

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2024

Public Authority: Attorney General's Office
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant requested information relating to the then Attorney General. The Attorney General's Office (AGO) refused to provide the requested information, citing sections 36 (prejudice to effective conduct of public affairs) and 41 (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the AGO was entitled to rely on section 36(2)(b)(i) and (c) to withhold the requested information.
3. He does, however, find that the AGO committed procedural breaches in its handling of the request.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 15 January 2024, the complainant wrote to the AGO and requested information in the following terms:

"Under the Freedom of Information Act 2000, I am requesting information concerning The Rt Hon Victoria Prentis KC MP, Attorney General, and her office's staff regarding their involvement with Singing for Syrians, a part of the Hands Up Foundation, and the subsequent removal of this interest from the ministerial interests list in December 2023.

I seek:

- Any communications (including emails and records of meetings) involving The Rt Hon Victoria Prentis KC MP or staff from her office regarding Singing for Syrians and the Hands Up Foundation.
 - Records of disclosures or declarations made by The Rt Hon Victoria Prentis KC MP and her office's staff about their roles in or involvement with these organisations.
 - Records of financial or non-financial support provided to these organisations by The Rt Hon Victoria Prentis KC MP and her office's staff.
 - Specific communications or documents relating to the decision to add The Rt Hon Victoria Prentis KC MP's involvement with Singing for Syrians to the ministerial interests list. Specific communications or documents relating to the decision to remove The Rt Hon Victoria Prentis KC MP's involvement with Singing for Syrians from the ministerial interests list in December 2023. This includes any discussions, instructions, or decisions made to add or remove the interest".
6. Following correspondence from the complainant about the response being overdue, the AGO provided its substantive response on 26 February 2024. It confirmed it held information within the scope of the request, but refused to disclose it, citing sections 41(1), 36(2)(b)(i) and 36(2)(c) of FOIA.
 7. The AGO told the complainant, by way of advice and assistance:

"... the Attorney General has declared all her private interests in accordance with the process set out in the Ministerial Code (Chapter 7)".
 8. Following an internal review, the AGO wrote to the complainant on 4 April 2024, albeit in a letter dated 4 March 2024, maintaining its position.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way their request for information had been handled. They consider that the exemptions were applied "without sufficient evidence or proper consideration of the substantial public interest in transparency and accountability".

10. During the course of the Commissioner's investigation, the AGO clarified that it considers that section 36 applies to **all** of the withheld information, with section 41 additionally applying to some of the information.
11. Accordingly, the Commissioner has first considered the AGO's application of section 36. If he finds that section 36 does not apply, he will go on to consider its application of section 41.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

12. Sections 36(2)(b) and 36(2)(c), the subsections relied on in this case, state:

"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."

13. The AGO considers sections 36(2)(b)(i) and 36(2)(c) apply and is relying on the higher threshold of prejudice. In other words, it considers that disclosure **would** harm the interests protected by those limbs of the exemption.

Is the exemption engaged?

14. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person.
15. The Commissioner has seen a copy of the submission that had been presented to Robert Courts KC, the then Solicitor General. That submission, dated 23 February 2024, set out a case for applying the section 36 exemption.
16. The AGO advised the Commissioner that the withheld information was enclosed with the submission and, therefore, provided to the then Solicitor General when reaching their decision.

17. In that respect, the Commissioner recognises that the AGO wrote to the complainant stating:

“The Solicitor General has supplied the qualified person assessment that the exemptions are engaged”.

18. The AGO also told the complainant:

“[The Solicitor General] was presented with the relevant material by officials”.

19. The Commissioner is satisfied that the Solicitor General is an appropriate Qualified Person for the purposes of the exemption. He is also satisfied that they gave an opinion and, from the evidence he has seen, that they did so on 25 February 2024.

What was the Qualified Person’s opinion and was it reasonable?

20. In making this determination, the Commissioner will consider all of the relevant factors. These may include, but are not limited to:

- whether the prejudice or inhibition 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; and
- the qualified person’s knowledge of, or involvement in, the issue.

21. 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. The qualified person’s opinion does not have to be the most reasonable opinion that could be held: it only has to be a reasonable opinion.

22. The Commissioner understands that the context of this request is the register of ministerial interests. The AGO considers that disclosure of the information in scope of the request would have a chilling effect on ministers seeking free and frank advice on their interests. It also considers that the disclosure of individual ministers’ conversations would harm the integrity of the process as a whole.

