Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 October 2009

Public Authority: University of Oxford
Address: University Offices
Wellington Square
Oxford
OX1 2JD

Summary

The complainant requested from the public authority a copy of an initial review of a National Audit Office report on stroke care conducted by an academic member of its staff. The public authority initially relied on section 43(2) to refuse the request. During the course of the Commissioner's investigation, it also sought to rely on section 36. The Commissioner has determined that it correctly applied section 36(2)(b)(ii) to the withheld information and did not require the public authority to take any further action. However, he found that it breached section 17(1)(b) and (c) by failing to state, by the time of the completion of the internal review, that it was relying on section 36(2)(b)(ii) and explain why it applied.

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. On 24 July 2008 the complainant requested a copy of the review that Professor Buchan wrote for the Oxford University Consulting on the National Audit Office ("NAO") 2005 Stroke report.

3. On 20 August 2008 the public authority refused to disclose the requested information on the basis that it was exempt under section 43(2) of the Act. It stated that disclosure of the information would be likely to prejudice the commercial interests of Oxford University Consulting.

4. On 27 August 2008 the complainant emailed the public authority to ask it to carry out an internal review of its decision. In his email, and subsequent correspondence, he set out reasons why he believed that the information should be disclosed.

5. On 15 October 2008 the public authority wrote to the complainant upholding its original decision and explaining why it did not believe that the reasons provided by the complainant justified the disclosure of the information. It also indicated that it had considered the use of section 36 but felt that it was sufficient, at present, to rely on section 43(2).

Background

6. In a letter to the Commissioner dated 16 July 2009, the public authority provided detailed information regarding the process and context in relation to the initial review requested by the complainant.

7. The public authority explained that it set up Oxford University Consulting ("OUC") to provide external organisations and businesses with access to its experts and to help academics manage and identify consulting opportunities. It is part of Isis Innovation Ltd, the University's technology transfer arm. In 2004, in competition with private sector bodies and other universities, Isis Innovation Limited was awarded a contract by the National Audit Office "NAO") to review the value for money ("VfM") reports it produced for Parliament. These reports assessed the value for money obtained by Government departments and other public bodies in the use of resources. The reviews were carried out by OUC on behalf of Isis Innovation Ltd. In the most recent tendering exercise for the contract to provide reviews of the NAO's VfM reports, the successful tenderers were Isis Innovation Ltd and a consortium made up of City University and a private sector company.

8. The public authority went on to explain that the purpose of the reviews conducted by OUC was to check the coherence and internal consistency of the NAO's reports. The review followed a detailed template prescribed by the NAO, which included scoring the reports against seven criteria. The overall aim of a review was to indicate whether a VfM report fulfilled the objectives set by the NAO and whether it was presented in a manner suitable for a non-technical audience. This was important as the NAO's reports were mainly written for MPs on the Public Accounts Committee.

9. The OUC's reviews were a form of external quality assurance, providing senior NAO management with a high level overview and assessment of the quality of the NAO's work. Reviews were purposely brief and concise, not usually exceeding four to five sides of A4. It was not part of the OUC's remit to question the public policy that was the subject of a VfM report or to validate the data on which a report was based. OUC was not seeking to repeat the NAO's work or to second guess its conclusions.

10. The public authority confirmed that the task of preparing the first draft of an OUC review was typically assigned to a senior academic with specialist knowledge of

the field to which the VfM report related. His or her draft report was expected to take no more than two days work to complete. It was then referred to two members of an OUC editorial/moderation panel. The panel consisted of four academics with extensive experience and knowledge of the NAO's requirements. Each OUC review consequently utilised a mixture of both specialist and more general academic expertise.

11. The panel members played an active part in the formulation of the final review document and were responsible for ensuring that it met the NAO's requirements and standards. It was common for the panel to make substantive changes, including changes to the scoring under the seven criteria used to assess each report. The final review submitted to the NAO would be in the name of the OUC, not of the individual academic who prepared the first draft of the review. The individual concerned was not normally identified.

12. In 2005/6, the OUC reviewed the NAO's published report "Reducing Brain Damage: Faster access to better stroke care". The initial draft review was prepared by Professor Buchan, a stroke expert. This first draft was considered by the editorial/moderation panel and a final version was issued by OUC and provided to the NAO.

13. The complainant obtained a copy of the OUC's final published review from the NAO under the Act. He subsequently contacted OUC and asked, amongst other things, whether certain academics from Oxford University had reviewed the report. OUC confirmed that Professor Buchan had contributed to the review. The complainant then requested a copy of the first draft of the review carried out by Professor Buchan.

