

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 November 2018

**Public Authority:** Department for International Trade  
**Address:** 3 Whitehall Place  
London  
SW1A 2AW

#### **Decision (including any steps ordered)**

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1. The complainant has requested information regarding the disclosure of an unredacted diplomatic cable.
2. The Commissioner's decision is that the Department for International Trade ('DIT') appropriately relied on section 36(2) – Prejudice to effective conduct of public affairs - to withhold the information in the scope of the request.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

#### **Request and response**

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4. On 19 November 2017 the complainant wrote to DIT and requested information in the following terms:  
"Please provide me with an electronic copy of all recorded information you hold regarding the mistaken FOIA release of an unredacted diplomatic cable (discussed here <https://unearthed.greenpeace.org/2017/11/19/brazil-shell-bp-greg-hands-liam-fox/>) including, but not limited to, a full copy of your correspondence with the requester."
5. DIT responded on 8 January 2018. It stated that it does hold recorded information regarding the release of the unredacted diplomatic cable,

however the information was withheld in reliance of the exemptions at sections 36(2)(b)(ii), 27(1)(a)(c)&(d), 40(2) and 43(2).

6. Following an internal review DIT wrote to the complainant on 9 March 2018 upholding its initial response.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 8 February 2018 to complain about the way his request for information had been handled. The complainant provided his concerns to DIT when requesting an internal review. He considered that the exemptions cited were not engaged and there had been a failure to explain why the exemptions had been applied and a 'misconstrual of the public interest'.
8. The Commissioner considers the scope of her investigation to be the application of the cited exemptions to the information falling within the scope of the request. DIT explained to the Commissioner that it had applied section 36(2)(b)(ii) to the entirety of the information in scope, with the remaining exemptions applied in addition to particular documents.

## **Reasons for decision**

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9. Section 36 of FOIA states:

"(2) 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 -

(ii) the free and frank exchange of views for the purposes of deliberation,"

10. Unlike other exemptions in FOIA, the application of any limb of section 36(2) requires a public authority to consult a relevant qualified person about the request. It further necessitates that the qualified person had the reasonable opinion that the harm referenced in the exemption would, or would be likely to, arise through disclosure. It follows from this that the Commissioner must not only be satisfied that a qualified person gave an opinion but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against.

11. Information may be exempt under section 36(2)(b)(ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority.
12. DIT explained that the qualified person's opinion was sought on 15 December 2017. Secretary of State for International Trade, Dr Liam Fox was the qualified person contacted. He was provided with the request, a register of documents in the scope of the request, the proposed response to the request and a draft opinion on the application of section 36 to the information. On 19 December 2017 the Secretary of State gave his opinion that disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
13. In determining whether this exemption is engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
  - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed.
  - The nature of the information. Whether it concerns an important issue on which there needs to be a free and frank exchange of views or provision of advice.
  - The qualified person's knowledge of, or involvement in, the issue.
14. 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, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not to say that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. 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.
15. The Commissioner is satisfied that, as the Secretary of State for International Trade, Dr Fox meets the definition of a qualified person set out by section 36(5) FOIA. She has gone on to consider whether the

qualified person's opinion with regard to section 36(2)(b)(ii) was reasonable.

### **Was the opinion reasonable?**

16. The qualified person's opinion followed the detailed submission provided to him by DIT which explained the background surrounding the request. DIT confirmed to the Commissioner that the qualified person had access to all the requested information and not just a summary. By agreeing to the application of the exemption the qualified person endorsed the arguments included in the submission. The submission did not direct the qualified person to the level of prejudice to be attributed nor did he determine whether the prejudice would, or would be likely to occur through disclosure of the requested information.
17. In the absence of a determination of the level of prejudice the Commissioner assumes the lower level of 'would be likely' will apply. While the level of prejudice designated by 'would be likely' is a lower standard; it means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur.
18. The Commissioner is satisfied that the requested information falls to be considered under section 36(2)(b)(ii) as the information clearly relates to the deliberations taking place following the inadvertent disclosure of information to another applicant in response to his FOI request. Having realised its error, action was taken by DIT.
19. DIT explained its consideration that the prejudice resulting from disclosure of the requested information would be likely to prevent the creation of safe space for deliberation both internally in DIT and between government departments in order to understand the timeline of events and to challenge current performance and behaviours within the DIT teams. In the circumstances of this case, DIT explained that it was necessary to allow officials the ability to hold each other to account and deliver improvements across its business. Without such a 'safe space' DIT considers that delivering improvements across the business would be hindered.
20. DIT went on to explain that the content of some of the information could be considered to contain 'immature advice based on incomplete events'. Disclosure of such information may in future prevent the exploration of ideas or actions at 'the early stage of events' which would be likely to restrict the free and frank exchange of ideas. Creating a risk of officials becoming 'more reticent and their advice more circumspect'.

