Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 December 2009

Public Authority: Department for Culture, Media and Sport
Address: 2 - 4 Cockspur Street
London
SW1Y 5DH

Summary

The complainant requested information from the Department for Culture, Media and Sport (DCMS) concerning the takeover of Chelsea Football Club in 2003. DCMS refused to release this information because in the reasoned opinion of a qualified person it was exempt under section 36(2)(b) of the Act. Also, it argued that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. The complainant requested an internal review and following the review DCMS maintained its original decision.

While the complaint was waiting to be investigated and following a decision by the Commissioner in another DCMS case, the department released some of the previously withheld information while maintaining that the remaining information was exempt and disclosure was not in the public interest.

The Commissioner's decision is that DCMS correctly applied section 36(2)(b) to the withheld information. However, in respect of some of the information, he believes the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. The public authority has therefore breached section 1(1)(b) in failing to disclose the requested information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant emailed DCMS on 19 March 2007 and requested the following information under the Act:

> "*Information concerning the takeover of Chelsea Football Club by Russian interests in 2003*"

3. DCMS responded on 17 April 2007. The reply confirmed the authority held information that fell within the scope of the complainant's request, but claimed exemption under section 36(2)(b)(i) and (ii) of the Act. As this was a qualified exemption, DCMS confirmed it had applied the public interest test and that, in this case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information. It informed the complainant of his right to request an internal review and his right to complain to the Commissioner. In a letter dated 18 April 2007, the complainant requested an internal review.

4. DCMS replied in a letter dated 3 December 2007, in which it apologised for the time taken to reply because of the need to consult other government departments and informed the complainant of the outcome of the internal review. DCMS upheld its earlier decision to withhold the information in question and argued that although the passage of time could affect the appropriateness of the use of exemptions:

> "*The takeover of Chelsea FC was a particularly high profile case…Since its takeover, other clubs have also come under foreign ownership and others are, or may be, in the process of doing so*".

5. It stated that

> "*The government's general position on football club takeovers has been made available through public statements on why it has decided not to intervene using the Enterprise Act 2002 and that explaining this is a matter for the football authorities*"

Finally, DCMS informed the complainant of his right to complain to the Commissioner.

6. In March 2008, following the Commissioner's decision in another DCMS case (*FS50121684)*, the department reconsidered the public interest test in this case and provided the complainant with some of the requested information. It maintained the remaining information it held was still exempt as the balance of the public interest lay in withholding disclosure.

The Investigation

Scope of the case

7. The complainant complained to the Commissioner on 10 December 2007 about the way his request for information had been handled. Following the release of some information in March 2008, the Commissioner has limited his investigation to consideration of the unreleased information.

Background

8. The withheld information in this case falls into two parts. The first relates to email exchanges between officials and a special advisor, whilst the second is briefing prepared by officials at the then Department for Trade and Industry (DTI) to prepare a Minister for debate of an Early Day Motion[1] (*1513 – 2 July 2003*).

9. As noted at paragraph 7 above, in March 2008 following the Commissioner's request to reconsider the case, DCMS provided the complainant with some of the information that was originally withheld. The information provided was the DTI briefing for the Early Day Motion but with one section of the briefing withheld as still exempt under section 36, and the headings withheld as not relevant to the request. The email exchanges continued to be withheld in their entirety as exempt under section 36 following the DCMS reconsideration.

Chronology

10. The Commissioner wrote to DCMS on 6 August 2008 and asked for a copy of the withheld information and the briefing provided to the qualified person. DCMS was invited to further develop its thinking in respect of the exemption claimed for the unreleased information under section 36(2)(b).

11. DCMS replied on 26 September 2008 and provided a copy of the withheld information and the submission, which had invited the Minister to give his reasonable opinion as a qualified person that the requested information was exempt under section 36(2)(b)(i) and (ii) of the Act. DCMS restated its view that the withheld information was exempt under section 36(2)(b) and disclosing it would inhibit free and frank provision of advice or exchange of views for the purpose of deliberation on competition policy in respect of football club takeovers.

12. DCMS wrote again on 4 November 2008 and developed its arguments further especially in respect of the public interest test. Whilst it accepted in principle there was a general public interest in knowing more about both how briefing for ministers is compiled, it did not consider this information would add much to either the public understanding of the takeover of Chelsea FC or the public's ability to understand how the executive addresses scrutiny, especially as DCMS had already released the main body of the briefing.