The Investigation

Scope of the case

14. On 30 October 2008 the complainant contacted the Commissioner to ask him to make a determination on whether the public authority was entitled to withhold the information that he had requested.

Chronology

15. There were a number of communications between the Commissioner, the public authority and the complainant. The most significant communications are identified below.

16. On 12 May 2009 the Commissioner wrote to the public authority asking it to provide him with the withheld information and any further arguments it wished to raise as to why it believed that the information was exempt from disclosure.

17. On 21 May 2009 the public authority wrote to the Commissioner to inform him that it intended to seek external legal advice with regard to its position and that this might delay its response to him.

18. On 5 June 2009 the public authority emailed the Commissioner to inform him that, having obtained legal advice, it wished to apply section 36(2)(b)(ii) to the withheld information.

19. On 9 June 2009 the Commissioner raised some further queries with the public authority in light of its stated intention to apply section 36.

20. On 16 July 2009 the public authority provided the Commissioner with detailed arguments as to why it believed the withheld information was exempt from disclosure under sections 36(2)(b)(ii) and 43(2).

21. On 7 August 2009 the complainant provided the Commissioner with further submissions as to why he believed that the information that he had requested should be disclosed.

Analysis

Exemptions

Section 36 – Prejudice to the effective conduct of public affairs

22. The public authority claimed that the withheld information was exempt from disclosure under section 36(2)(b)(ii) which provides that:-

> *"36(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)...*
> *(ii) the free and frank exchange of views for the purposes of deliberation"*

23. In order to determine whether the exemption was applicable to this information the Commissioner considered:-

(i) the opinion of the qualified person; and

(ii) as the exemption is a qualified exemption, whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

(i) Opinion of the qualified person

24. The public authority confirmed to the Commissioner that an opinion was given by its Vice Chancellor. The Commissioner is satisfied that he is the qualified person for the purposes of section 36.The Commissioner has been provided with a copy of the qualified person's written opinion which is dated 15 July 2009.

25. Where, as in this case, a public authority claims an exemption for the first time in the course of his investigation, the Information Tribunal in *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and Friends of the Earth (EA/2008/0087)* confirmed that the Commissioner has discretion as to whether or not to consider the exemption. He notes that the public authority's refusal notice and internal review letter are based on its concerns about the effect that disclosure would have been likely to have on the free and frank expression of views by those involved in the review process and that its arguments related to the application of section 43(2) were based on the broader implications of those concerns on reviewers' willingness to continue to participate in the review process. In the Commissioner's view section 36 would appear to be the more appropriate exemption for the public authority to seek to apply based on its arguments. In the circumstances of this case, he is therefore prepared to consider the public authority's arguments related to the application of section 36 to the withheld information.

26. In the case of *Guardian & Brooke v Information Commissioner & the BBC (EA/2006/0011 and 0013)*, the Information Tribunal stated that "in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at." (para 64). In relation to the issue of reasonable in substance, the Tribunal indicated that "the opinion must be objectively reasonable" (para 60). In determining whether an opinion had been reasonably arrived at, it suggested that the qualified person should only take into account relevant matters and that the process of reaching a reasonable opinion should be supported by evidence, although it also accepted that materials which may assist in the making of a judgement will vary from case to case and that conclusions about the future are necessarily hypothetical.

27. In relation to whether the qualified person's opinion was reasonably arrived at, the public authority provided the Commissioner with a copy of the qualified person's opinion and the evidence he considered prior to giving his opinion. This evidence consisted of a lengthy memorandum setting out in detail the issues related to the request. Attached to the memorandum were copies of the withheld information, the refusal notice, the result of the internal review and copies of documents sent by the complainant setting out his arguments as to why the information should be disclosed. The qualified person's opinion makes specific reference to his consideration of the factors identified in the memorandum. From these documents, the Commissioner is satisfied that the qualified person appears to have taken into account relevant considerations and does not appear to have been influenced by irrelevant ones.

28. The Commissioner is also satisfied that it was objectively reasonable for the qualified person to conclude that the disclosure of the withheld information would have been likely to inhibit the free and frank exchange of views for the purposes of deliberation. It would appear reasonable to conclude that the disclosure of this

information could have had an inhibiting effect on the free and frank exchange of views by OUC reviewers.

