

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 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 expectation for the Civil Service to spend a minimum of 60% of their working time working in the office. The Cabinet Office ("the public authority") relies on section 36 to withhold the requested information.
2. The Commissioner's decision is that the public authority was correct to apply the exemptions provided by section 36(2)(b)(i) and (ii) to withhold information from disclosure.

Request and response

3. On 3 January 2024, the complainant wrote to the public authority and requested information in the following terms:
 - [1] Which (bright spark) made this decision for the 60% office attendance and signed it off?
 - [2] Please provide all the information taken into consideration when coming to this decision?
 - [3] Was feedback sought by employees, if so by whom and how many?
 - [4] Is feedback going to be obtained on this decision, if so when and from whom?

- [5] How much of the prison estate (%) has been sold by the tory government in the last 3 years?"
4. The public authority responded on 31 January 2024 confirming that information within scope of the request was held, confirming that Heads of Departments had reached a non-minuted consensus on the Civil Service spending a minimum of 60% of their working time working in the office (in answer to question 1).
 5. It further confirmed that information relating to correspondence that led to the office attendance expectation was exempt from disclosure under sections 36(2)(b)(i) and (ii), and section 36(2)(c) (prejudice to effective conduct of public affairs) of the Act (in answer to question 2).
 6. In regard to staff engagement, the response confirmed government departments were responsible for engaging with their employees and monitoring feedback. As such, it did not hold information in scope of this element of the request (questions 3 and 4).
 7. In regard to the prisons estates, the response confirmed that it did not hold this information (in answer to question 5).
 8. On the same day (i.e. 31 January 2024), the requester sought an internal review of the public authority's response. In particular, he questioned the public interest test and stated:

"Transparency favours disclosure as to why the decision was made. I don't see what is so controversial about non-disclosure other than you trying to cover up an unjustified baseless decision."
 9. The public authority responded on 24 May 2024 and confirmed it maintained its conclusions in regard to the application of section 36, but acknowledged further additional context and explanation could be provided. In particular that "arguments put forward and considered by the qualified person in favour of section 36 were that the materials in question included detailed background information on internal civil service operating mechanisms around use of the estate and employee attendance. Options and details were shared to inform debate and provide reassurance. They include detailed information about the estate, costs and plans that are not in the public domain due to commercial considerations. The material is also highly sensitive in the Industrial Relations landscape where ongoing strike and ballot action continues in some areas and remains a threat in others".
 10. The internal review response also went on to confirm an additional piece of information was in scope of the request and it was also exempt under the same section 36 exemptions.

Scope of the case

11. The complainant contacted the Commissioner on 23 April 2024 to complain about the way his request for information had been handled. He said as follows;

"I made a foi request regarding civil servants office 60% attendance decision, what information was taken into consideration and sale of prison estate.

Cabinet Office refused to provide the office attendance information citing s36 and are being very sneaky.

It's not clear whether it's would or would be likely level of prejudice.

The public interest favours transparency. Part of their argument is it will affect future decisions, this is not the case, each case is dealt individually."

12. After receiving the public authority's internal review response the complainant (on 16 June 2024) wrote again to the Commissioner. He said as follows;

"I'm not satisfied with the response. It's a cover up of a bad decision in bad economic times. Civil servants have been working fine before the 60% office attendance and the decision is unjustified and puts further strain on workers (who are under paid and over worked).

I dont believe s36 exempting everything applies. There is a clear public interest in disclosing this information ..."

13. The Commissioner considers that the scope of his investigation is to determine, as complained about, whether the public authority was entitled to rely on section 36 to withhold requested information.

Reasons for decision

Section 36(2)(b)(i) and (ii)

14. Section 36(2) of FOIA 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: –

(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.'
15. The public authority applied section 36(2)(b)(i) (inhibition to the free and frank provision of advice) and section 36(2)(b)(ii) (inhibition to the exchange of views for the purposes of deliberation) to withhold the requested information in its entirety.
 16. The Commissioner's guidance on section 36 explains that information may be exempt under section 36(2)(b)(i) and (ii) if its disclosure could inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options when providing advice or giving their views as part of the process of deliberation. The reason for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision-making.
 17. These exemptions are concerned with protecting the processes that may be harmed by the disclosure of the information. The issue to be considered is whether disclosure would or would be likely in future to inhibit the processes of providing advice and exchanging views.
 18. In deciding whether section 36(2) is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one.
 19. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the matter. 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 not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Nor does the qualified person's opinion have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
 20. The public authority told the Commissioner that section 36(2)(b)(i) and (ii) of the Act applied as disclosing the withheld information :

"...would be likely to inhibit the future free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

We consider that officials must be able to provide advice and exchange views regarding sensitive information throughout the process of developing major operational policy, in circumstances where they can feel assured that such advice, views and comments will not be prematurely disclosed into the public domain. It was also vital for officials and Ministers to have the benefit of this space during the drafting of the policies and we consider that those directing future operational change must also have its benefit to ensure that civil service operations in the future are not undermined.