[1] Early Day Motions are formal motions submitted for debate in the House of Commons, but very few are actually debated. Instead, they are used for reasons such as publicising the views of individual MPs, drawing attention to specific events or campaigns, and demonstrating the extent of parliamentary support for a particular cause or point of view. Although there is very little prospect of Early Day Motions being debated, many attract a great deal of public interest and frequently receive media coverage.

Analysis

Exemption

Section 36(2)(b)

13. The full text of section 36(2)(b) can be found in the Legal Annex at the end of this Notice.

14. Section 36(2)(b) provides an exemption from disclosure for information which, in the reasonable opinion of the qualified person, 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. In the Information Tribunal's decision in *Guardian & Brooke v BBC (EA/2006/0011)* the Tribunal found that 'reasonable opinion' for the purposes of section 36 is one which is both objectively reasonable and reasonably arrived at.

15. The Commissioner has also been guided by the Tribunal's indication that the reasonable opinion is limited to the degree of likelihood that prejudice may occur, rather than the severity, extent or frequency of such prejudice (although it must not be trivial).

16. Section 36 requires that the exemption be applied by a qualified person expressing a reasonable opinion. In this case, the Commissioner is satisfied the person making the decision was the appropriate 'qualified person', namely a Minister of the Crown as set out in section 36(5)(a). Furthermore, having seen information provided by DCMS, the Commissioner is satisfied both that an opinion was given and that it was given before the information request was refused. The opinion was dated 16 April 2007 and DCMS's letter refusing the request for information was dated 17 April 2007. The opinion was given in a note from the Minister, which agreed the course of action proposed in a submission put to him setting out the circumstances of the information request.

17. Having established the opinion was given by a qualified person and was timely, the Commissioner has considered whether that opinion was reasonable in substance and reasonably arrived at.

18. The opinion given by the qualified person was that disclosure under section 36(2)(b)(i) and (ii) would inhibit the ability of officials to provide free and frank briefings and would inhibit the effective conduct of public affairs. In particular, disclosure would inhibit free and frank provision of advice and the exchange of views for the purpose of deliberation on competition policy in respect of football club takeovers. The qualified person believed that there was a significant and weighty chance of prejudice to the identified public interests.

19. In the case of *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030),* the Tribunal found that the "prejudice test is not restricted to "would be likely to prejudice". It provided an alternative limb of "would prejudice". This second limb of the test places a much stronger evidential burden on the public authority to discharge. For "would prejudice" the prejudice

must be at least more probable than not. DCMS has claimed "would prejudice", therefore the Commissioner has considered the exemption in light of this limb of the test.

20. As noted at paragraph 8, the withheld information fell into two parts; email exchanges and briefing for an Early Day Motion.

21. With regard to the emails, the opinion stated disclosure of the emails would reveal examples of free and frank discussions that may lead to civil servants and special advisors being less willing to discuss issues in a free and frank way when considering policy issues in the future because of concerns that such discussions may be placed in the public domain. The opinion went on to state it was believed that such inhibition would be detrimental to the good operation of the department. Equally DCMS felt that, by their very nature, emails represented a more informal exchange of views and that the release of that information would work to the detriment of the quality of deliberations as those using emails would be likely to become more circumspect in expressing their views. In the specific context of this case DCMS argued the emails from the special adviser included some highly contentious and subjective information, which if released would be likely to damage day to day relations with stakeholders in football. The consequence of release would be likely to result in limiting the provision and the recording of advice by special advisers or at least encourage them only to provide "safe" advice.

22. Furthermore, DCMS argued the Government does not have a direct role in football club ownership but represents the public interest in meetings with stakeholders on these issues. Given the high level of sensitivity involved, football clubs expect any feedback given to Government on ownership issues to be treated confidentially. If such information was released routinely it would be less likely that football clubs would engage in open discussions with the Government in future. The Commissioner considers this is not at all an unreasonable view to take, although he does have some concerns in the present case that section 36 may to some extent be being applied in order to withhold potentially embarrassing information, rather than simply because it is part of a free and frank exchange of views.

23. The opinion considered the briefing material for the Early Day Motion separately. The main point made in the opinion referred to central government guidance, which suggested that opinion and speculation about the reasons and likely motivation behind such an Early Day Motion "potentially fall within exemption section 36(2)(b)(i)". The Commissioner notes that nothing further was included in the opinion to explain why this might apply in the present case, and no reference was made to the fact that the guidance stated such information only "potentially" fell within the exemption. However having viewed the withheld information he accepts that the opinion was reasonable with regard to the background briefing.

