

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 2018

Public Authority: Department for Work and Pensions

Address: 4th Floor
Caxton House
Tothill Street
London
SW1H 9NA

Decision (including any steps ordered)

1. The complainant has requested the emails received by a named inbox which relate to whistleblowing. The Department for Work and Pensions (DWP) is relying on the exemption at section 36(2)(c) to withhold the information.
2. The Commissioner's decision is that DWP is entitled to rely on section 36(2)(c) to withhold the requested information and that, in the specific circumstances of this case, the public interest lies in maintaining the exemption.
3. No steps are required.

Request and response

4. On 25 February 2017, the complainant wrote to DWP and requested information in the following terms:

"Please state how many calls have been made to the DWP Whistleblowers Hotline 0800 917 4881, how many Emails have been sent to the CSHR Casework inbox and how many calls to RAD (crisis of conscience concerns 0114 240 8745) have been made in each year since 2010."

5. On 20 March 2017, DWP responded and explained that its whistleblowing policy provides a number of channels through which staff can raise their concerns. DWP confirmed that both of the numbers quoted are operated by the Government Internal Audit Agency's Counter Fraud and Investigation team, and concerns could be raised via other telephone channels. DWP confirmed that it did not hold information on the number of calls made to the separate contact phone numbers. DWP provided the number of concerns recorded by the Counter Fraud and Investigation team by year from 2013. DWP confirmed that the CSHR Casework email inbox was set up in 2012, but did not receive emails in 2012 or 2013. DWP provided the number of emails received by year until 2017.

6. On 31 March 2017, the complainant wrote to DWP and made a further request for information in the following terms:

"Please provide copies of all emails received by the CSHR Casework inbox since 2014"

7. On 4 May 2017, DWP responded and explained that it was unable to collate the individual emails and to identify each individual case would incur disproportionate costs as it would involve sourcing each record held by its managers. DWP confirmed that it was relying on section 12 of the Act to refuse to comply with the request.
8. On 14 May 2017, the complainant wrote to DWP to request an internal review, disputing DWP reliance on section 12 of the Act.
9. DWP provided the outcome of its internal review on 20 June 2017. It upheld the handling of the request but confirmed that, on review, the request may have been for the emails related only to whistleblowing.

DWP confirmed that it would rely on section 40(2) of the Act in relation to these emails.

Scope of the case

10. The complainant contacted the Commissioner on 17 May 2017 to complain about DWP's request handling in general. The Commissioner confirmed that, under section 50, she could only consider individual requests for investigation and asked the complainant to set out which requests he wished to proceed to investigation. On 28 September 2017, the complainant confirmed that he wished to complain about the request made on 31 March 2017.
11. The Commissioner considers that the request can be interpreted in more than one way. She therefore sought clarification from the complainant with regards to the information being requested. The complainant confirmed as follows:

"THE INTENTION OF THE REQUEST WAS TO OBTAIN COPIES OF ALL EMAILS RELATED TO WHISTLEBLOWING, RATHER THAN SPAM ETC. THAT IS TO SAY ANY EMAIL, WHETHER AN INITIAL CONTACT EMAIL, A FOLLOW UP REPLY, OR ANY EMAIL THAT MENTIONS WHISTLEBLOWING ACTIVITY BY ANYBODY."
12. The Commissioner confirmed this interpretation with DWP and obtained its consent to proceed with the investigation on the basis of this interpretation of the request. DWP confirmed that it wished to rely on section 40(2) of the Act to withhold the information.
13. Having reviewed the withheld information and DWP's submissions, the Commissioner confirmed to DWP that she was not persuaded that the entirety of the requested information could be withheld under section 40(2) as some of the emails could be sufficiently redacted to prevent identification. The Commissioner therefore invited DWP to review its position.
14. DWP confirmed to the Commissioner that it wished to maintain its reliance on section 40(2) of the Act with regards to some of the information but also wished to rely on section 36(2)(c), section 41(1) and section 31(1)(a) to withhold the requested information.
15. DWP attempted to write to the complainant on 5 November 2018 to confirm its amended position. However, the email address provided was no longer in use and the Commissioner therefore provided the complainant with DWP's fresh response on 8 November 2018.

16. The Commissioner set out to the complainant that she would proceed with her investigation on the basis of DWP's new position. The complainant did not object to this approach.
17. The Commissioner will consider whether section 36(2)(c) applies to the entirety of the withheld information and whether, in the specific circumstances of the case, the public interest lies in maintaining the exemption. If the Commissioner finds that section 36(2)(c) is not engaged, or that the public interest favours disclosure, she will go on to consider sections 40(2), 41(1) and 31(1)(a).

Reasons for decision

Section 36(2)(c): Prejudice to effective conduct of public affairs

18. Section 36(2)(c) states that:

"(2) 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...

