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Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 November 2024

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

Decision (including any steps ordered)

1. The complainant has requested information about the Annual Functions Survey. The Cabinet Office (CO) refused to provide it citing several exemptions within section 36 (prejudice to the effective conduct of public affairs) as its basis for doing so. After internal review it upheld this position.
2. The Commissioner's decision is that CO is entitled to rely on section 36 as its basis for withholding the requested information.
3. The Commissioner does not require further steps.

Request and response

4. On 18 December 2023, the complainant requested information of the following description from CO:

"Please could you provide a copy of the results of the latest Annual Functions Survey."
5. On 22 January 2024, CO responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so: - section 36(2)(b)(i), (ii) and section 36(2)(c) – effective conduct of public affairs.

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6. The complainant requested an internal review on 22 January 2024.
7. The Cabinet Office sent them the outcome of its internal review on 7 March 2024. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 2 April 2024 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to decide whether or to what extent CO is entitled to rely on section 36(2)(b)(i), (ii) and section 36(2)(c) as its basis for withholding the requested information.

Reasons for decision

Background

10. CO provided the following background information:

“The Functions Quality Survey (‘the survey’) is an annual survey carried out by the Analysis and Insights team in the Cabinet Office, and has been running for 7 years. It has been designed to benchmark the quality of corporate functions (such as HR, finance, digital, communications) in each government department. The survey asks Senior Civil Servants (SCS) across government to answer on behalf of their business area and rate the functions in their department that they have experience with. They are also asked their opinions on what needs to be improved and to offer suggestions for improvements; the survey is more balanced towards issue and problem identification and inviting rich, critical and actionable feedback. Functions are also asked to ‘self-reflect’ on their own functions’ performance.”

Section 36 – prejudice to the conduct of public affairs

11. Under section 36(2), information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
 - (b) would, or would be likely to, inhibit—
 - (i) the free and frank provision of advice, or

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- (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.
- 12. CO has applied sections 36(2)(b)(i), (ii) and 36(2)(c) to withhold the requested survey. Arguments under these sections are usually based on the concept of safe space and a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.
- 13. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person (QP). The Commissioner is satisfied that CO sought the opinion of a minister who is designated as a QP in respect of this specific request. It did so on 8 January 2024. Baroness Neville-Rolfe who was, at the time, Minister of State at the Cabinet Office, gave her opinion on 10 January 2024 under section 36(5) of FOIA. Her opinion was that all three limbs of section 36 were engaged.
- 14. The Commissioner has considered whether the opinion about all three limbs of section 36 is reasonable. It is important to note that 'reasonableness' is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? The only requirement is that it is a reasonable opinion, and not necessarily the most reasonable opinion.
- 15. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
- 16. For the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition or prejudice may arise. In his published guidance on section 36 the Commissioner notes that it is in the interests of public authorities to provide him with all the evidence and arguments that led to the opinion, to show that it was reasonable. If this is not done, then

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there is a greater risk that the Commissioner may find that the opinion is not reasonable.¹

17. CO has provided the Commissioner with a copy of the submission it provided to the QP. This shows that the QP was provided with a copy of the information being sought, arguments for why the inhibition or prejudice envisioned under section 36(2)(b)(i),(ii) and 36(2)(c) would or would be likely to occur, and counter arguments.
18. The QP provided her opinion that the harm envisioned in all three limbs would be likely to happen. The Commissioner accepts that it was reasonable for the qualified person to consider that there was a need to protect the safe space in which such surveys are conducted and the likely inhibition of frank expression of opinion in future surveys. The knock on effect of undermining the effectiveness of such surveys is also, in the Commissioner's view, a reasonable opinion to hold.
19. It is important to note that in order for section 36(2)(c) to be engaged, the public authority must explain why disclosure would – or would be likely to – otherwise prejudice the effective conduct of public affairs other than in the manner described in 36(2)(b)(i) and (ii). The Commissioner is satisfied that CO did so and that the qualified person provided a reasonable opinion in that regard.
20. In its submissions to the Commissioner, CO fleshed out the detail of its arguments with specific reference to the withheld information. It explained the likelihood of inhibition and the negative impact on the value of such surveys. It drew attention to specific areas of the survey as part of these submissions.
21. It said: We consider disclosure would be likely to adversely affect the Cabinet Office's relationship with senior officials across the surveyed departments. Departmental results in particular are identifiable and relatable to named leaders of functions within those departments. Departments were not informed their results would be published when they agreed to participate in and distribute the survey to their leadership teams. It is unclear whether they will engage in future should their results be published. It is important that relationships between the Cabinet Office and senior officials across government are strong, if the survey is to remain an effective tool to drive improvement within departments. An effective survey is predicated on engagement, as well as the free and frank provision of views discussed above. Reduced

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

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engagement or unwillingness to be open and critical of functional performance, including the performance of leadership, will undoubtedly have a detrimental effect on the overall ability of each department to improve its corporate functions.”

22. It added: “It is important to note that disclosure of the information would be likely to have a prejudicial effect on the process from which the information is derived. We anticipate a social desirability bias in responses from those within functions motivated by improving perceptions of the overall functional model and agenda. The ‘self-reflection’ questions for leadership to reflect on their own functions are particularly likely to be diminished. Respondents are likely to “pull their punches” and be less critical and explicit in detail. Releasing this information would undermine the robustness of the results - it would not be possible, for example, to distinguish if ratings improvements in the first survey after publication were due to actual improvements in functional performance, or due to methodology changes i.e. informing participants that aggregate ratings and feedback would be published, thereby eliciting more positive responses. This significantly devalues the case for continuing the research in its current form. Having an effective process to elicit views and act on the results is vital to the effective conduct of public affairs, because the survey results help departments to improve their corporate functions that underpin their support and delivery of Government priorities and public services”.
23. In light of the above, the Commissioner is therefore satisfied that each limb of section 36 that was relied upon has been correctly applied.

Public interest test

24. Section 36 is subject to the public interest test. This means that, although the three limbs of section 36 that have been cited are engaged, the withheld information must be disclosed unless the public interest in maintaining these section 36 exemptions is stronger than the public interest in disclosure.

Public interest in disclosure

25. The complainant argued that any disruption that might arise would be minimal and that there was a very strong public interest in identifying serious issues with cross government functions. They argued that any concerns CO might have about identifying staff would only apply if the survey had been of 10 people. They argued that government statistics showed that there were 770 people at Senior Civil Servant (SCS) grades

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and 7,220 people in senior grades across the civil service². The complainant stated that it would, therefore, be difficult to identify individuals from any smaller group response as asserted by CO in its letter of internal review dated 7 March 2024.

26. In that letter to the complainant, CO had said:

"The Functions Quality Survey relies on free, frank and direct policy feedback and participation is from a much smaller group of senior people within the department. Publication risks inhibiting the sharing of views and the distortion of future feedback creating a social desirability bias as respondents think about the optics of their feedback. This would clearly reduce the quality of evidence for improving functions and in turn their support for the efficient and effective conduct of public affairs."

27. CO's submissions to the Commissioner had reiterated this point but with additional reference to the content of the withheld information.

28. In its submissions, CO also recognised the public interest in transparency in the results of the survey. It said:

"Corporate functions are funded by the taxpayer, and there is a public interest in knowing if the users of corporate services are content with them and if they are providing value for money. Disclosure would also provide evidence that the Cabinet Office actively encourages senior officials to provide their views on those functions as a snapshot at a particular point in time, and disclosure would give an insight into any issues raised by respondents."

29. It also said there was a public interest in disclosure to "increase confidence that government departments are providing efficient and cost-effective corporate functions. Disclosure would increase transparency and allow public scrutiny".

