Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 7 January 2016

Public Authority: Department for Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested a copy of a report regarding abuses of the Intensive Start Up Scheme. The Commissioner's decision is that the Department for Communities and Local Government has correctly applied the exemption where disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation at section36(2)(b) of the FOIA. He has also decided that the Department for Communities and Local Government breached the statutory time for compliance. He does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

2. On 3 January 2015, the complainant wrote to Department for Communities and Local Government ('DCLG') via the WhatDoTheyKnow website and requested information in the following terms:

> "In Autumn 2013 your investigator was sent to Enterprise Solutions (NW) Ltd following an investigation by Grant Thornton that reported to Wirral Borough Council in March 2013 regarding abuses of the Intensive Start Up Scheme ISUS.
>
> Regardless of the fieldwork being complete by December 2013 the report-which is known to me to be written-has not been released.
>
> I request a copy of the report"

3. DCLG responded on 19 June 2015 and refused to provide the requested information citing the exemptions at sections 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c), 41 and 40(2).

4. The complainant requested an internal review on 21 June 2015.

5. DCLG provided its internal review response on 17 July 2015 in which it maintained its original position.

Scope of the case

6. The complainant contacted the Commissioner on 24 August 2015 to complain about the way his request for information had been handled.

7. DCLG said that all the information is considered to be exempt from disclosure under the exemptions at section 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA, or alternatively section 36(2)(c). It also said that some of the information requested is considered to be exempt under section 41 and section 40(2) of the FOIA.

8. The Commissioner has first considered whether DCLG are correct to apply the exemption at section 36(2)(b) where disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.

9. As the Commissioner has decided that the exemption at section 36(2)(b) applies in this case, he has not deemed it necessary to consider the exemptions at section 36(2)(c), section 41 and section 40(2).

Reasons for decision

10. Section 36 states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged, only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).

11. In this case the Commissioner is considering the application of the exemption at section 36(2)(b).

12. Section 36(2)(b) provides an exemption where disclosure 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.

Is the exemption engaged?

13. In order to establish whether the exemption has been applied correctly the Commissioner has:

- Ascertained who is the qualified person or persons for the public authority in question;
- Established that an opinion was given;
- Ascertained when the opinion was given; and
- Considered whether the opinion given was reasonable.

14. With regard to the first two criteria, the Commissioner has established that the opinion was given by, James Wharton MP, Parliamentary Under Secretary of State, Minister for Local Growth and the Northern Powerhouse. The Commissioner is satisfied that James Wharton is a qualified person as section 36(5)(a) of the FOIA provides that the qualified person for a government department is any Minister of the Crown.

15. In relation to the third criterion, DCLG has provided dates when the opinion was sought and given. The Commissioner is satisfied that the opinion was provided after the receipt of the request and before the initial response of 19 June 2015.

16. With regard to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that being: in accordance with reason, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable for these purposes. 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 only not reasonable for these purposes 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.

17. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner &*

BBC[1]*,* that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

18. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*[2] confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*[3] commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36). The Commissioner considers that 'would prejudice' means that it is more likely than not that prejudice would occur.

19. In its response to the complainant and its record of the qualified person's opinion, DCLG stated that claimed inhibition *would* occur if the information was disclosed. Therefore, the Commissioner considers that it is appropriate to apply the stronger evidential test.

20. At the Commissioner's request, DCLG provided a copy of the qualified person's opinion. The Commissioner notes that the qualified person was: provided with all the information within the scope of the request; given information relating to the current status of the requested report; informed which specific limbs of the exemptions his opinions were being sought on; made aware that his opinion was being sought in respect of all the information in the report, including that also regarded as being confidential information provided by third parties or personal

---

[1] Appeal numbers EA/2006/0011 & 0013

[2] Appeal number EA/2005/0005

[3] Appeal number EA/2005/0026 & 0030

information; and provided with reasons for those exemptions being engaged. The Commissioner notes that there were no specific counter arguments put forward but it was stated that 'Should the grounds for the cited exemptions being engaged not prove to be sufficiently strong then the information would automatically become due for disclosure to meet the requirement of section 1(1)(b) of the FOI Act'.

