

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 2 August 2011

Public Authority: Police Ombudsman for Northern Ireland
Address: New Cathedral Buildings
St Anne's Square
11 Church Street
Belfast
BT1 1PG

Summary

The complainant requested information relating to the appointment of the Police Ombudsman for Northern Ireland. The public authority refused to disclose the majority of the information falling within the scope of the requests, citing the exemptions provided by section 36(2)(b) (inhibition to the free and frank provision of advice and to the free and frank exchange of views). The Commissioner finds that these exemptions were cited correctly in relation to some of the information falling within the scope of the requests, but that the remainder of the information is not exempt and the public authority breached sections 1(1)(b) and 10(1) of the Act in failing to disclose this information within 20 working days of receipt of the request. The public authority is now required to disclose the non-exempt information. The Commissioner also finds that the public authority breached the requirement of section 17(1) in failing to respond to the request with a refusal notice within 20 working days of receipt.

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 made the following information requests on 14 October 2010:

"(i) Any and all documentation between the Office of the Police Ombudsman and the Northern Ireland Office which pertains to: security clearance for the second Police Ombudsman; the terms and conditions of employment of the second Police Ombudsman; and, the short-listing of candidates for the post of the second Police Ombudsman.

"(ii) Also, any and all documentation on same between the Office of the Police Ombudsman for Northern Ireland and the Police Service of Northern Ireland."

"(iii) A transcription (or a copy of the tape) of the phone conversation that occurred on 09 May 2007 between Ms. Nicky Oppenheimer of Odgers, Ray and Berndtson (currently Odgers Berndtson) and Mr. Sam Pollock, Chief Executive of the Police Ombudsman's Office."

3. The responses to these requests were dated 28 November 2010, outside 20 working days from receipt of the requests. Information pertaining to the terms and conditions of the Ombudsman's employment was disclosed. The remainder of the requests were refused, with the exemptions provided by section 36(2)(b) cited (inhibition to the free and frank provision of advice and to the free and frank exchange of views).
4. The complainant responded on 30 November 2010 and requested an internal review. The public authority failed to complete the internal review by the beginning of the Commissioner's investigation. The Commissioner comments further on the internal review delay below.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner's office initially on 14 February 2011. At this stage the complainant raised both the issue of the refusal of her requests and the delay in the completion of the internal review.
6. The Commissioner's office contacted the public authority initially on 5 March 2011 and asked that it complete the internal review within 20

working days. After the 20 working days period had elapsed the complainant contacted the Commissioner's office and advised that the internal review had not been completed.

7. Owing to the delay in the completion of the internal review a decision was taken at that stage to progress the case without waiting for this review to be completed. The public authority was subsequently advised of this.
8. The complainant subsequently clarified that her complaint related to all aspects of her information requests. This included the request for the terms and conditions of the employment of the Ombudsman, despite the disclosure of some of the information that fell within the scope of that request.

Chronology

9. The Commissioner's office contacted the public authority on 20 April 2011. At this stage the public authority was asked to respond with further explanation for the citing of the exemptions provided by section 36(2)(b) and with a copy of the information withheld from the complainant.
10. The public authority responded to this on 24 May 2011. This response included explanation for the exemptions cited and a copy of the information withheld from the complainant, which included information about the Ombudsman's terms and conditions.

Background

11. The complainant specifies information about the appointment of the second Police Ombudsman for Northern Ireland in the wording of the requests. The appointment referred to is that of Mr Al Hutchinson, who became Ombudsman on 6 November 2007.

Analysis

Exemptions

Section 36

12. The public authority has cited sections 36(2)(b)(i) (inhibition to the free and frank provision of advice) and 36(2)(b)(ii) (inhibition to the free and frank exchange of views for the purposes of deliberation). Consideration of these exemptions is a two-stage process. First, the

exemptions must be engaged. Secondly, these exemptions are qualified by the public interest, which means that, for the information to be withheld, the public interest in the maintenance of the exemptions must outweigh the public interest in disclosure.