23. The AGO explained to the Commissioner that these distinct prejudices were made clear in the submission.

24. In relation to section 36(2)(b), the Commissioner's guidance¹ states:

"Note that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. To engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank".

25. Noting that the AGO considers section 36(2)(c) also applies in this case, the Commissioner accepts that in order to engage both limbs of the exemption, the prejudice claimed under (c) must be different to that claimed under (b). In other words, some prejudice other than that to the free and frank provision of advice has to be shown for section 36(2)(c) to be engaged.

26. In that regard, his guidance states:

"The Information Tribunal here took the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. So, if section 36(2)(c) is used alongside another exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)".

27. While the rationale as to why the two limbs of the exemption applied is contained in the recommendation to the qualified person, to which the latter simply agreed, the Commissioner is satisfied that this is an appropriate process to follow in seeking the qualified person's opinion (and is in line with the approach taken by other central government departments).

28. The submission to the qualified person argued that disclosure would inhibit the free and frank provision of advice and that individual disclosures would otherwise prejudice the effective conduct of public affairs.

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/>

29. With respect to the former, it argued that disclosure would have a chilling effect on ministers discussing their interests in full and seeking free and frank advice. The Commissioner accepts that it was reasonable for the qualified person to consider that there is a need to protect the provision of advice.
30. The submission also argued that the disclosure of individual ministers' private deliberations about their interests would harm the integrity of the process as a whole.
31. The Commissioner accepts that it was reasonable for the qualified person to consider that there is a need to protect the integrity of the ministerial interests process overall.
32. He is, therefore, satisfied that both limbs of the exemption relied upon are engaged.

Public interest test

33. Even where the qualified person has identified that disclosure of information would cause inhibition or prejudice, a public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.
34. Where, as in this case, the Commissioner has accepted that disclosure of the requested information would cause prejudice or inhibition, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.

Public interest in favour of disclosure

35. Arguing in favour of disclosure, the complainant referred to a number of previous ICO decisions which they consider "underscore the principle of maximum disclosure". They told the AGO that the balance of public interest "strongly favours transparency and accountability over confidentiality in this context".
36. They argued that the circumstances of this case raises questions about the integrity and transparency of public office and that scrutiny of the requested information is necessary.
37. The AGO recognised the general public interest in disclosing information regarding ministers' interests on the basis of transparency and accountability. The AGO accepted that the register of interests is of public interest, noting that the register is publicly available.

Public interest in favour of maintaining the exemption

38. In favour of maintaining the exemption, the AGO argued that there is a strong public interest in ministers being able to request advice about their outside interests in a safe place.

39. It also told the Commissioner

“Items which do not meet the Independent Advisor’s criteria to be registered interests are, as a result of the process and by definition, not in the public interest”.

Balance of the public interest

40. The Commissioner, when he considers the balance of the public interest, takes account of the weight of the qualified person’s opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition.

41. In carrying out this exercise, appropriate weight must be afforded to the public interest in avoiding harm to the provision of advice and the ministerial interests process.

42. The Commissioner acknowledges the complainant’s view that the public interest in understanding the conduct of public officials strongly favours disclosure.

43. With respect to the timing of the request, he notes that it was made shortly after the Independent Adviser on Ministers’ Interests published the ‘List of Ministers’ Interests’ on 14 December 2023.

44. In the circumstances of this case, while he acknowledges that the general public interest in openness and transparency would be served if the requested information was disclosed, he finds the public interest in protecting ministers’ access to unfiltered and frank advice about their outside interests, and in protecting the overall scheme of ministers declaring their interests, to be stronger.

45. Consequently, he is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that the AGO was entitled to rely on sections 36(2)(b)(i) and (c) of FOIA to refuse the request.

46. In light of this decision, he has not gone on to consider the AGO’s application of section 41(1) which it also cited in respect of some of the withheld information.

Procedural matters

Section 1 – General right of access

Section 10 - Time for compliance

47. Section 1(1)(a) of FOIA states that a person who asks for information is entitled to be informed whether the information is held. If it is held, section 1(1)(b) states that the person is entitled to have that information communicated to them.
48. Section 10(1) of FOIA states that on receipt of a request for information, a public authority should respond within 20 working days.
49. By failing to respond to the request within the statutory time for compliance, the AGO breached sections 1(1)(a) and (b), and 10(1) of FOIA.
50. The Commissioner has made a record of these breaches for monitoring purposes.

Right of appeal

51. 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

52. 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.
53. 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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