24. DCMS explained that the headings used in the Early Day Motion briefing had been withheld when other parts of the briefing had been disclosed following the review in March 2008 because they were not considered relevant to the information request. The reasoning was that the headings showed the way in which briefings were organised rather than the information requested on the

takeover of Chelsea FC. (The Commissioner notes however that when the complainant made his request the headings were originally withheld by virtue of section 36(2)(b)(i), as they formed part of the briefing document as a whole).

25. The Commissioner has noted DCMS's argument as to why it did not include the briefing headings when it disclosed most of the briefing in March 2008. However he is not persuaded by the argument and his view is that the headings fall squarely within the terms of the original information request. They provide the context and the rationale for each section of text that follows, and the information disclosed would have been more intelligible to the complainant if the headings had been included. The Commissioner therefore concludes that the briefing disclosed in March 2008 should have included the headings to provide the context and rationale for the information that was disclosed. As DCMS is no longer relying on section 36 for this part of the request and is now withholding the headings only on the basis of their lack of relevance, and the Commissioner has concluded that they do in fact fall within the request's ambit, these should now be disclosed to the complainant.

26. Having considered all of these matters, the Commissioner believes that with regard to the email exchange and the withheld section of the briefing, the issue is finely balanced but he has concluded that the opinion was reasonable in substance and reasonably arrived at, and therefore that DCMS was entitled to rely on the exemption at section 36(2)(b)(i) and (ii) of the Act for both these sets of information. Therefore, the Commissioner has gone on to consider the public interest arguments.

The public interest test

27. As noted at paragraph 8 above there are two sets of information covered by the information request that continue to be withheld. The first, the email exchanges involving a special adviser, contains views on some issues to do with foreign ownership. The second consists of background briefing headings and one section of the briefing prepared for a minister for a debate on an Early Day Motion. As the Commissioner has concluded in paragraph 25 above that the headings should be disclosed to the complainant, he has only considered the public interest in relation to the emails and the withheld section of the briefing.

Public interest arguments in favour of disclosing the requested information

28. DCMS accepted there was a legitimate public interest in providing greater transparency in the way government operates. This would make government more accountable, would be likely to increase trust and understanding, and would enable the public to assess the quality of communications taking place among officials and the advice being given to Ministers. In turn, as knowledge of the way government worked increased the public contribution to and understanding of the process would be likely to become more effective and broadly based and this would provide increased confidence in the quality of any resulting policies or decisions.

29. In addition, DCMS accepted that club ownership was still a live issue of high national interest and likely to remain so for the foreseeable future as foreign

takeovers continue to take place. Although the information requested was three years old at the time of the request and is now six years old it is likely that it would still be of interest. Furthermore, the passage of time may have weakened the justification for withholding the requested information.

Public interest arguments in favour of maintaining the exemption

30. In DCMS's view, the public interest of informed public participation was not always advanced by placing the bare facts of subject matter, of communications or of advice to Ministers in the public domain. This may lead to speculation about the possible direction of policy making and the development of ideas and would make free and frank discussion more difficult. Ministers and officials must be free to make rigorous and candid assessments as such discussions lead to better decision making.

31. In the present case, the Government's general position on football takeovers has been made public through statements on why it has decided not to intervene using the Enterprise Act 2002. Consequently, DCMS's view was that the public interest in release of the information requested was not significant given the large amount of information made public already about the consideration of mergers and the process for that consideration.

32. DCMS maintained there were strong public interest reasons why officials should be able to provide free and frank advice to Ministers ahead of Parliamentary debates. DCMS's position is that it is in the public interest that Ministers can properly answer Parliamentary Questions, that they can provide sound and reliable information to Parliament, that they can robustly defend decisions and where necessary protect collective responsibility. Advice for debates must be full and frank to enable Ministers to see political context of the question being asked or the motion being tabled and to understand the likely motivation and views of those tabling the question or motion and those MPs supporting the question or motion. Though some briefing will be factual and some of its contents may already be in the public domain, revealing what factual information has been selected and used, even if separated from the judgements about that information, could harm the process. DCMS argued that this could make it easier for opponents to anticipate the likely content of future briefing and therefore make officials reluctant to provide full and frank advice for fear they could give opponents of the Government an unfair advantage.