29. In addition, the Commissioner notes that the qualified person had reached his opinion on the basis that he considered that disclosure would be likely to inhibit the free and frank exchange of views which is the lower level of prejudice. In line with a number of previous Tribunal decisions, he has interpreted this to mean that there is a real and significant risk of prejudice to the interest in the exemption.

30. The Commissioner also notes the Tribunal's view from the *McIntyre v Information Commissioner & The Ministry of Defence (EA/2007/0068)* case, when commenting on the application of section 36(2)(c), but which he believes is equally applicable to the consideration of section 36(2)(b), that where the reasonable opinion of the qualified person is based on the higher threshold,

> "...this will give greater weight to the public interest inherent ... in the... exemption in favour of maintaining the exemption than if the reasonable opinion was based on the lower threshold. That in turn will affect the public interest balance." (para 43)

31. He considers this further when applying the public interest test in relation to this exemption.

32. The Commissioner is of the view that section 36(2)(b) (ii) was therefore engaged in relation the information that was withheld. He then went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosure.

(ii) Public interest test

33. The Commissioner notes the comments of the Information Tribunal in the *Guardian & Brooke* case that he should give due weight to the reasonable opinion of the qualified person when considering the public interest test in relation to section 36. However, the Tribunal's view was that the qualified person's opinion was limited to the degree of likelihood that inhibition or prejudice would occur and that the opinion "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" (para 91).
34. The Commissioner therefore, in assessing the public interest arguments, particularly those related to withholding the information, considered the relevance of factors such as the severity, extent and frequency with which the inhibition of the free and frank exchange of views might have occurred if the information had been disclosed.

Public interest arguments in favour of disclosing the requested information

35. The Commissioner recognises the general public interests in promoting transparency and accountability in relation to public bodies and those employed by them.

36. The complainant contended that there was a strong public interest in the disclosure of the initial review as this would have been of assistance in determining whether there were serious flaws in the NAO's report on stroke. The NAO's report suggested that the NHS could save millions of pounds from changes in treatment for some of those who suffer from strokes. The complainant believed that some of these suggested savings may have been based on flawed economic models and assumptions underpinning the NAO's report.

37. The public authority recognised that there may have been a public interest in the disclosure of the initial review of the NAO's report to allow the public to be satisfied that the NAO's work is subject to effective, external quality assurance. However, it was of the view that this interest was already met by the disclosure of the OUC's final review of the report.

38. In addition, the Commissioner notes that the purpose of the review was to check the coherence and internal consistency of the report. It was intended as a high level overview to be carried out within strict parameters. It was not part of the OUC's remit when carrying out the review to question the public policy that was the subject of the NAO's report or provide an analysis of any data on which the report was based. Consequently, it was not part of the purpose of the review in question to critically examine the economic models and assumptions which underpinned the savings detailed in the NAO's report and which were the focus of the complainant's concerns. Therefore the disclosure of the initial review would have been unlikely to throw further light on the issues which the complainant had highlighted.

39. It could be argued that there is also a public interest in knowing that those who undertake quality assurance of the NAO's work have the appropriate expertise and experience. However, as the public authority pointed out, this has been met in the present case by the identification of Professor Buchan as the person who carried out the initial review.

40. The public authority argued that there would be little or no public interest in disclosure of the draft review because the final review was in the public domain. The disclosure of the initial review might expose differences of view between the initial review and the final report produced by the panel but this would add little to the public's understanding of the underlying issues. If anything, it might merely deflect attention from more important matters.
41. The Commissioner acknowledges that there is a general public interest in the disclosure of information to allow the public to obtain a full picture in relation to particular circumstances in the interests of openness and transparency. However, he has had the benefit of examining the contents of the initial review and comparing these with what is contained in the final published review. What variances exist between the initial review and the final review do not appear, in the Commissioner's view, to raise any issues which would create a significant public interest in favour of the disclosure of the initial review.

Public interest arguments in favour of maintaining the exemption

42. The public authority argued that the production of a VfM review for the NAO involved the free and frank exchange of views between the initial reviewer and the members of the editorial/moderation panel which produced the final published review and between the individual members of that panel. In the public authority's view, if the initial review was subject to disclosure, there was a risk that the individual who carried this out would be drawn into any wider controversy surrounding the policies addressed in the NAO's VfM report, even though their terms of reference expressly exclude them from commenting on such matters.