21. In relation to section 36(2)(b)(i), the record of the qualified person's opinion states that the ability of internal auditors and other officials to be able to provide advice to Ministers and anyone who might need it, during the process of an audit investigation and leading up to finalised conclusions, and to be able to do so freely and frankly and within an appropriate degree of private space, has to be protected. Without the private space within which to consider all information, contributions and findings within a live audit investigation, the process of providing objective, comprehensive and fully-informed advice would quite clearly be inhibited and undermined.

22. In relation to section 36(2)(b)(ii), the record of the qualified person's opinion states that it is crucial to the provision of advice, and the ability to reach objective, comprehensive and fully-informed findings in an audit investigation and report, and in this case no different, is the ability to be able to have free and frank exchanges with third parties. Without the ability to do that within an appropriate degree of private space the exchange of views as part of the deliberation (and prior to coming to a decision) would clearly be inhibited and undermined.

23. The Commissioner accepts that it is a reasonable opinion that if the withheld information was disclosed it would cause those involved to be less candid in this particular and future audit processes. Whilst the Commissioner does not accept that those involved will be put off providing advice and views in full, it is not unreasonable to conclude that information would be less descriptive and couched in a more cautious manner. This would then have a harmful effect on the deliberation process of drawing conclusions from audits. He finds that the opinion of the qualified person is a reasonable one in this instance and therefore finds that section 36(2)(b) is engaged.

Public interest test under section 36

24. Sections 36(2)(b) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the

information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC*[4] indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

> "The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice." (Paragraph 88)

25. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, the Commissioner's view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

26. In its response to the Commissioner, DCLG said that it always takes in to account the general public interest served by the disclosure of information held by public authorities, and how this increases transparency and accountability, enables the public to be informed and better able to engage in any debate about the delivery of government policies or services, and thus increases public trust and confidence in good governance. It said that, in this case, there is a public interest served by disclosing information which would aid an understanding of the reality behind any possible financial wrongdoing, especially as a public body and public funding was involved.

[4] Appeal numbers EA/2006/0011 & EA/2006/0013

27. In its response to the complainant, DCLG also said that there is, generally, a public interest served by knowing that audit investigations are appropriate, thorough and objective and in knowing that findings are well-founded based on available evidence.

Public interest arguments in favour of maintaining the exemption

28. DCLG has expressed its view that the severity and extent of the inhibiting effects would be reasonably significant in this case. It explained that the requested report has not been finalised as when approached about the release of the report, Wirral Borough Council stated that it has not yet been given a "formal right of reply" to the report and have made observations on its accuracy and clarity which has led to further discussion between interested parties. DCLG has explained that until these discussions have been finalised and concerns addressed, the report cannot be seen to be finalised. The Commissioner understands that, at the time the request was responded to, the Government Internal Audit Agency ('GIAA') and the NW GDT were reviewing the comments made by Wirral Borough Council to the findings in the report and that DCLG needed to agree the final report with the GIAA and discuss next steps with the Department for Business Innovation & Skills.

29. Due to the report not yet being finalised, DCLG said that there is still a need for an appropriate degree of private space within which officials can continue to consider the investigation's findings, have full and robust exchanges freely and frankly, and to provide advice as needed in order to inform the final report and its conclusions. It said that failure to protect that necessary degree of private space by releasing the information at this time would, despite any caveats that it was not finalised, undermine the ability to have exchanges of views and to provide robust advice aimed at finalising the report without being hindered by external comment and/or media involvement. It said that release of a draft report would lead to an unreasonable degree of scrutiny and conclusion about its contents and findings which would inevitably require it to focus on and potentially defend the released version of the report which would undermine the ability to have exchanges of views and to provide robust advice aimed at finalising the report.