13. Turning first to whether the exemptions are engaged, sections 36(2)(b)(i) and (ii) can be cited only where the reasonable opinion of a specified qualified person (QP) is that the inhibition described in these sections would be at least likely to result. The QP for each public authority is either specified in the Act, or is authorised by a Minister of the Crown. In considering whether these exemptions are engaged, the Commissioner will cover the following:
 - whom the Act or a Minister of the Crown specifies as QP for this public authority;
 - whether the QP gave an opinion in this case;
 - when this opinion was given;
 - whether the opinion given was objectively reasonable in substance and reasonably arrived at.
14. The now archived website, *www.foi.gov.uk*, via which the government provided advice on the Act, records that the QP for the public authority is the Ombudsman; and the public authority has stated that the Ombudsman acted as QP in relation to the complainant's request, although it has no record of the date that this opinion was given. Whilst the inability of the public authority to clarify the date on which the opinion was given indicates a lack of appropriate record keeping concerning the citing of section 36, which is commented on further in the '*Other matters*' section below, the Commissioner does not regard this alone as a basis on which to conclude that no opinion was given by the QP. Instead, the Commissioner accepts the assurance of the public authority that an opinion was given by the QP and that this opinion was given prior to the date of the refusal notice, albeit that this decision would have been made on a stronger footing had the public authority kept an appropriate record.
15. Turning to whether this opinion was reasonably arrived at, the issue here is the process undertaken by the QP in forming their opinion. If, for example, the QP had formed their opinion on the basis of a toss of a coin, the Commissioner would conclude that the opinion had not been reasonably arrived at. In this case the public authority has stated that the opinion was based on a '*verbal briefing*' provided to the QP, and that the QP viewed '*some*' of the withheld information. That the briefing provided to the QP was verbal poses a difficulty to the Commissioner in that the public authority has been unable to provide any record of this briefing. This issue becomes particularly important given the confirmation that the QP did not view all of the information in

question. The view of the Commissioner is that, for an opinion to be reasonably arrived at, if the QP did not view the entirety of the information in question it is essential that they were provided with a detailed briefing that describes the content of the information and the relevant factors that should have been taken into account when forming an opinion.

16. Whilst the public authority has stated that the QP was briefed verbally, it has provided no record of this briefing, or any description of the content of this briefing. It has also confirmed that the QP viewed some of the information, and so in effect has also confirmed that the QP did not view the remainder of the information. Given this absence of detail as to what the QP took into account when forming his opinion, the Commissioner cannot be satisfied that this opinion was reasonably arrived at.
17. However, the approach of the Commissioner is that an opinion arrived at through a flawed process may still be accepted as reasonable if it was overridingly reasonable in substance. This is in line with the approach taken by the Information Tribunal in *McIntyre vs the Information Commissioner and the Ministry of Defence* (EA/2007/0068) in which it stated:

"...where the opinion is overridingly reasonable in substance then even though the method or process by which that opinion is arrived at is flawed in some way this need not be fatal to a finding that it is a reasonable opinion." (paragraph 31)
18. In this case, the Commissioner has considered the content of the information in question and what this suggests about the reasonableness, or otherwise, of the QP's opinion. If the Commissioner considers that the opinion was overridingly reasonable in substance, having taken the content of this information into account, he will conclude that the exemption is engaged despite the flaws in the process of the formation of the opinion.
19. In relation to some of the information, the view of the Commissioner is that this is clearly of a free and frank nature. This information, which consists of correspondence, was clearly written in the expectation that it would remain confidential. The Commissioner accepts that it would be overridingly objectively reasonable to hold the opinion that disclosure of this information would be likely to result in inhibition to others when engaging in exchanges of views in future, and so the exemption provided by section 36(2)(b)(ii) is engaged in relation to that information.

