 36(5) of FOIA explains what is meant by the ‘qualified person’. Subsections (a) to (n) define who the qualified person is for a number of specific authorities.

...

Most public authorities will fall under section 36(5)(o). For these authorities the qualified person is either a Minister of the Crown or a person authorised by a Minister of the Crown. A Minister may authorise the public authority itself or any officer or employee of the authority to be the qualified person”.

32. With regard to the process of seeking the opinion in this case, the DLUHC explained that it consulted the qualified person, a government minister, on 14 April 2021.
33. It confirmed that the signed record of approval, with regard to engaging the exemption contained at sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA, was received on 26 April 2021.
34. During the course of his investigation, the DLUHC provided the Commissioner with a copy of the submission to the qualified person. It also provided him with a copy of the form that was used to obtain and record the qualified person's opinion.
35. Having seen the submission provided to them, the Commissioner notes that the qualified person, namely Luke Hall MP, Minister of State for Regional Growth and Local Government, was asked to provide an opinion with respect to the following subsections of the exemption:
 - 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
36. He also notes that the form recording the decision records that the qualified person's opinion is that, if the information requested were disclosed, the prejudice/inhibition specified in sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) would be likely to occur.

Is the exemption engaged?

37. To determine whether the DLUHC correctly applied the exemption, the Commissioner is required to consider the qualified person's opinion. In order to better understand whether that opinion is reasonable, he will take account of the submissions presented to the qualified person. In order to establish that the exemption has been applied correctly the Commissioner must:
 - i) ascertain who was the qualified person or persons
 - ii) establish that an opinion was given by the qualified person
 - iii) ascertain when the opinion was given; and
 - iv) consider whether the opinion was reasonable.
38. The Commissioner acknowledges the complainant's concerns that it was a minister who made the decision not to release the requested information, information that the complainant believes might shed light on the original decision-making process.

39. He recognises that the complainant disputes that a minister can be considered to be "a fair arbiter of whether or not to release the information".
40. However, having considered the legislation, and with reference to his guidance, the Commissioner is satisfied that it was appropriate for the DLUHC to regard a Minister of the Crown, in this case Luke Hall MP, as the qualified person for the purposes of section 36.
41. With regard to the criteria at (ii) and (iii), the Commissioner is satisfied that the 'Record of Qualified Persons Opinion' form evidences that the opinion was given on 26 April 2021. It also evidences the qualified person confirming that, in their opinion, disclosing the requested information would be likely to have the effect set out under sections 36(2)(b)(i), (ii) and (c).
42. The Commissioner has next gone on to consider whether the qualified person's opinion is reasonable.
43. In making that determination, the Commissioner will consider all of the relevant factors. These may include, but are not limited to:
 - whether the prejudice or inhibition relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of, or involvement in, the issue.
44. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that 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. The qualified person's opinion does not have to be the most reasonable opinion that could be held: it only has to be a reasonable opinion.
45. As noted above, the Commissioner considers that, in order for the qualified person to form a reasonable opinion, the public authority should provide them with all relevant material, together with arguments and any evidence on what the effects of disclosure would be. He also notes that his guidance states that the record of the qualified person's opinion should include whether the prejudice or inhibition would or would be likely to occur and the reasons for this.
46. In this case, the Commissioner is satisfied that the submission to the qualified person clearly related to the request that was made by the

complainant. He is also satisfied that they were provided with a copy of the withheld information.