30. DCLG also said that if the information is released at this time it could impact on the on-going negotiations in relation to this investigation and prejudice the responses of those parties entitled to a "right of response" to the draft report which would have a negative impact on the ability of DCLG and GIAA to continue to have exchanges with those parties in view of the deterrent effect that would have resulted.

Balance of the public interest arguments

31. Where, as with this case, a qualified exemption is engaged, the information requested must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it

32. The complainant has said that he believes there is a greater public interest in publishing a report that was completed back in December 2013. In correspondence to DCLG via the WhatDoTheyKnow website he said the following:

> "If the public, and indeed whistle-blowers , who risk their careers to expose financial wrong-doing must wait so long upon your department to even report on your findings then the effectiveness of your audit department is seriously undermined. I cannot imagine any whistle-blower being encouraged to speak out to you in the future. This latter effect is determinedly not in the public interest since it neuters your audit department, and encourages companies to risk abusing public contracts.
>
> I cannot see how a draft report on so relatively minor a matter should need you to deliberate from December 2013 until June 2015 and beyond, a period of 18 months so far, and I suggest that you get on with it. I certainly am going to make representations to the court of Auditors in Europe about this matter. If it be claw-backs that you are discussing levied on any negligent local authorities then why were you able to make conclusions against Social Enterprises North West in Liverpool-a £4m claw-back,which no doubt you wll never collect-in so rapid an order-the project starting in 2012 and concluding in December 2014 wuith [sic] the claw-back? Is it because local authorities are public authorities and Social enterprises North West was a private company? It is not in the public interest for your department to appear to "manage" scandals where public authorities are involved but to slam down hard on small priate [sic] companies."

33. Having viewed the withheld information, the Commissioner has considered where the balance of the public interest lies, taking into account the severity, frequency and extent of the claimed prejudice.

34. The Commissioner notes that there is a public interest inherent in section 36(2)(b)(ii), that being a prejudice-based exemption, in avoiding harm to the decision making process. He has taken into account that there is automatically some public interest in maintaining this exemption.

35. The Commissioner's guidance on section 36[5] states that;

> "The safe space argument could also apply to section 36(2)(b), if premature public or media involvement would prevent or hinder the free and frank exchange of views or provision of advice… This need for a safe space will be strongest when the issue is still live. Once the public authority has made a decision, a safe space for deliberation will no longer be required. If it was a major decision, there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly sidetracked. However, this can only last for a short time and the public authority would have to explain clearly why it was still required at the time of the request on the facts of each case. The timing of the request will therefore be an important factor."

36. As stated above, the report has not yet been finalised. Discussions have not been concluded and concerns have not yet been addressed. Therefore the Commissioner has given significant weight to the public interest in maintaining a safe space.

37. The Commissioner has considered the complainant's argument that it is in the public interest to release the report because of the length of the time that has occurred since the investigation began. He appreciates that the delay is frustrating to those involved but has to consider that the report has not been finalised and the harm that could result from publishing an unfinished report as detailed above. He considers that the complainant's argument relates more to finalising the report in the normal course of business than release of that report under the FOIA.

38. In relation to the complainants argument that it is not in the public interest for DCLG to appear to manage scandals where public authorities are involved but to slam down hard on small private companies, the Commissioner has not seen any evidence to comment on whether this is the case and, more importantly, does not consider that it is within his remit to adjudicate on such a matter.

39. The Commissioner has considered the public interest arguments presented in this case. He has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the free and frank provision of

[5] https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

advice and exchange of views for the purposes of deliberation. He has given weight to the fact that the deliberation process is still ongoing. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information and therefore the exemption at section 36(2)(b) has been applied correctly.

Section 10 – Time for compliance

40. Section 10(1) states:

> "Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

41. DCLG received the request on 3 January 2015 and responded on 19 June 2015 some five and a half months following the date of receipt. Therefore, DCLG did not respond to the request within the statutory time limit in breach of section 10(1).

Right of appeal

42. 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

43. 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.

44. 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 .....

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF