

DECISION NOTICE

Section 42

Decision Number: 2016/0004

Public Authority: Cabinet Office

Address: Third Floor
Government Office
Bucks Road
DOUGLAS
ISLE OF MAN
IM1 3PN

Decision Date: 21 November 2016

Decision & steps to be taken by the Public Authority

1. The decision notice has been issued subsequent to the completion of the actions required to be undertaken by Cabinet Office in Decision Notice 2016/0001.
2. Cabinet Office issued a further refusal notice to the review applicant citing the exemptions set out in Sections 20 and 35(c).
3. The review applicant applied for a review of that decision by the Information Commissioner.
4. The Information Commissioner investigated and his decision is:-
 - a) *Cabinet Office was justified in applying the exemptions set out in the refusal notice, and*
 - b) *In respect of section 35(c), the balance of public interest in maintaining the exemption outweighs the public interest in disclosure.*
5. The Information Commissioner does not uphold the review applicant's complaint.

Reasons for the Decision

Background

6. The background to the applicant's request is set out in Decision Notice 2016/0001 and, as such, there is no need to replicate that background in this decision notice.
7. Decision Notice 2016/0001 set out the steps to be taken by Cabinet Office in respect of the review applicant's original request as:

"To the extent that the Cabinet Office holds the information requested, the Cabinet Office must, within 30 days of the date of this Decision Notice, either disclose the information requested to the review applicant or give the review applicant a further Refusal Notice in accordance with section 17."

8. On 23 September 2016, Cabinet Office responded to the review applicant. Cabinet Office refused to provide any information to the applicant citing the following exemptions:

Section 20: Information accessible to applicant by other means
Section 35(c): Conduct of public business

9. On 16 October 2016, the review applicant made an application for a review of the decision of the public authority by the Information Commissioner ('Commissioner').

Initial Review

10. In giving the review applicant a refusal notice, Cabinet Office provided an explanation as to why the exemptions had been applied, identified the prejudice, and showed how the balance of public interest had been considered.
11. As this was a follow-on to Decision Notice 2016/0001, the Commissioner decided not to consider whether any of the provisions set out in section 42(3) applied.
12. On 18 October 2016, the Commissioner sought further information from the review applicant in respect of their application, providing a period of 28 days for submissions. Further submissions were received and the application for review by the Commissioner under section 42 of the Freedom of Information Act 2015 ('FOIA') was accepted as valid on 18 November 2016 and receipt acknowledged.
13. As the Commissioner was already in possession of the information to which the review related, there was no requirement to seek further information from Cabinet Office.

Commissioner's Analysis and Findings

14. Under section 42(1) the Commissioner is required to make a decision on
 - (a) whether a public authority has responded to a request for information in accordance with the requirements of Part 2 (access to information held by public authorities); or
 - (b) whether a public authority was justified in refusing to give information requested.
15. In coming to a decision the Commissioner has considered all the information provided to him.

Matters relating to section 42(1)(a) – compliance with the requirements of Part 2

16. In this case, Cabinet Office gave a refusal notice to the review applicant within 28 days of the issue of Decision Notice 2016/0001, as required.
17. The Commissioner is satisfied that the refusal notice was issued in accordance with section 17 and confirmed that to the review applicant by email on 24 October.

Matters relating to section 42(1)(b) - Refusal to give information requested

18. In refusing to give the information requested Cabinet Office cited two exemptions, namely:-

Section 20: Information accessible to applicant by other means
Section 35(c): Conduct of public business

Section 20 - Information accessible to applicant by other means

"(1) Information is absolutely exempt information if it is reasonably accessible to the applicant, whether free of charge or on payment, other than by requesting it under section 9(1) (requests for information).

(2) Without limiting subsection (1), information is taken to be reasonably accessible if —

- (a) it is available in public libraries or archives;*
- (b) it is available on the internet or from any other reasonably accessible source;*
- (c) it is made available under a publication scheme; or*
- (d) the public authority that holds it, or any other person, is obliged by or under any enactment to supply it to members of the public on request."*

19. Cabinet Office applied section 20 to information it held constituting correspondence to and from the review applicant.
20. This is an absolute exemption, so no public interest test falls to be considered.
21. The Commissioner is satisfied that Cabinet Office is entitled to rely on section 20 in respect of that information.

Section 35(c) - Conduct of public business

"Information is qualified exempt information if its disclosure would, or would be likely —

- (a) ...;*
- (b) ...; or*
- (c) otherwise to prejudice the effective conduct of public business."*

22. It is common ground that the review applicant made a formal complaint about a named officer to the Civil Service Commission. The Civil Service Commission considered the complaint and informed the review applicant of its decision in writing.
23. The review applicant subsequently made a complaint about the Civil Service Commission to the Chief Minister, who responded on 18 December 2015 having had the matter reviewed. In his response, the Chief Minister advised the review applicant: *"I am content that this matter has been dealt with properly and now consider this matter to be closed"*.

24. The information to which Cabinet Office has applied section 35(c) is the information contained in that review which informed the Chief Minister and which led to the response to the review applicant on 18 December.
25. Cabinet Office's public interest considerations were stated as:

Factors in favour of disclosing the information include:

- That the release of information would provide some insight into the process that was carried out which may increase confidence in the process itself;*
- Disclosure would promote transparency, which in turn may promote good decision making and fair treatment.*

Factors in favour of maintaining the exemption

Disclosure of information may cause the subject of the complaint harm through suspicion of wrong-doing, even if this is unfounded;

- Both staff members and the general public need to have confidence in the integrity of the complaints process and the disclosure of information pertinent to a particular complaint may undermine this.*
- In this case the request for information is from the complainant and therefore is made to further a private interest.*
- The request itself can be said to be futile, on the basis that the issue has already been conclusively resolved after being subject to investigation and the requester seeks to reopen the matter.*

Disclosure would contravene both the Code of Practice [on Disciplinary and Grievance Procedures 2007] and the complaints procedure (particularly in relation to the assurances of confidentiality) and thereby undermine the process itself and the integrity thereof.

- Having a standardised complaints procedure promotes good government and can be used to improve practises and procedures. The disclosure of information in contravention of this may have a detrimental impact on the process by inhibiting potential complainants coming forward.*
- There is a need to offer protection to employees as part of the complaints process (including those employees who may have some involvement in the complaint but who aren't necessarily the person that the complaint refers to), especially in circumstances where a complaint is later determined to be unfounded. Whilst civil servants are subject to a greater level of scrutiny it would not be commensurate with good employment practice for information relating to any complaints about them (whether amounting to personal data or not) to be disclosed when the same would not apply to private sector employees. It may also amount to a breach of the implied terms of mutual trust and confidence which exist between an employer and an employee.*
- The effect of this exemption is that disclosure will not only affect the Cabinet Office but also the wider public.*

26. Section 35(c) can only be relied on in circumstances where sections 35(a) or (b) are not engaged. It is a broad exemption which can be engaged if a public authority determines that *"disclosure would, or would be likely to prejudice the effective conduct of public business"*.
27. The Commissioner expects a public authority relying on that exemption to show what specific harm, or prejudice, would, or would be likely, to be caused to the effective conduct of public business and how that would be expected to follow from disclosure¹.
28. The Commissioner considers that the public does have *"specific interests in understanding ... how the complaint ... had been handled and due process"*² and accepts that senior public officials *"should be open to scrutiny and accountability"*³.
29. The Commissioner is satisfied that the *"Factors in favour of disclosing the information"* identified by Cabinet Office are relevant.
30. The Commissioner is also satisfied that the factors identified by Cabinet Office in respect of maintaining the exemption are relevant in the context of the information, in particular, that a degree of confidentiality is required *"to ensure that the allegations which had been made could be investigated fairly and objectively"*⁴.
31. The Commissioner has taken into account any future prejudice to investigations that could be caused by disclosure of the information, in particular the public interest in being able to conduct disciplinary investigations independently and impartially, maintaining the fairness of that process.
32. The Commissioner notes the review applicant's view that disclosure of the information is in the public interest. It appears to the Commissioner, however, that the request has been motivated by a private interest of the review applicant.
33. The Commissioner therefore concludes that whilst the information may be of a private interest to the review applicant, it does not amount to information that is of serious concern and benefit to the public at large.
34. It is the Commissioner's view that the exemption has been correctly engaged and the public interest in maintaining the exemption appreciably outweighs the public interest in disclosure.

¹ Scottish Information Commissioner – Decision 185/2016 ABW Consultant Ltd and West Lothian Council
<http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600163.aspx>

² First Tier Tribunal Michael Thompson v Information Commissioner and Cheshire East Council EA/2016/0044 page 13
[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1896/Thompson,%20Michael%20EA-2016-0044%20\(07.11.16\).PDF](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1896/Thompson,%20Michael%20EA-2016-0044%20(07.11.16).PDF)

³ Ibid.

⁴ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201600163.aspx>

Decision

35. The Commissioner's decision is that:

- a) Cabinet Office was justified in applying the exemptions set out in the refusal notice, and
- b) In respect of section 35(c), the balance of public interest in maintaining the exemption outweighs the public interest in disclosure.

36. The Commissioner does not uphold the review applicant's complaint.

Steps to be taken

37. No steps are required.

Appeal

38. Section 50(1) provides that either party has the right to appeal against this Decision Notice to the High Court on a point of law. An Appeal must be filed within 28 (calendar) days from the date of this Decision Note. Further information about the Appeal process can be found on the General Registry's web site at: <https://www.courts.im/courtprocedures/AppealsCivil/>

An appeal should be filed at or sent to:

The Court Office
Isle of Man Courts of Justice
Deemsters Walk
Bucks Road
Douglas
Isle of Man
IM1 3AR

Enforcement

39. Section 48 provides that if a public authority fails to comply with a Decision Notice by not taking the steps it is required to take, then the Commissioner may certify in writing to the High Court that it has failed to comply. The Court must inquire into the matter and may deal with the public authority as if it had committed a contempt of court.

Publication

40. The Commissioner will publish this decision notice 5 working days after it has been issued to the review applicant and public authority.