21. The Commissioner's guidance<sup>1</sup> explains that information may be exempt from disclosure under section 36(2)(b)(ii) if its disclosure would or would be likely to inhibit the ability of the public authority's staff and others to express themselves, as detailed in paragraph 11. It follows therefore that the exemption is about process – the process of providing or exchanging views – which may be inhibited. The 'exchange of views' must be as part of a process of deliberation, where 'deliberation' refers to the public authority's evaluation of competing arguments or considerations in order to make a decision.
22. The Commissioner is satisfied that the arguments presented by DfIT are ones that relate to section 36(2)(b)(ii). Furthermore the information concerns an important issue on which there needed to be a free and frank exchange of views and deliberation. She has concluded that the opinion of the qualified person is one that a reasonable person could hold.
23. The Commissioner therefore finds that the section 36(2)(b)(ii) exemption is engaged. She has gone on to consider the public interest in accordance with section 2(2)(b).

### **The public interest**

24. The public interest test is separate from the qualified person's opinion, however, having the opinion should be afforded some weight when considering this test. As noted in the Information Tribunal in *Guardian Newspapers Ltd and Brooke v Information Commissioner & BBC (EA/2006/0011 and EA/2006/0013, 8 January 2007)* at paragraph 92.
25. DIT explained that it considers the public interest in disclosure of the requested information concerns transparency. Disclosure would enable DIT to be more accountable and would increase trust, understanding and engagement between the public and DIT; which would be a positive outcome.
26. DIT argued that the public interest in maintaining the exemption carries greater weight. It explained that officials must have the safe space for deliberation and to challenge 'existing performances and behaviours within the department'. DIT reiterated its concern that disclosure of 'immature' advice based on incomplete events may prevent officials expressing ideas in the early stages of deliberation resulting in

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2259713/prejudice-to-the-effective-conduct-of-public-affairs-section-36.docx>

restricting the free and frank exchange of ideas during incidents and investigations.

### **The Commissioner's view**

27. In finding that the exemption at section 36(2)(b)(ii) is engaged, the Commissioner has accepted that the release of the requested information would be likely to have a prejudicial effect on DIT's ability to deliberate on such incidents. Having seen the information, the Commissioner notes that, at the time of the request, the subject matter of the withheld information was ongoing.
28. The Commissioner considers that there is a strong argument in favour of disclosure to provide transparency regarding the handling of a mistake made by a government department.
29. Nevertheless, the Commissioner considers that there is a weightier argument to consider in that it is important that lessons are learnt and implemented to avoid repeating such an error. To achieve this she considers that the 'safe space' arguments advanced by DIT carry significant weight. She accepts that it is in the public interest that officials are able fully investigate and challenge events without external scrutiny in order to ensure full and frank deliberation. She considers that deliberation with honest and candid views will be more effective in understanding and resolving the issues which led to the mistake and thereby avoiding any recurrence.
30. On balance, the Commissioner has decided that the public interest in demonstrating through the requested information that the incident was investigated and acted upon, does not outweigh the public interest in protecting the 'safe space' required to achieve this outcome. Therefore she has determined that in all the circumstances the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption.
31. The Commissioner accepts that all the information within the scope of the request falls within this exemption. She notes that some of the information has had other exemptions applied, however, as she is satisfied that all is appropriately withheld in reliance of section 36(2)(b)(ii) she has not further considered other exemptions.

## Right of appeal

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32. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

33. 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.
34. 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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**