43. It contended that the academic responsible for an initial review would not wish to become entangled in such a debate on the basis of a draft document, completed over one or two days, that was of no direct relevance to the broader issues likely to be of primary concern to the media and the public. There was a fundamental difference between defending a final review, which represented the collective opinion of OUC, arrived at after careful and methodical process of peer review and refinement, and defending a draft review, which represented only the individual reviewer's personal opinion and which was less likely to meet the high standards that they would aim to achieve in their published academic work, precisely because it was still a draft. It confirmed that the final document that was submitted to the NAO was submitted in the name of the OUC, not of the individual academic that produced the original draft.

44. The public authority informed the Commissioner that it had been informed by the academic member of staff who had carried out the initial review that he had prepared the review on the understanding that it was a draft which might be amended by the OUC's editorial/moderation panel before it was submitted to the NAO. He considered it to be confidential, in the sense that it would not be released to third parties, other than the NAO.

45. The public authority was also concerned that, if specific comments were attributed to an individual reviewer by the disclosure of the initial review, interested parties might seek to engage that reviewer in debate and discussion about issues relevant to the particular NAO report that had been reviewed when the decision as to what was contained in the final review document was made by the whole panel.

46. In light of this, it was suggested that that the disclosure of the initial review would have been likely to inhibit this and other initial reviewers and the editorial/moderation panels from expressing their views freely in relation to future reviews. Authors of the initial draft review might express himself or herself in more cautious and guarded terms, avoiding strong expressions of approval or disapproval of the NAO's VfM report (in case these were not supported by the editorial/moderation panel). Likewise, the panels might be inhibited from expressing disagreement with the initial author, for fear that if the disagreement came to light then it would be perceived as reducing the value of the OUC review. Both the authors of the initial review, and the panels, would be likely to be inhibited from saying anything that could draw them into public controversy about the OUC review.

47. The public authority argued that a draft review was, by definition, a work in progress and therefore more likely to contain errors. Academics from the University were expected to produce work of the highest intellectual quality, whether it was a research publication or a review of a VfM report. To publish work of any sort prematurely, before it was checked by others, was to risk exposing error and inaccuracy, something that any academic would wish to avoid.

48. The complainant argued that, as a result of the introduction of the Act, academics and others should be aware that their reports might be accessed by the public and therefore there was no reason for there to be any chilling effect on their willingness to provide rigorous and objective analysis.

49. The complainant argued that a NAO Management Board paper entitled "Strengthening Value for Money Quality Assurance" made clear that reviewers should be reminded that anything they wrote was disclosable under Freedom of Information. However, the public authority stated that it understood this to be a general statement which reflected the position under the Freedom of Information Act that any information held that related to the review of NAO reports was potentially disclosable under the Act. It was not intended to indicate that reviews would be disclosed. This would have to be determined according to the facts of each individual case. The Commissioner would agree with this interpretation of the document, that it appears to constitute a general statement about the need to consider the potential for any documents that are held to be disclosed rather than an indication that initial reviews should be disclosed.

50. The Commissioner notes that as part of its ongoing contract OUC carries out a significant number of reviews of NAO reports. Since 2004, it informed him that it had carried out over two hundred reviews involving the input of thirty five academics. This represented a sizeable part of its income. Any inhibiting effect that might arise from disclosure could potentially therefore have a significant, and continuing, impact on the quality of the reviews prepared for the NAO.

51. The public authority informed the Commissioner that several academics associated with OUC had expressed concern about the precedent that would be set by the disclosure of an initial review and had suggested that they would be unwilling to continue to do this type of work, should these documents be disclosed in future. It confirmed to the Commissioner that academics that participated in the review process were not under any contractual duty to do so as part of their standard academic contracts. Participation was a voluntary choice on their part.
52. The public authority was of the view that specialists of the calibre of the academic who carried out the initial review in this case were small in number and had other consultancy opportunities available to them, including opportunities in the private sector. Given that the number of academics with the requisite specialist knowledge to review a particular NAO report was limited, the loss of even one or two could have a significant adverse effect on OUC's ability to continue with this work.

53. The Commissioner notes that in a number of cases considered by the Information Tribunal it has been reluctant to accept arguments linked to the "chilling effect" of

disclosure. These arguments relate to the loss of frankness and candour in debate or advice resulting from disclosure which, it is suggested, would lead to poorer quality advice and less well formulated decisions. However, he also notes the statement of principle expressed by the Information Tribunal in *Department for Education and Skills v The Information Commissioner (EA/2006/0006)* that

> "Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

54. The Commissioner believes that there is a significant difference between this case and the cases where the Information Tribunal has been reluctant to accept the "chilling effect" arguments as those cases related to officials carrying out their normal contractual duties whereas this case relates to additional duties voluntarily accepted by academic staff.