Those involved in the policy development and the drafting of its final proposals must be able to express themselves openly, honestly and completely at all times when providing advice or giving their views. They must have the freedom to explore options which may be considered radical or unpopular without concern that those exploratory views will be disclosed prematurely.

At the time of the request, the information was particularly recent (being only a few months old), making it particularly sensitive. Indeed, the information remains sensitive for the ongoing management of operations and estates. We also note that there has been a change of government since the request. It's clearly feasible that the current government will have, or make its position clear in the future, views on how the Civil Service should operate. Our contention is that those involved in the drafting of the information were right to have the benefit of a space in which to express themselves and provide advice fully and openly at the time of the request, and now. The same space will be needed in the future.

The submission that was put to the qualified person summarised the reasons for applying sections 36(2)(b)(i) and (ii) and they had access to the withheld information. In particular, highlighting the sensitivity of the information in scope and evidenced the free and frank nature of the discussions and decisions."

21. The Commissioner is satisfied (having viewed the same and the withheld information) that the submission included a clear overview of the request and relevant arguments for, and against, the application of the exemptions. He finds that it was reasonable for the qualified person¹ to

¹ Baroness Neville-Rolfe DBE CMG - Minister of State at the Cabinet Office

reach the view from the submission that there was a need to protect the confidentiality of free and frank discussions and deliberations between officials and those they consult with for advice. He is further satisfied that the qualified person's opinion - that inhibition 'would be likely to' occur through disclosure of the withheld information - was reasonable.

22. The Commissioner is therefore satisfied that sections 36(2)(b)(i) and (ii) of FOIA are engaged in this case.
23. Section 36 is subject to the public interest test, as set out in section 2 of FOIA. This means that although sections 36(2)(b)(i) and (ii) are engaged, the withheld information must be disclosed unless the public interest in maintaining these exemptions is stronger than the public interest in disclosure. The Commissioner considered public interest factors as espoused by the Cabinet Office, the complainant or his own cognisance.

Public interest test

Public interest arguments in favour of disclosure

24. There was significant interest in this particular operational policy in the media and within the workforce. These operations are also funded by the public purse, so there is public interest in being as transparent as possible.
25. There is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. FOIA is a means of helping to meet that public interest and so it must always be given some weight in the public interest test.

Public interest arguments in favour of maintaining the exemptions

26. The withheld information is highly sensitive and was only a few months old at the time of the request. Office attendance at the time was clearly a live matter. It is clear from a review of the information that it is free and frank in nature and was intended to inform Ministers and senior officials for relevant consideration and decisions.
27. Those considerations and decisions clearly related to significant impacts on the Civil Service work force and estates. The Civil Service is clearly a sizable operation, funded through the public purse. To run it effectively clearly requires a safe space for frank discussions and decisions in regard to its operation. It would not be in the public interest to harm that safe space or to undermine the protection of informed and robust decision making in regard to it.

28. Those involved in the drafting of the withheld information were right to have the benefit of a space in which to express themselves and provide advice fully and openly at the time of the request and knowledge of having this "safe space" benefits the decision making process.
29. When considering the application of section 36(2)(b)(i) and (ii), the Commissioner notes that there is a public interest in full and frank advice being requested and provided within government departments. This leads to better informed and more robust decision making. Some advice may be sensitive, and a subsequent disclosure of this may have a 'chilling effect' upon civil servants' ability to inform the decision makers (i.e. Ministers) when providing advice in the future. This would lead to less informed decision making.
30. The Commissioner notes that the concerns expressed by the qualified person in applying these subsections are real, and of substance, and he considers that the public interest in these subsections being maintained outweighs that in the information being disclosed.

The Commissioner's conclusions

31. For the reasons outlined above, and within the Cabinet Office's response to the Commissioner, the Commissioner finds that the public interest in each of the exemptions being maintained outweighs that in the information being disclosed under each in this instance.
32. In particular, the Commissioner notes that the withheld information is highly sensitive and was only a few months old at the time of the request. Office attendance at the time was clearly a live matter. It is clear from a review of the information that it is free and frank in nature and was intended to inform Ministers and senior officials for relevant consideration and decisions. Those considerations and decisions clearly related to significant impacts on the Civil Service work force and estates. The Civil Service is a sizable operation, funded through the public purse. To run it effectively clearly requires a safe space for frank discussions and decisions in regards to its operation. It would not be in the public interest to harm that safe space or to undermine the protection of informed and robust decision making in regards to it.
33. Having found the information to be wholly exempt under the exemptions contained in section 36(2)(b) the Commissioner did not go on to consider the applicability of section 36(2)(c).

Other matters

34. Internal reviews under FOIA are not subject to statutory timescales. However, the Commissioner's guidance² to public authorities is clear and well established, in that he expects most internal reviews to be provided within 20 working days, with a maximum of 40 working days in certain circumstances. The Commissioner considers that the time taken to provide the internal review in this matter was excessive and not reasonable.

² [Request handling, Freedom of Information – Frequently Asked Questions | ICO](#)

Right of appeal

35. 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

36. 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.
37. 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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