

Record keeping arguments

Section 35. Section 36(2). Regulation 12(4)(e)

Issue

Record keeping arguments

Line to take

We are sceptical of arguments that disclosure of information will adversely affect the creation and retention of records, but we do not dismiss them entirely.

The argument may be made in three ways:

1. that disclosure will discourage officials from creating complete records of a discussion (the 'pure' record keeping argument)
2. that the lack of adequate records of a previous discussion will impair future discussions of the same or similar issues
3. that less complete records will be evidence of a chilling effect on discussions

In simple terms, we are unlikely to accept the first two arguments but the third argument may be more convincing, depending on the evidence and justification produced by a public authority.

Further information

UPDATE: *The essence of this line is now covered in the following external guidance:*

- [Government policy \(section 35\)](#)
- [Prejudice to the effective conduct of public affairs \(section 36\)](#)
- [Internal communications \(regulation 12\(4\)\(e\)\)](#)

Case officers are advised to consult the relevant guidance for the up-to-date public position, although it remains broadly the same as set out in this LTT. Nonetheless the detail of this LTT will be retained for the time being, pending the publication of additional (more detailed) guidance on this topic.

1. The 'pure' record keeping argument

The 'pure' record keeping argument is that concerns about potential disclosure under FOIA mean that officials are less candid in putting their views in writing, that more discussions take place verbally and are not recorded, and that the minutes of meetings are less detailed. The **harm** that is envisaged according to this argument is that in future the records of decisions would be less complete or less accurate. This would be important because records are needed for evidential and business purposes. Records of previous policy discussions can serve as a knowledge base for future work and if these are not available or not adequate it would lead to inefficiencies through 'reinventing the wheel'.

Firstly, it should be noted that this argument is not in itself inherent to the exemptions under s35 or s36(2)(b). We will reject it if it is not linked to the interests that the exemption protects.

Secondly, while this argument may often be advanced, the evidence for it is largely anecdotal. Indeed, studies carried out by the Constitution Unit provide some evidence to the contrary. In their study of the effect of FOI on central government policy making they said (para 7.23):

"FOI was part of a general trend towards fewer written records rather than the dominant factor behind the trend."

In the preliminary findings of their study of [the effect of FOI on local government](#), while they have found some examples of less detailed record keeping, in relation to the general chilling effect on record keeping they said that *"few officials felt it had an effect"* and concluded that there is *"little chilling effect except in particular places"*

The Tribunal has been consistently sceptical of the 'pure' record keeping argument. In [Guardian & Brooke](#) they said at §107:

"It was further argued that the keeping of proper minutes was itself part of the process of carrying out proper deliberations, and that disclosure in this case might tend to discourage the keeping of proper minutes in the future. We regard that contention with considerable scepticism. For purposes of effective administration, a responsible public body ought to keep suitable

minutes of important meetings, whether or not the minutes may be disclosed to the public at a future date."

The Tribunal in [DfES](#) made a similar point at §83:

"As to record – keeping, we were told that standards were hard to maintain already. Certainly, the minutes which we are considering are fairly skeletal. Whether or not this is, as the Commissioner contends, a management issue, we do not consider that we should be deflected from ordering disclosure by the possibility that minutes will become still less informative. This is not a problem unique to central government... Good practice should prevail over any traditional sensitivity as we move into an era of greater transparency."

In [Baker](#) the Tribunal heard evidence (at §18) that while central government officials may be inclined to give advice to Ministers orally rather than in writing, for fear of disclosure, it was acknowledged that this represented bad practice that could be addressed through staff management, as had apparently been the case in local government.

The Tribunal has maintained this view in the more recent case of [PCSU](#) (at §38) where the National Offender Management Service argued that record keeping would deteriorate as a result of fears about disclosure:

"We do not attach great weight to that factor. The introduction of a freedom of information regime should not lead to discussions or advice being inadequately recorded, because this would ultimately undermine the decision-making process itself. We do not believe that civil servants should or would resort to such behaviour to undermine a law that Parliament has created in a form that includes adequate protection for information that justifies continuing confidentiality."

It should also be borne in mind that, far from being a negative effect, keeping less detailed but nevertheless adequate records may actually represent good record keeping practice. The Tribunal in [DBERR vs Information Commissioner \(EA/2007/0072\)](#) considered (at §128) that

"The prospect of disclosure might have the beneficial effect of introducing a certain degree of rigour in drawing up notes."

Similarly, the Constitution Unit study of local government has found that "FOI had the positive effect of 'cleaning up' emails and correspondence", and in the ICO's Annual Track research report for 2010, 83% of public authorities said that FOIA improves records management.