33. In addition, DCMS argued release of information about discussions concerning issues behind Parliamentary questions and motions would be likely to have the effect of discouraging officials from recording such advice in future or being more circumspect in their drafting. Ministers' ability to respond would be compromised as a result. DCMS considered that the release of speculation about a MP's motivation in tabling a motion or question would damage the space in which officials provide free and frank advice or exchange views. DCMS also contended that release would do little to meet the complainant's desire for information about what the Government does to ensure that Britain's sporting institutions are in suitable hands, as set out in his original request.

34. With regard to the withheld emails, DCMS argued that the Government represents the public interest in meetings with stakeholders on football club ownership issues even though it does not have a direct role in it. Given the high level of sensitivity involved, football clubs would expect any feedback given to Government on ownership issues to be treated confidentially, and routine disclosure would make it less likely that football clubs would engage in open discussions with the Government in the future.

35. DCMS maintained email was a more informal method of communication and consequently officials were more likely to engage in a greater level of frankness when using email. If special advisers or officials had expected emails to be made public, there was a real concern it would have significantly changed the actions of those concerned.

36. In addition, DCMS noted that, as special advisers worked within a high pressure/high workload environment, they generally needed to absorb information and provide deliberation and communications very quickly. At times, this may have meant arguments were put bluntly in a manner that would never be considered appropriate if the information were being prepared for publication. DCMS maintained material prepared for publication would take account of all relevant legal considerations, of issues of public perception, and be subject to a process of collective agreement. Of necessity, deliberation by special advisers was less guarded. However, DCMS accepted there was no blanket exemption for information provided by special advisers and each piece of information must be considered on its own merits.

37. DCMS also argued that the passage of time has weakened the public interest in disclosing the requested information and cited the case of *DCMS v Information Commissioner [EA/2007/0090]* in support of this view.

Balance of the public interest arguments

38. Having accepted the qualified person's opinion with regard to prejudice to the identified interests, the Commissioner has considered the extent, severity and frequency of such prejudice when considering the balance of the public interest.

39. The Commissioner considered first the question of the age of the information and noted that it can potentially alter the appropriateness of use of exemptions. DCMS stated its view that the public interest in disclosure of the requested information has not increased over time and if anything has weakened. However, as noted above, at paragraph 29, DCMS has accepted that the issue of football club ownership remains high profile, particularly the question of foreign ownership, and is likely to remain so as foreign owners continue to take over clubs. In the Commissioner's view, this undermines any case that information relating to foreign ownership is likely to be of less interest with the passage of time.

40. Turning to the general proposition advanced by DCMS that informed public participation is not always advanced simply by placing bare facts in the public domain, the Commissioner sees merit in this view, although not necessarily with the conclusion then drawn by DCMS that it may lead to speculation about the

possible direction of policy making. It is not clear why such speculation might be undesirable in the context of promoting public participation.

41. However, section 36 of the Act is intended to provide a space where the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation can take place. This seems particularly relevant with regard to the section of the Early Day Motion briefing that has been withheld. Having considered the withheld information, the Commissioner is satisfied that it required speculation about the motivation behind the Early Day Motion, speculation that ensured the Minister was properly briefed to participate in the debate on the motion, including educated speculation about the wider context in which the motion was tabled.

42. In the absence of a clear statement from the MP or other publicly available information about his reasons for tabling the motion, officials would be required to make their best guess about his motivation, but it could only ever remain a guess. The Commissioner is satisfied this falls firmly within the intended ambit of section 36(2)(b)(i).

43. The Commissioner considers that there is a strong public interest in ministers being fully briefed by officials when dealing with parliamentary questions and early day motions as this is an important part of the democratic process and the business of government. Having considered DCMS's arguments he is therefore satisfied in the present case that the withheld section of the briefing is exempt information and that the public interest favours its non-disclosure.

44. Turning to the withheld emails, the Commissioner has difficulty in accepting the argument advanced by DCMS that emails should be regarded as an informal medium, to which, by implication, lesser standards apply. Information contained in an email does not have any less value or standing than that contained in other media. Emails are used routinely to form part of the official record. Those using this medium to record information should at all times be aware that an email can form part of an official record.

45. In addition, the Commissioner is not entirely persuaded by DCMS's comments and arguments specifically concerning special advisers. He notes the role as being one where both pressure and workload are high, and deliberation is speedy and potentially less guarded as a result. However DCMS appears to be advancing what amounts to a special case for special advisers when in fact DCMS accepted, as noted at paragraph 36 above, that there was no blanket exemption for information provided by special advisers and that each piece of information must be considered on its own merits.