Public interest in maintaining the exemptions

30. Dealing first in the public interest in maintaining the two limbs of section 36(2)(b) that it had cited, CO stressed the public interest in avoiding inhibition to open and honest expression when gathering responses to this regular survey. The survey, it said, helped "to inform plans to

² <https://www.gov.uk/government/statistics/civil-service-statistics-2022/statistical-bulletin-civil-service-statistics-2022#pay>

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improve services provided by and used within each government department”.

31. It also drew attention to the explicit encouragement given to senior officials to be “confident of being open in your responses”. It also described the survey as granular in detail and being from a small leadership cohort across the Civil Service. There was, it said, an implicit understanding of confidentiality. It added that “[r]esults are identifiable with, and relatable to named officials who lead government functions, particularly departmental results” although it did not give examples. It did, however, provide more detailed commentary to support its view of the likely chilling effect with specific reference to the information.
32. With regard to section 36(2)(c), it explained that there was a public interest in the effective functioning of future surveys where they are conducted on a confidential basis “so it can engender improvement”. It explained that “A diminished picture of the effectiveness of departments’ functions would result in less informed conclusions”.
33. It argued that, on balance, there were stronger public interest factors favouring maintaining the exemptions to protect the safe space in which SCS officials can provide their honest views at a given point in time. Such honesty and frankness would help to shape and strengthen corporate functions to support the delivery of the Government’s priorities and public services.
34. It added there was a public interest in avoiding the decrease in usefulness of this survey and wider cross-government surveys in the future. It stressed the strong public interest in staff engagement to improve the operation of various functions in each department.

The balance of public interest

35. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP’s opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition.
36. The QP in this case, when giving their opinion, made specific reference to the usefulness of the survey including particular sections. The Commissioner is satisfied that the QP’s opinion carries notable weight in the consideration of the public interest this case.
37. The Commissioner has next considered the timing of the request. The public interest in being able to exchange views about an issue freely and frankly, for example, will be greater if the issue is ongoing and live at the time of a request. The Commissioner notes that the survey was dated September 2023 and was therefore relatively recent information

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which was therefore feeding into decision making at the time of the request.

38. The Commissioner has considered the severity, extent and frequency of the envisioned prejudice or inhibition. The Commissioner notes that this survey is conducted annually. He also notes that it is an extremely thorough survey and its findings draw heavily on open text responses and includes direct quotes. While these quotes are not attributed to individuals, they are often attributed to particular departments or functions within departments. While he does not believe individuals are identifiable from the quotes, it may be possible to draw conclusions (fair or otherwise) about the operation of teams within different departments including leadership of those teams.
39. The Commissioner does not necessarily give great weight to a public authority's assertion that its officials, particularly its senior officials, will not be as frank in the future if requested information is disclosed. However, he recognises that disclosure of a detailed and internally facing survey of how colleagues are working together is more likely to inhibit future participation because it is, to a greater extent, more personal. Colleagues may be less willing to speak frankly about how other teams are working in relation to them if their comments are made public. This is very different to speaking frankly to ministers about government policy options which is a necessary part of their job.
40. That said, he recognises that there is a strong public interest in the public knowing more about how different functions within the civil service are working in relation to each other. This would improve transparency and accountability, and contribute to the public's understanding of whether it is getting value for money in the operation of government and where any operational pinch points might be. The fact that this information is relatively recent would, it could be argued, give an up-to-date and therefore more useful picture.
41. In light of the above, the Commissioner has concluded that, by a narrow margin, the public interest favours maintaining all three exemptions. He has given particular weight to the public interest in protecting the safe space in which views are expressed and analysed with respect to this information. He has made further comment in the Other Matters section of this Notice.

Other matters

42. Given the strong public interest in disclosure of the information, the Commissioner would encourage CO to consider ways of making public sections of this survey (or information from future surveys of this

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nature) by, for example, also producing content which is disclosable i.e. in a less detailed format that is, nevertheless, useful and informative.

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Right of appeal

43. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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