The section 46 Code of practice on the management of records provides guidance for public authorities on keeping records for business, regulatory, legal and accountability purposes.

The 'pure' record keeping argument may be put forward as part of the PIT under FOIA s35 or s36(2) or EIR r12(4)(e). For the reasons above we would give this little or no weight as a PIT factor for maintaining the exemption.

2. Effect on future deliberations

An authority may use its records not only as evidence of what happened in the past but also as a tool for future deliberation and actions. If a related issue arises in future, the authority is likely to look back at what was said previously for guidance. In this argument, the **harm** that is envisaged is that an incomplete record of what was said previously may have a limiting effect on subsequent discussions and make it harder to reach appropriate decisions in future.

Whether we accept this argument depends on how far we accept the pure record keeping argument in the first place. If we do not accept that disclosure of the disputed information in any particular case will lead to inadequate records being kept, then it is difficult to argue that there will be any prejudice to future deliberations.

However, we do not reject the future deliberations argument out of hand. In [DN FS50252690](#) (LB Merton), in relation to s36(2)(b)(ii), we said at para 47:

"Although the Commissioner does not agree with the opinion that inhibition would be likely, he accepts the opinion was nonetheless a reasonable one ... The Commissioner can accept that just as some staff members may be put off expressing certain views if the information was disclosed, they may also choose to discuss their views verbally but without recording them in detail. Furthermore, he accepts that an absence of detailed records to refer to may

restrict the thoroughness of future related exchanges for the purposes of deliberation.”

We accepted that s36(2)(b)(ii) was engaged, because the future deliberations argument was a reasonable opinion to hold, but we accorded it little weight in the PIT:

“The Commissioner would also add that in respect of the record-keeping concerns, the Commissioner also feels that this issue could and should be addressed by effective management.” (Para 64)

In this case we found that the balance of the PIT was in favour of disclosing the information.

Where this argument is put forward, the future deliberations which it is alleged will be adversely impacted by poorer records would have to be related in some way to the information in question. In the LB Merton DN, this was the case. The Council had said:

“...disclosure of the confidential draft notes of the discussions ... would be likely to prevent such note taking in the future. The notes record the rationale behind the recommendations and provide an important reference point for the refinement of the proposals, particularly, but not exclusively, by those who were not at the meeting.” (Para 45)

In this case the future deliberations would be about how to ‘refine’ the proposals agreed at a ‘Star Chamber’ meeting. If the detailed notes were not made (because of fear of disclosure) it would be harder for staff to develop the proposals agreed at that meeting. The opinion is reasonable because the future deliberations are related to the records in question. It would not be reasonable to think that future unrelated discussions would be impacted by less detailed or non-existent notes of the Star Chamber discussions.

3. Records as evidence of a chilling effect

The traditional scenario, in which the record is a set of minutes that is created after and exists independently from the activity or discussion which it represents, does not always fit the reality of administration or decision

making. In many cases documents, which are part of the actual deliberation in progress, become records. For example, the discussion itself may be conducted by email or through memos or correspondence and those documents constitute both the discussion itself and, when it is concluded, the record of it. If officials are reluctant to commit themselves to unpopular views in that exchange of emails, then we can say that there is a chilling effect, but because, in effect, the record *is* that exchange of emails, there is also an effect on record keeping. In this scenario the chilling effect means that the correspondence is less detailed and therefore the record of the discussion is less adequate.

The third record keeping argument is therefore that disclosure will create a chilling effect on future discussions and the evidence of this will be less detailed records. This argument works differently to the previous ones. Arguments 1 and 2 claim that disclosure will have an adverse effect on record keeping and that this will cause harm to administration or to deliberation; argument 3 claims that disclosure will have an adverse effect on deliberation which will be evidenced by poorer record keeping.

This argument is in fact a way of evidencing the chilling effect argument. Indeed, it is difficult to argue that a discussion will be inhibited (i.e. there will be a chilling effect) unless it is also argued that this will be evidenced by less detailed documentary records.

The argument must nevertheless be specific to the information in question, and this will determine whether we accept it.

In [DN FS50079488](#), the ECGD put forward what was essentially this third record keeping argument for withholding information under s35(1)(a). In relation to one withheld document (Document 6) the DN notes at para 43 *"... the concerns of the ECGD that the prospect of potential disclosure could have a "chilling effect" on the way in which advice or discussions **are recorded** (emphasis added). However, the Commissioner does not accept that the officials responsible for providing advice and recording information would cease to perform their duties on the ground that the information may be disclosed."* By contrast, in relation to another document (Document 10) we were *"willing to accept that in this case these views and opinions may be expressed less candidly if it was thought that they would be accessible in the public domain."*

