

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

### **Decision notice**

**Date:** 11 December 2014

**Public Authority:** Parliamentary and Health Service Ombudsman (PHSO)

**Address:** Millbank Tower  
Millbank  
London  
SW1P 4QP

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

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1. The complainant has requested the minutes of two meetings. The PHSO refused to provide the requested information under section 36(2)(b)(i) and (ii) and section 36(2)(c) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the PHSO has correctly applied section 36(2)(b)(ii) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 7 December 2013 the complainant requested information of the following description:  
  
"Please supply the minutes if these meetings  
  
Bernard Jenkin, Chair of PASC, quarterly meetings on 10 October and 27 November."
5. On 8 January 2014 the PHSO responded. It refused to provide the information requested under section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA.

6. The complainant requested an internal review on 9 January 2014. The PHSO sent the outcome of its internal review on 14 April 2014. It upheld its original position.
7. The complainant is dissatisfied with the PHSO's application of section 36 as she is concerned as to whether or not Dame Judie Mellor was the qualified person and therefore whether the application of this exemption was flawed. She is also dissatisfied with the time it took the PHSO to carry out the internal review.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 24 March 2014 to complain about the way her request for information had been handled.
9. The Commissioner has considered whether the PHSO correctly applied section 36(2)(b)(i) and (ii) or section 36(2)(c) FOIA to the withheld information.

### **Reasons for decision**

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10. Section 36 FOIA 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-

(2)(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

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

11. The Trust has applied section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA to the withheld information. The Commissioner has first considered the PHSO's application of section 36(2)(b)(ii).

12. In determining whether section 36(2)(b)(ii) was correctly engaged by the Trust, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
- Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.
13. The PHSO explained that the qualified person is Dame Julie Mellor, Ombudsman. It explained that the qualified opinion was provided on 7 January 2014. The qualified person's opinion was that section 36(2)(b)(ii) FOIA was applicable in this case. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions to the qualified person and the qualified person's opinion was provided to the Commissioner.
14. The PHSO acknowledged that the complainant does not consider that Dame Julie Mellor was sanctioned to act as the qualified person on this case. The PHSO explained that the statutory powers of the PHSO are invested in the person who holds the role of Ombudsman. It said that the person who holds the role of Ombudsman has always taken the decision in respect of section 36 FOIA. It acknowledged that the 'qualified person' was previously listed as the Executive Board, it explained that the decision has always been taken by the Ombudsman as Chair of the Board and as head of the organisation. The PHSO said that it has recently sought certification from the Cabinet Office for an additional 'qualified person'. It said this was so it could ensure that in the absence of the Ombudsman, decisions in respect of this exemption could still be taken without delay. The PHSO received a letter from Francis Maude MP on 14 April 2014, confirming the Ombudsman as the qualified person and also sanctioning the person holding the office of Senior Information Risk Officer (SIRO) to act as the qualified person. A copy of this letter was provided to the Commissioner. It said that currently the role of SIRO is held by the PHSO's Managing Director.
15. It summarised that the Ombudsman, as head of the organisation, has always been the qualified person for the purpose of section 36 FOIA. It therefore concluded that it was entirely appropriate that the decision to apply section 36 in this case (both originally and at internal review) was taken by Dame Julie Mellor. It said that nobody else at that stage

could have taken the decision. However it said that as the SIRO has also now been approved as a 'qualified person' he has too now taken the decision to apply section 36 to the information requested by the complainant.

16. The Commissioner is satisfied that Dame Julie Mellor was the appropriate qualified person in this case.
17. The PHSO has explained that there is one set of notes held relevant to the scope of the request. It explained that the meeting to which the notes relate was between the Ombudsman and the Chairman of the Public Administration Select Committee (PASC).
18. The qualified person's opinion is that disclosure so soon after the meeting took place would be likely to impede the free and frank exchange of views relating to an ongoing live issue, involving some particularly sensitive discussions linked to the delivery of the More Impact for More people Strategy.
19. The Commissioner considers the opinion of the qualified person is a reasonable one.
20. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)<sup>1</sup>.
21. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present

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<sup>1</sup> EA/2006/0011; EA/2006/0013

case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

### **Public interest arguments in favour of disclosing the requested information**

22. The PHSO considers that there is a public interest in openness and transparency.

### **Public interest arguments in favour of maintaining the exemption**

23. The PHSO has explained that it believes the following public interest arguments favour maintaining the exemption:

#### **Safe Space**

The PHSO considers that there is a strong public interest in protecting the safe space for discussion of live and sensitive issues between the Chair of PASC and the Parliament Ombudsman.

It said that it is important that both the PASC Chair and the Ombudsman are able to talk about their work together and build that working relationship. It said that they need to be able to develop ideas and hold discussions without external interference or distraction. It said that these discussions inform its policy development directly in terms of how it seeks to influence the development of public policy.

#### **The Chilling Effect**

The PHSO said that if information were released, going forward, discussion would be likely to be inhibited where views could be properly shared or opinions expressed effectively.

It also argued that disclosure could have a chilling effect on future cross government discussions.

#### **The Timing of the Request**

The PHSO argued that the timing of the request is likely to increase the chilling effect as the request was made soon after the meeting to which the requested notes relate took place.

### **Balance of the public interest arguments**

24. The Commissioner considers there is a strong public interest in openness and transparency, particularly in relation to the area of complaints

handling within the health sector as this is likely to have an impact for a fairly significant proportion of the population.

25. The Commissioner does however consider that this area requires free and frank discussion and sharing of views between the Ombudsman and PASC. Disclosure of information which would be likely to inhibit the frankness and candour of such discussions would not be in the public interest as in turn it would be likely to have a negative impact upon the PHSO's ability to influence Parliament in order to successfully deliver its More Impact for More People Strategy.
26. In this case the Commissioner acknowledges that the request was made a short time after the relevant meeting took place which gives greater weight to the chilling effect arguments.
27. The Commissioner has viewed the withheld information and accepts the PHSO's argument that some parts of the notes relate to particularly sensitive issues under discussion.
28. The Commissioner considers that there is a strong public interest in disclosure of information relating to how health service complaints are handled. However the Commissioner considers that there is a strong public interest in allowing the Chair of PASC and the Ombudsman safe space for discussion and to enable views to be shared freely and frankly relating to this issue. As the meeting notes requested were live and extremely recent at the time of the request, the Commissioner considers that this adds greater weight to the chilling effect arguments.
29. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) FOIA was therefore correctly applied in this case.

## Right of appeal

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30. 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)

31. 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.
32. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**