46. The Commissioner has also considered the points made by DCMS about the role played by Government in football club ownership. This is described as not a direct role but as representing the public interest in meetings with stakeholders. DCMS's view is that football clubs would be less likely to engage in open discussions with Government in future if, because of the high level of sensitivity involved in ownership of football clubs, such information was routinely disclosed by Government.

47. The Commissioner accepts that this argument is valid, but having reviewed the emails with regard to which this argument was advanced, he is not convinced that the level of prejudice would be as great as that envisaged by DCMS in this particular case. Without revealing the detailed contents of the email exchange it does not appear to him to contain information that has come to the Government following discussions, sensitive or otherwise, with football stakeholders. The exchange is concerned with the then regulatory framework within football.

48. The Commissioner notes DCMS's statement that the email exchange contains some "highly contentious and subjective information", which if released would be likely to damage day to day relations with stakeholders in football. Having reviewed the email exchange, the Commissioner accepts that it is indeed frank, but he is not persuaded that the level of prejudice would be as described by DCMS, particularly in view of the age of the information and the consequent likelihood of subsequent changes to the regulatory framework.

49. Furthermore, the Commissioner sees a difference between "free and frank" provision of advice or exchange of views as provided for in section 36(2)(b) of the Act and what DCMS describes as "contentious and subjective information". As noted at paragraph 44 above the Commissioner was concerned at what appeared to be DCMS's argument, in outline at least, for a different standard to apply to emails.

50. The Commissioner is required to weigh the pros and cons when considering the public interest test. The issue of the email exchange is finely balanced. In this instance, given the position of football in British culture and the high profile position of Chelsea FC, there is a strong public interest in transparency and openness in promoting a better understanding both of the Government's stance on foreign ownership and how that was arrived at. The release of the information contained in the email traffic will assist in this context. In addition, the takeover of Chelsea FC was the first such takeover in the era of the Premiership, and the thinking behind the decision process that led to the takeover proceeding as it did, was, and still is, of public interest.

51. The Commissioner's decision is therefore that the balance of the public interest favours release of the email exchange. While he acknowledges the potential prejudice to the identified public interests that their release would cause, on balance he does not consider that this would be to such a level or extent that the public interest in withholding the information would outweigh the continuing public interest in its disclosure.

The Decision

52. The Commissioner's decision is that DCMS acted in accordance with the requirements of the Act in correctly withholding one section of the background briefing for the Early Day Motion under section 36(2)(b)(i).

53. However the Commissioner has decided that DCMS did not deal correctly by regarding the headings in the background briefing as not relevant and as a consequence withholding them as well.

54. Furthermore, the Commissioner has decided that DCMS did not deal correctly with the information contained in the series of internal emails in that it incorrectly applied the public interest test in respect of the withheld information. DCMS is therefore in breach of section 1(1)(b) of the Act by virtue of the incorrect application of section 36(2)(b)(ii).

Steps Required

55. The Commissioner requires DCMS to take the following steps to ensure compliance with the Act:

The information contained within the internal emails and the background briefing including the headings but without the withheld section considered at paragraphs 41 to 43 above should be disclosed to the complainant within 35 calendar days of receipt of this Notice.

The Commissioner reminds DCMS that the names of any junior official included in the correspondence should be redacted in accordance with agreed practice.

Failure to comply

56. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

57. Although they do not form part of this Decision Notice the Commissioner wishes to highlight his concerns regarding the length of time it took DCMS to complete its internal review in relation to its refusal of this information request. DCMS reported the findings of its review to the complainant in a letter dated 3 December 2007, which was more than 150 working days after the review was requested on 18 April 2007.

58. The Commissioner's position as explained in the 'Freedom of Information Good Practice Guidance No. 5' published in February 2007 is that internal reviews should take no longer than 20 working days, and in exceptional circumstances which have been clearly explained to the complainant, the total time taken should not exceed 40 working days. Although the delay does not constitute a breach of

the Act, the Commissioner would like to make it clear that this does not accord with good practice. Therefore he expects the public authority to be aware of his position as provided in the published guidance as his office will monitor the public authority's compliance or otherwise via future complaints made against it.

Right of Appeal

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59. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 22nd day of December 2009

Signed ……..

Anne Jones
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 36(2) provides that –

"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-

(a) would, or would be likely to, prejudice-
  (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  (iii) the work of the executive committee of the National Assembly for Wales,
(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."