55. The complainant contended that the public authority was misconceived in suggesting that academics at such a prestigious institution as the University of Oxford would not be able to withstand any adverse comment that might arise from the disclosure of the initial review. If there were some academics that were uncomfortable with disclosure, then he believed that there would be plenty of other very capable and respected academics who would be willing to act in a transparent manner that would be willing to replace those who had reservations about continuing to undertake such work.

56. The Commissioner notes the arguments with regard to potential impact on the willingness of some staff to continue to participate in the review process. He acknowledges that if some staff were to discontinue their involvement in the reviewing of NAO's reports this could impact on the range of expertise and, consequently, opinions which were available in the reviewing of reports. If this were to happen it would have an inhibiting effect on the free and frank exchange of views of available to the public authority in considering the NAO's reports.

57. The complainant contended that the NAO Management Board paper referred to above also indicated that a reviewer might be required to attend a meeting of the Parliamentary Public Accounts Committee. As a consequence reviewers were not guaranteed anonymity in their work and might need to defend their assessment of a particular NAO report before the Public Accounts Committee. However, the public authority pointed out that the NAO Management Board paper did not suggest that the draft review should be made public. If a reviewer were asked to attend a Public Accounts Committee meeting they would be there to discuss the contents of the final review, not the initial review. It felt that there was a significant difference between defending a final review which represented the collective opinion of OUC, arrived at after a careful and methodical process of peer review and refinement and defending an initial draft review, which represented only the individual reviewer's opinion.

Balance of the public interest arguments

58. The Commissioner has carefully considered the relevant public interest arguments. In his view, there is a significant public interest in the public authority being able to continue to ensure that the academic staff who carry out the initial reviews of NAO reports, and those who produce the final report, do not feel inhibited in engaging in a free and frank exchange of views or from participating in the process at all.

59. The Commissioner is satisfied on the facts of this particular case that the disclosure of the requested information would be likely to have a significant inhibiting effect in future in light of the evidence supplied by the public authority about the impact it might have on its staff and the voluntary nature of the duties being undertaken. In his view, any public interest in the disclosure of the initial review is very limited. As a result, the Commissioner believes that the public interest in maintaining the exemption outweighed the public interest in disclosure and that, therefore, the public authority correctly applied section 36(2)(b)(ii) to the withheld information.

Section 43(2) – Prejudice to commercial interests

60. As the Commissioner determined that section 36 was correctly applied to the withheld information by the public authority, he did not continue to consider the arguments in relation to the application of section 43(2) to the same information.

Procedural Requirements

Section 17 – Refusal of request

61. Section 17(1) of the Act requires that, where a public authority is relying on a claim that an exemption in Part II of the Act is applicable to the information requested, it should in its refusal notice:-

    (a) state that fact,
    (b) specify the exemption in question,
    (c) state why the exemption applies.

62. In this case, by failing to inform the complainant within 20 working days of the date of the request that it was relying on section 36(2)(b)(ii), nor explain why it applied, the public authority breached section 17(1). By failing to state that it was relying on section 36(2)(b)(ii), nor explain why it applied, by the time of the completion of the internal review, it breached section 17(1)(b) and (c).

The Decision

63. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- it correctly withheld the requested information under section 36(2)(b)(ii).

64. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- it breached section 17(1) by failing to state within 20 working days of the date of the request that it was relying on section 36(2)(b)(ii) and explain why it applied; and

- it breached section 17(1)(b) and (c) by failing to state, by the time of the completion of the internal review, that it was relying on section 36(2)(b)(ii) and explain why it applied.

Steps Required

65. The Commissioner requires no steps to be taken.

Other Matters

66. The Commissioner notes that, following the complainant's request for an internal review to be carried out, it took the public authority nearly two months to complete this. He would reiterate his guidance that only in exceptional cases should an internal review take longer than 20 working days.

Right of Appeal

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67. 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

68. 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.

69. 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 27th day of October 2009

Signed ……

Lisa Adshead
Senior Policy Manager

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

Legal Annex

Refusal of Request

Section 17(1) provides that -
"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies."

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –
"This section applies to-

(a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
(b) information which is held by any other public authority.

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.

Commercial interests

Section 43(1) provides that –
"Information is exempt information if it constitutes a trade secret."

Section 43(2) provides that –
"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."