47. However, the Commissioner has concerns about the overall quality of the submission to the qualified person.
48. As noted above, the Commissioner considers it to be difficult for the qualified person to reach a reasonable opinion if they are not aware of the relevant factors that need to be taken into account. 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, that relates to the specific subsection(s) of section 36(2) being claimed, may arise.
49. The Commissioner considers that the submission that the DLUHC provided to the qualified person did not reflect the content of the submission it provided to the Commissioner during the course of his investigation.
50. The Commissioner acknowledges that the submission the DLUHC provided to him during the course of his investigation addressed, to some extent, its arguments as to why prejudice or inhibition would be likely to arise as a result of disclosure. He also accepts that it explained that its primary concern in citing section 36 was to protect the integrity of the role and purpose of the Accounting Officer's advice as a mechanism of accountability.
51. However, from the evidence he has seen, the Commissioner considers that where the arguments that were presented to the qualified person relate to the engagement of the exemption, they only assert that the prejudice would be likely to occur rather than explaining how. He also considers some of the arguments relate to the public interest test, a consideration that only becomes relevant once the matter of whether prejudice or inhibition will, or is likely to, occur has been determined.
52. Having considered the submission to the qualified person and the completed 'Record of Qualified Persons Opinion' form, the Commissioner notes that neither of them documents the reasons why disclosure would be likely to have the specific prejudicial or inhibitory effects claimed in this case.
53. He acknowledges that the signed and dated 'Record of Qualified Persons Opinion' form records the lower level of likelihood of prejudice or inhibition for each of the subsections of the exemption claimed. However, those parts of the form that record the reasons why the qualified person considers the prejudice or inhibition would be likely to occur are blank.

54. In the absence of evidence of the prejudice or inhibition envisaged, and of how it relates to the specific subsections claimed in this case, the Commissioner does not find that the qualified person's opinion is reasonable.
55. As the Commissioner is not satisfied that the opinion was reasonable, it follows that he does not find section 36 engaged.
56. The Commissioner has next considered the DLUHC's application of section 42 to the information withheld by virtue of that exemption.

Section 42

57. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings.
58. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.
59. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of 'Bellamy v The Information Commissioner and the DTI' (EA/2005/0023) (Bellamy) as:

" ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation."
60. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

61. In its correspondence with the complainant, the DLUHC simply told him:

“The Accounting Officer’s full assessment also includes legally privileged advice and so the exemption under section 42(1) of the FOI Act is engaged”.

62. In its submission to the Commissioner, it confirmed that the information withheld by virtue of section 42 was obtained for the sole purpose of providing professional legal advice to the Accounting Officer. The DLUHC was also satisfied that the advice remains privileged.

Is the exemption engaged?

63. As noted above, section 42 is a class-based exemption, which means that if the information is of the type described in the exemption, then it is covered by that exemption.

64. In his guidance on section 42², the Commissioner states:

“In order for public authorities to determine whether LPP applies, they will need to be clear who the parties to the confidential communication are.

...

For public authorities, establishing who is the legal adviser will be key to them identifying when a communication is legally privileged”.

65. When, as is his practice, the Commissioner wrote to the DLUHC setting out the scope of his investigation, he said with respect to section 42:

“Legal advice privilege may only be claimed in respect of certain limited communications that meet the following requirements:

- the communications must be made between a professional legal adviser and client;

² https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

- the communications must be made for the sole or dominant purpose of obtaining legal advice; and
- the information must be communicated in a legal adviser's professional capacity. Consequently not all communications from a professional legal adviser will attract advice privilege.

Therefore, with reference to the above criteria please explain why MHCLG considers that the withheld information attracts advice privilege.”.

66. In its response, the DLUHC confirmed its view that the withheld information attracts advice privilege on the basis that the information was obtained for the sole purpose of providing professional legal advice to the Accounting Officer.
67. The Commissioner has seen the withheld information: he accepts that the information that DLUHC considers that withheld by virtue of section 42 is within a part of the document headed 'legal advice'.
68. However, with respect to the criteria that enable legal advice privilege to be claimed, the Commissioner considers it is essential that the public authority establish who is the legal adviser and who is the client.
69. In this case, the Commissioner considers that the DLUHC failed to explain who the legal adviser is and who is the client. Similarly, he considers it failed to demonstrate that the information it claims is legally privileged was communicated in a legal adviser's professional capacity.
70. The Commissioner's decision, therefore, is that insufficient arguments have been advanced by the DLUHC to engage section 42 of FOIA.

Right of appeal

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

72. 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.

73. 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

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