Section 36 – Common problems and issues

Section 36

Line to take

Below lists some problems and issues that may arise from section 36 and how we address them.

Problem/issue

There is insufficient evidence of the qualified person's (QP) opinion e.g.

- The PA has not provided the submission made to the QP
- There is no documentary record of the QP's opinion

It is not clear whether the PA's arguments are actually those considered by the QP.

Our response
If the PA has no record of the submission or the QP's opinion, we would accept a signed statement from the QP stating whether they saw the information in question, what factors they took into account and what their opinion was and when they gave it. There is a form on our website that PAs can use to provide us with a record of the QP opinion.

Note, this form sets out the minimum level of information that we would expect a public authority to provide us with.

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

S36 is claimed for the first time at internal review or during our investigation

Our response
Public authorities have the right to raise s36 exemptions for the first time at internal review or during our investigation. In each case they are still required to obtain the reasonable opinion of the QP.

Problem/issue

The QP has not specified level of prejudice (would/ would be likely to)

Our response
Give the PA an opportunity to confirm what the QP meant.

If no confirmation received, apply 'would be likely to' unless there is clear evidence that the QP meant 'would'. For example, the QP's opinion may talk about the consequences of disclosure rather than possible consequences. If there is any doubt then apply 'would be likely to'

Problem/issue

The PA claims s36 but has not obtained the QP opinion

Our response
If there is no QP opinion the exemption is not engaged. This applies in all cases except in relation to statistical information under s36(4).

Problem/issue

The opinion has been given by someone other than the QP.

Our response

If another person is formally acting up i.e. they have been given the responsibilities of the QP's post, then accept it as a QP opinion.

Otherwise, do not accept it as a QP opinion. For example, if a more junior official is merely 'covering' while the QP post holder is on leave, they are not the QP.

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.

Problem/issue

The PA has extended the time for considering the PIT under s10(3) without first obtaining the QP opinion.

Our response
There is a procedural breach of s17(1). S36 cannot be engaged until the QP opinion has been given.

Problem/issue

Case officer doesn't really agree with QP opinion

Our response

The test is not whether we agree with the opinion, but whether it is a reasonable opinion to hold. It is only not reasonable if no reasonable person could hold it.

This approach means that it is likely that we will accept that the exemption is engaged more often than we used to.

Problem/issue

The submission or the QP's reasoning includes irrelevant factors.

Our response

Concentrate first on the actual opinion rather than the reasoning process that led up to it. The opinion is simply that prejudice/ inhibition would/

would be likely to occur. Consider whether this is an opinion that any reasonable person could hold.

If on the face of it, the opinion is not one that a reasonable person could hold or this is doubtful, consider the reasoning and the supporting arguments. They may shed light on why the QP came to their opinion.

We are not concerned with the quality of the reasoning process itself, only the substantive opinion.

Problem/issue

QP specifies “would”; case officer thinks “WBLT” more realistic but difficult to say “would” not reasonable

Our response

In theory we may consider that it is unreasonable to say that prejudice/ inhibition would occur but reasonable to say it would be likely to occur.

This possibility is stated in our external guidance because we do not want PAs to claim ‘would’ in every case, simply in order to gain extra weight in the PIT. Remember that we have to accept or reject the QP’s opinion as stated and if they say ‘would’ this will carry a greater weight over into the PIT than WBLT.

In practice such situations are likely to be rare. It is more likely that we would accept ‘would’ as a reasonable opinion, even if we do not agree with it.

Problem/issue

I have had to accept the QP opinion as reasonable even though I don’t agree with it. Doesn’t giving due weight to the QP opinion mean that the PI will always favour maintaining exemption?

Our response

No. The QP opinion is only about the likelihood of prejudice / inhibition (i.e. it would or would be likely to occur). If we accept that the opinion is reasonable we accept that the specified prejudice/ inhibition would or would be likely to occur, but we then go on to consider the severity, extent and frequency of that prejudice/ inhibition.

If we consider that it would not be particularly severe or extensive or occur frequently then it is possible to find that the PI in maintaining the exemption does not outweigh the PI in disclosure.

Problem/issue

The PA has applied s36(2)(b)(i) or (ii) but the content of the information is not notably 'free and frank'

Our response

S36(2) is about the effects of disclosing the information, not the content of the information. If the content clearly represents a free and frank exchange of views/ advice then it may be easier to accept that disclosing it could lead to prejudice / inhibition but disclosing more anodyne, less controversial information could also have that effect, depending on the circumstances of the case. Concentrate on how the prejudice/ inhibition could happen rather than how free and frank the information is.

Problem/issue

Officials have applied the QP's opinion to information that the QP does not appear to have considered.

Our response

Consider whether the QP's opinion could be construed broadly to cover the exempted information, even if they did not specifically consider it. Bear in mind that it may not be feasible for the QP, who is a very senior official, to look at every piece of relevant information.

If the QP's opinion can be broadly construed to cover the withheld information, accept that is covered by the QP's opinion.

If the withheld information is not part of and clearly different from the information that the QP considered, then there is no QP opinion relating to that information.