20. The information falling within the scope of request (iii) consists of an audio recording of a telephone call. The view of the Commissioner is that the content of this information could be accurately characterised as the free and frank provision of advice and that this suggests that the expectation of the participants in this telephone call was that the content of this would remain confidential. The Commissioner concludes that it would be overridingly objectively reasonable to hold the opinion that disclosure of this audio recording would be likely to have an inhibitory effect on telephone calls of similar sensitivity in future and so finds that the exemption provided by section 36(2)(b)(i) is engaged in relation to this information.
21. However, in relation to the remainder of the information the view of the Commissioner is that this is of considerably less sensitivity. Significantly, the content of this information is factual, rather than imparting the views of any individual. Given the nature of the content of this information, the Commissioner does not regard it as clear how the disclosure of this would be likely to lead to any future inhibition. The Commissioner does not, therefore, accept that the opinion of the QP was overridingly reasonable in relation to this information and so concludes that neither of the exemptions provided by section 36(2)(b) is engaged in relation to this information.
22. The specific information in relation to which the Commissioner accepts that section 36(2)(b)(ii) is engaged is set out in a separate confidential annex sent with this Notice to the public authority only. The steps specified later in this Notice should be carried out on the basis of this annex.

The public interest

23. In relation to the information that the Commissioner has concluded is exempt under sections 36(2)(b)(i) and (ii), the Commissioner has considered whether the public interest in maintaining this exemption outweighs the public interest in disclosure.
24. In the case of *Guardian & Brooke v the Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013), the Information Tribunal acknowledged that the application of the public interest test to the section 36 exemption "*involved a particular conundrum*", noting that although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public interest, "*it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice*" (paragraph 88).

25. In the Tribunal's view, the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable 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"* (paragraph 91). This means that whilst the Commissioner should give due weight to the reasonable opinion of the QP when assessing the public interest, he can and should consider the severity, extent and frequency of inhibition to the free and frank provision of advice and the exchange of views.
26. On the issue of the severity and extent of the inhibition resulting from disclosure here, in relation to the information consisting of exchanges between the public authority and the Police Service of Northern Ireland (PSNI) and the Northern Ireland Office (NIO), the view of the Commissioner is that the severity of future inhibition would be likely to vary according to the sensitivity of the subject matter and / or the content of the advice or exchanges. In this case, the Commissioner accepts that the subject matter and content of the information in question are of a high level of sensitivity. He accepts that if such sensitive advice and views were to be disclosed in this case then the likely inhibition in future cases, would be severe enough to damage the quality of the advice given and views exchanged which would in turn affect the quality of the public authority's final decisions.
27. The Commissioner would accept that it is vital that the public authority can communicate in a free and frank manner with these other bodies. The Commissioner would also accept that any inhibition sufficient to affect the quality of the public authority's future decision making would result in an impact upon the public authority of considerable severity and extent.
28. In relation to the audio recording of a telephone call, the Commissioner recognises that the content of this conversation covered a sensitive subject and was of a frank nature. Given this, he also recognises that inhibition resulting through disclosure of this information on future telephone calls of similar sensitivity would be likely to be severe. The Commissioner further notes that it is clearly vital for the public authority that an appropriate individual is appointed as Ombudsman. If this were hindered by officials within the public authority being unwilling to offer appropriate and necessary advice about the process of appointing a new Ombudsman and this contributed to an inappropriate individual being appointed as Ombudsman, the impact of this upon the public authority would be severe and extensive.

