

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 11 April 2011

Public Authority: Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Summary

The complainant made a request to the Cabinet Office for recorded information it held in respect of the discussions between the Conservative and Liberal Democrat negotiating teams prior to the formation of the coalition government. The Cabinet Office responded providing some relevant information whilst withholding additional information under the exemption found in section 36 (Prejudice to effective conduct of public affairs). The Commissioner has investigated and determined that section 36(2)(c) applies to all of the information withheld from the complainant and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner finds the Cabinet Office in breach of section 17(1) in that it did not provide a refusal notice to the complainant within the specified time limit.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. On 7 May 2010 the then Prime Minister, Gordon Brown, announced that he had asked the Cabinet Secretary to "arrange for the civil service to provide support on request to parties engaged in discussions on the formation of a government". Therefore each political party who entered the coalition was offered a team of supporting civil servants. The civil servants were allowed to provide objective, factual policy advice.

However, no civil servants attended the actual negotiations and the parties were left to conduct the meeting of 7 May 2010 on their own.

The Request

3. On 10 May 2010 the complainant requested the following information:

“I am writing to request a copy of any minutes taken by civil servants or Cabinet Office officials at the talks between Conservative and Liberal Democrat negotiating teams on Friday May 7. I would also like copies of any briefing notes or other internal documents arising from the meeting”.

4. On 20 August 2010 the Cabinet Office responded and explained that it did not hold any records of minutes taken by civil servants or Cabinet Office officials on the date specified in the request. It went on to confirm that it did hold information within the scope of the request. Some information was provided with the remainder withheld relying on the exemption contained in section 36(2)(c) and 36(2)(b)(i) and (ii).
5. On 20 August 2010 the complainant requested an internal review of the Cabinet Office’s response. On 8 September 2010 the Cabinet Office replied upholding the original decision.

The Investigation

Scope of the case

6. On 23 September 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the public authority’s application of the public interest test.

Chronology

7. On 15 December 2010 the Commissioner wrote to the complainant to explain that he would examine the withheld information in order to determine if the exemption relied on by the Cabinet Office had been applied appropriately.
8. On 27 January 2011 the withheld information and the submissions to the qualified person were inspected at the Cabinet Office.

Analysis

Exemptions

Section 36(2)(c)

9. Section 36(2)(c) provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information would prejudice, or be likely to prejudice, the effective conduct of public affairs. The “qualified person” is set out in section 35(5) of the Act. In investigating whether the section 36 exemption is engaged the Commissioner will undertake the following:
 - Ascertain who is the qualified person for the public authority
 - Establish that an opinion was given
 - Ascertain when the opinion was given
 - Consider whether the opinion was reasonable in substance and reasonably arrived at.
10. The Cabinet Office confirmed that in this instance the “qualified person” was the Advocate General for Scotland. When deciding which “qualified person” should provide an opinion the government acknowledges the principle that incoming or current Ministers should not see papers of previous administrations. In this case because some of the requested information related to negotiations of a coalition partner with the party of which the Attorney General is a member, the customary choice of the Attorney General was not chosen to act as the “qualified person” in this case. The Commissioner accepts that the Advocate General for Scotland is a Minister of the Crown and therefore is able to act as a “qualified person” for the information in the case.
11. The Cabinet Office allowed the Commissioner to inspect the documentation submitted to the Advocate General for Scotland seeking his opinion on the application of 36(2)(c) and his resultant formal opinion. The documentation included the Cabinet Office’s submission and information falling within the scope of the complainant’s request. The documentation was submitted prior to the Cabinet Office’s Refusal Notice to the complainant. The submission was made to the qualified person on 28 July 2010 and an opinion was given on 17 August 2010.
12. The Commissioner has carefully considered the formal opinion of the Advocate General for Scotland and the reasons given for his decision that the exemption should be applied. The Commissioner also notes the arguments provided to complainant in support of the exemption on 22

August 2010. The Commissioner is satisfied that the Advocate General's opinion and decision was based on the appropriate consideration of factors relevant to the case and in the Commissioner's view was reasonably arrived at.

13. In the Commissioner's view, section 36(2)(c) is only appropriate for a public authority to apply in cases where the disclosure would or would be likely to prejudice a public authority's ability to offer an effective public service or to meet its wider objectives or purpose due to disruption caused by the disclosure and diversion of resources in managing the impact of disclosure. In *McIntyre v Information Commissioner & the Ministry of Defence*, the Tribunal commented:

".....this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure of the diversion of resources in managing the impact of disclosure."