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

19. Section 36(5) defines the "qualified person":

"In subsections (2) and (3) "qualified person" –

(a) In relation to information held by a government department in the charge of a Minister of the Crown means any Minister of the Crown"

20. In this case, Baroness Buscombe, Minister for Work and Pensions (Lords) provided the opinion in relation to the application of section 36(2)(c). The Commissioner is satisfied that she is a qualified person for the purposes of section 36(2)(c).
21. In determining whether the exemption is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In this context, an opinion either is or is not reasonable. In deciding whether an opinion is reasonable, the Commissioner will consider the plain meaning of the word, rather than defining it in terms derived from other areas of law.
22. The Commissioner considers the most relevant definition of "reasonable" in the *Shorter Oxford Dictionary* is *"in accordance with reason; not*

irrational or absurd” – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.

23. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person’s opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person’s position could hold. The qualified person’s opinion does not even have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
24. In determining whether the qualified person’s opinion is reasonable, the Commissioner has considered all of the relevant factors, including:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable;
 - the nature of the information and the timing of the request;
 - the qualified person’s knowledge of, or involvement in, the issue.
25. In order to assist the qualified person, DWP provided the Minister with a detailed submission on 16 October 2018.
26. On 18 October 2018, the private secretary to Baroness Buscombe confirmed by email that Baroness Buscombe approved of the application of the exemption under section 36(2)(c).
27. DWP stated to the Commissioner that *“In the opinion of Baroness Buscombe, Minister for Work and Pensions (Lords)... disclosure of this material would be prejudicial to the conduct of public affairs”*.
28. DWP explained that the reason for the prejudice is that disclosure would damage the confidence that Civil Servants have in the existing process whereby they can raise concerns. DWP considered that individuals may be discouraged from raising legitimate issues due to the possibility that their concerns may be disclosed at a later date.
29. Having regard to the submissions before the qualified person and the submission provided as part of this investigation, the Commissioner’s view is that the opinion given is a reasonable one for Baroness Buscombe to hold. The Commissioner is concerned that the Qualified Person’s opinion was not sought within the statutory timescale and was obtained at a late stage of the investigation, however, this does not render the opinion unreasonable.

The public interest test

30. Section 36(2)(c) is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case, the public interest in maintaining section 36(2)(c) outweighs the public interest in disclosing the information.

31. In *Guardian and Heather Brooke v the Information Commissioner and the BBC (EA/2006/001 and EA/2006/0013)*, the Tribunal provided some general principles about the application of the Public Interest Test in section 36 cases as following:

- The lower the likelihood is shown to be that the free and frank exchange of views or provision of advice would be inhibited, the lower the chance that the balance of the public interest will favour the exemption.
- While the Commissioner cannot consider whether the prejudice is likely (that is for the qualified person to decide), she is able to consider the severity, frequency or extent of any likely prejudice.
- Since the public interest in maintaining the exemption must be assessed in the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
- The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
- In considering factors against disclosure, the focus should be on the particular interest that the exemption is designed to protect.
- While the public interest considerations in the exemptions from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption.
- Disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation of the public in the democratic process.

32. DWP set out to the Commissioner its public interest considerations, as below.

Public interest in disclosure

33. There is a strong public interest in ensuring that the Civil Service Code is being adhered to and that complaints made regarding breaches of the Code are properly dealt with.
34. There is a need to ensure transparency of the process so that citizens can be confident in the propriety and ethics of the Civil Service.
35. Disclosure of the small number of substantive complaints which do disclose a potential breach of the code would offer confirmation of the generally high standards of probity that are maintained by the Civil Service.

Public interest in maintaining the exemption

36. It is in the public interest to ensure that breaches of the Civil Service Code are brought to the attention of department and that appropriate action is taken to deal with such breaches.
37. Individuals can only raise concerns with confidence if they are able to do so confidentially. Disclosure under the Act is disclosure to the world at large and, once disclosed, DWP has no control over what happens to that information.
38. Individuals who have used, or are considering using, this process may become discouraged from using the process in the future as they may be concerned about the risk of disclosure.
39. DWP set out that it considers the overriding public interest in is ensuring that the Civil Service maintains its high standards of ethical behaviour. The confidential process to raise concerns is a critical check and balance in maintaining this standard and can only operate if all Civil Servants are assured that they can use it without risk of their concerns being divulged to third parties. DWP explained that it therefore considered the public interest lies in maintaining the exemption.

The Commissioner's considerations

40. The Commissioner considers that this is a finely balanced case with strong public interest arguments on both sides. The Commissioner recognises that there is a clear public interest in transparency and awareness of the processes in place to ensure that the Civil Service maintains a high standard of integrity.
41. The Commissioner has reviewed the withheld information and she considers that whilst it would add to the public understanding, the public interest in protecting the process itself and the confidence civil servants

have when using this process outweighs the public interest in disclosing the moderate amount of information that would further add to the public understanding.

42. The Commissioner also considers that whilst the individual issues raised in the emails may become less sensitive as time passes, it is likely that Civil Servants will still be deterred from raising concerns if their correspondence may be made public in the future. It is in the public interest that Civil Servants feel comfortable to raise concerns in the knowledge that these concerns will continue to be treated confidentially.
43. Having reviewed the withheld information and DWP's arguments, the Commissioner considers that the public interest lies in maintaining the exemption.
44. As the Commissioner is satisfied that DWP can rely on section 36(2)(c) for the entirety of the information, she will not consider the further exemptions applied as to do so would be academic.

Right of appeal

45. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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

**Gerrard Tracey
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