29. As to the frequency of inhibition, in relation to exchanges between the public authority and the PSNI and the NIO, the Commissioner would expect that such exchanges would take place frequently. Therefore, inhibition to these exchanges would also take place frequently.
30. In relation to the audio recording of the telephone call, clearly the process of appointing a new Ombudsman takes place infrequently, meaning that the potential for inhibition of an identical nature to that identified in this case would also arise only infrequently. However, the Commissioner also recognises that it could be argued that this inhibition would occur more widely than only in relation to discussions about the appointment of a new Ombudsman, as it instead could occur in any situation where an issue of similar sensitivity is being discussed.
31. Overall, the Commissioner accepts that there is potential for the inhibition identified by the QP to occur frequently and to be of considerable severity and extent. This carries significant weight in favour of maintenance of the exemptions.
32. Turning to those factors that favour disclosure of the information, the Commissioner believes that there is a strong public interest in information relating to the appointment of the Ombudsman. The role played by the Ombudsman is central to the continued support of policing by the populace within Northern Ireland, meaning that the public interest in the process of appointing the Ombudsman is legitimate. Added to this factor relating to the specific information in question is the general public interest in improving the transparency and openness of the public authority.
33. The complainant has drawn the Commissioner's attention to recent press reports which question the independence of the Ombudsman's office. These reports appeared in the press following the resignation of the Ombudsman's Chief Executive Sam Pollock on 31 March 2011. The Commissioner notes that this resignation had not taken place as at the date of the request. He therefore considers that any public interest in understanding whether or not there was any substance behind comments allegedly made by Mr Pollock upon his resignation, did not arise at the date of this request, and so carries no weight in the balance of the public interest here.
34. The Commissioner has recognised legitimate and strong public interest in disclosure on the basis of the subject matter of the information in question. Added to this is the general public interest in the openness and transparency of the public authority. However, having accepted as reasonable the opinion of the QP that inhibition relevant to sections 36(2)(b)(i) and (ii) would be likely to result through disclosure, and having found that this inhibition would be likely to occur frequently and

be of considerable severity and extent, he must afford appropriate weight to the public interest in avoiding this outcome. Having done so, he finds that the public interest in the maintenance of the exemptions outweighs the public interest in disclosure.

Procedural Requirements

Sections 1 and 10

35. In failing to disclose within 20 working days of receipt of the request the information that the Commissioner has now concluded was not exempt, the public authority did not comply with the requirements of sections 1(1)(b) and 10(1).
36. In failing to confirm within 20 working days that it held information within the scope of the request, the public authority again breached section 10(1).

Section 17

37. In failing to respond with a refusal notice within 20 working days of receipt of the request the public authority did not comply with the requirement of section 17(1).

The Decision

38. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemptions provided by sections 36(2)(b)(i) and (ii) correctly in relation to some of the information within the scope of the request. However, in relation to the remainder of the information, the Commissioner finds that neither of these exemptions are engaged and that the public authority breached sections 1(1)(b) and 10(1) in failing to disclose this information within 20 working days of receipt of the request. The public authority also breached section 10(1) in failing to confirm within that timescale that it held information falling within the scope of the request, and section 17(1) in that it failed to respond with a refusal notice within 20 working days of receipt of the request.

Steps Required

39. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- disclose to the complainant the information that the Commissioner has concluded was not exempt (this information is specified in an annex sent to the public authority with this Notice).
40. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

41. 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

42. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The public authority was unable to confirm the date on which the QP provided his opinion on the citing of the exemptions from section 36(2)(b). It was also only able to provide a brief description of the reasoning for the opinion; as a result, the Commissioner was only able to conclude that the exemptions were engaged on the basis that the opinion was overridingly reasonable in substance. This decision was not based on the explanations provided by the public authority.
43. In future, when citing any of the exemptions provided by section 36, the public authority should ensure that it keeps a record of the opinion of the QP, including the date that this was given and the reasons for it. Further guidance on what should be recorded when citing section 36 is available on the Commissioner's website¹.
44. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority had failed to complete the internal review by the commencement of his investigation, which was well over 40 working

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/section_36_practicalities_v1.pdf

days from the date on which the complainant had requested an internal review. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

45. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 2nd day of August 2011

Signed

**Lisa Adshead
Group Manager
Information Commissioner's Office
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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 10(1) provides that –

"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."

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."

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."