

Section 36 – internal guidance and policy advice

Lines to take

Problem/issue

There were flaws in the process (e.g. QP opinion not obtained) but these were corrected at internal review.

Our response

We accept that errors in applying an exemption can be corrected at the internal review stage. If the QP opinion was not given before the refusal notice was issued, s36 can still be engaged if the QP gives a reasonable opinion at internal review. The QP should base their opinion on the situation at the time of the request.

Problem/issue

There is no one within the public authority who has been authorised as QP.

(i.e. the PA is not listed in s36(5)(a)-(n), or in the archived list produced by the Ministry of Justice and there has been no specific authorisation by a Minister previously)

Our response

All public authorities will have a QP. This is because, under s36(5)(o), a Minister of the Crown is able to act as the qualified person. However, seeking the opinion of a Minister is seldom a practical solution for public authorities other than government departments.

The PA may request a Minister of the Crown authorises one of their officers as a QP via the FOI team of their central government parent department.

If no one within the public authority has been authorised as a QP, s36 cannot be engaged (other than for statistical information), unless the public authority seeks an opinion directly from a Minister.

A QP who was authorised after the time for compliance, but by the time of the internal review, can give their opinion and engage s36 at that stage.

Internal policy advice

September 23

Question

Can we advise if a Minister of the Crown has authorised local authority trading companies to act as qualified persons for the purpose of engaging section 36? UPDATE (19.09.2023): The case officer requested additional advice at the back of the PA's response which indicated they had nominated their own qualified person.

Advice

ICO not likely to have this information. The authority should check either with the PA which owns the company or with the Cabinet Office. **FOLLOW UP ADVICE (19.09.2023)** - section 36 does not allow a public authority to nominate its own qualified person. The qualified person must be nominated or authorised by a Minister of the Crown.

Extract from policy review – EA/2007/0135

Summary of FTT decision

The Tribunal has allowed the appeal in part.

Mr Salmon requested from King's College, Cambridge, (the College) the papers and minutes about the resignation of the College's former Provost as well as the final agreement reached with her. The College refused to disclose the information requested on the basis of sections 36(2)(b), 40, 41 and 43. In the Decision Notice the Commissioner upheld the application of sections 36(2)(b) and section 40; the Commissioner did not consider sections 41 and 43.

The Tribunal decided that, at the time of the request, there was no qualified person for the purposes of section 36. [...] The Tribunal has decided that information which does not fall under section 40 FOIA should be released.

Notes

Section 36

The finding that the acting provost was not the designated qualified person for the purposes of s36 is unique to this case. Even though the

Tribunal found the application of s36 was invalid it did go on to comment on some aspects of the Commissioner's decision on the exemption;

Para 38

When the public authority addressed the public interest test it argued that the interest in accountability for the public spending of public funds was diminished as the public authority only received a relatively small amount of its funds from the public purse. The Commissioner had dismissed this argument in the DN and the Tribunal endorsed this approach at para 38.