14. The Commissioner agrees that it was reasonable for the qualified person to find that disclosing the requested information would be likely to prejudice the processes involved with the formation of the new government. He also agrees that the effective conduct of government necessitates the formation of a stable government at a time when an election does not result in a clear majority for one party. In order to form that government discussion and negotiation is required between the parties. The role of the civil service in providing support for this process is significant in facilitating agreement between parties. At this critical point in the formation of a government political parties must have the greatest possible confidence in relying on the services and support of the civil service without any concern that information provided, consulted or relied on may be compromised by being revealed at a later date. The conduct of public affairs is likely to be prejudiced if political parties feel unable to ask for civil service advice. The Commissioner has decided that the Advocate General's opinion is objectively reasonable and therefore he has determined that section 36(2)(c) is engaged.

Public Interest Test

15. Having concluded that the opinion (and the way it was arrived at) was reasonable, the Commissioner next considered the public interest test. This arises because section 36(2)(c) is a qualified exemption and therefore it is necessary to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

16. The public interest consideration in favour of disclosure is broad in its scope. The Commissioner considers that the disclosure of information serves the general public interest by promoting better government through transparency, accountability and public debate. Disclosure of information generally assists the public in gaining a better understanding of decisions, which allows informed and meaningful participation by the public in the democratic process.
17. The Commissioner acknowledges the complainant's view that information relating to the formation of a coalition government after some fifty years was a significant event which will impact on a wide range of issues of interest and would hold significant public interest. The coalition partners were involved in negotiating around a range of topics and there was a public interest in understanding the extent and nature of civil service involvement and further background about what led to the final coalition agreement.

Public interest arguments in favour of maintaining the exemption

18. In accepting the qualified person's opinion that the exemption is engaged the Commissioner must give due weight to his opinion in the Public Interest Test.
19. The Commissioner must also consider the severity, extent and frequency of prejudice to the effective conduct of public affairs if the information requested was disclosed. If the parties involved in the formation of government concluded that they were unable to make use of the civil service in this way it may significantly impact on the process of forming a government and developing an effective agreement. In this situation the severity and extent of the prejudice would carry a great weight. In assessing the frequency of such prejudice the Commissioner considered the likely political scenarios that existed at the time of the request and noted that it was possible that the electorate would have continued to be evenly divided between the political parties. It is also reasonable to note that many respected political commentators suggested that another general election, in a short period after the 2010 election, was a possibility. Following this line it is feasible that the formation of coalition governments may occur more frequently than during recent history and therefore this factor carries significant weight. Thus the weight the Commissioner applies to these factors provides a significant argument in favour of maintaining the exemption.
20. The Commissioner accepts the argument put forward by the Cabinet Office that the effective conduct of government requires the formation of

a stable government where an election does not result in a majority for a single party. The discussions between the parties in such a situation must have the opportunity to take support from the civil service. Any action taken which could result in parties not requesting support in such circumstances would be likely to prejudice the process of government formation and the effective conduct of public affairs.

Balance of the public interest arguments

21. The inspection of the withheld information by the Commissioner led him to conclude that the information would only inform the public interests identified to a limited extent. The Commissioner is mindful that there is a presumption of openness running through the Act, and if the public interest is evenly balanced, the public interest favours disclosure. However, the Commissioner is of the view that the argument for maintaining the exemption in this case is stronger than the opposing arguments for disclosure of the requested information.
22. The Commissioner is satisfied that he should give significant weight to his finding that the disclosure of the withheld information would be likely have a prejudicial effect on whether parties in future would use the Civil Service to facilitate, advise and support future coalition negotiations. The Commissioner considers that strong weight should be given to this, to ensure that Political parties are able to take up the option of Civil Service advice in the future. Therefore the Commissioner is satisfied that the Cabinet Office correctly withheld the information in reliance of the exemption under section 36(2)(c).
23. It is not necessary for the Commissioner to investigate the application of section 36(2)(b)(i) and (ii) as the exemption found in section 36(2)(c) is engaged.

Procedural Requirements

Section 17

24. The Cabinet Office did not provide a refusal notice which stated that it was relying on section 36(2)(b)(i) and (ii) and 36(2)(c) within the time for compliance. The Commissioner therefore finds that the Cabinet office breached of section 17(1).

The Decision

25. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- The application of section 36(2)(c)

However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The Cabinet Office breached section 17(1)

Steps Required

26. The Commissioner requires no steps to be taken.

Right of Appeal

27. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

28. 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.
29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 11th day of April 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

"This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

"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-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,

(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.