



Steven Dickinson

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FOI/EIR	FOI		s35, s36	Issue	'Chilling effect' arguments
	EIR	Section/Regulation	Reg 12(4) (e)		

Line to take:

UPDATE: *As part of the guidance review most of the content of this line to take is now covered in external guidance. The remainder of the line will be incorporated into guidance or caseworker advice notes in due course at which point this line will be withdrawn.*

'Chilling effect' arguments should not be dismissed out of hand as "ulterior considerations" but should be given appropriate weight in the Public Interest Test dependent on the circumstances of the case and the information in question.

The term 'chilling effect' can cover a number of related scenarios, which argue a progressively wider impact on the frankness and candour of debate. As the impact of the 'chilling effect' argued gets progressively wider, the Commissioner considers that it will be more difficult for convincing arguments of this nature to be sustained.

Arguments that disclosure under FOIA may equally lead to better quality advice and improved decision making, may also be relevant and should also be considered in the circumstances of the case.

Further Information:

UPDATE: Most of this line is now covered in the following external guidance:

- [Government policy \(section 35\)](#)
- [Effective conduct of public affairs \(section 36\)](#)
- [Internal communications \(regulation 12\(4\)\(e\)\)](#)

Case officers are advised to consult the relevant guidance for the up-to-date line, although the position remains broadly the same as that set out in this LTT. Nonetheless the detail of this LTT will be retained for the time being, pending the publication of additional (more detailed) guidance on this topic.

Chilling effect arguments :

'Chilling effect' arguments are usually made in relation to the public interest test under s35 FOIA. However (as per LTT128) they may also apply to some s36 cases and to some information falling under Regulation 12(4)(e) of the EIR. They are described in *Scotland Office v the Information Commissioner* (EA/2007/0070) as arguments about "the risk to candour and boldness in the giving of advice which the threat of future disclosure would cause".

They are related to, but not the same as "safe space" arguments, and care should be taken to differentiate between these two concepts. "Safe space" arguments are about the need for a "safe space" to formulate policy and debate 'live' issues" without being hindered by external comment and/or media involvement. The Commissioner's view is that, whilst part of the reason for needing a "safe space" is to allow free and frank debate, the need for a "safe space" exists regardless of any impact on the candour of debate of involved parties, which might result from a disclosure of information under FOIA (see also LTT129 safe space arguments). "Chilling effect" arguments are directly concerned with the argued loss of frankness and candour in debate / advice which, it is said, would lead to poorer quality advice and less well formulated policy and decisions, and would result from disclosure of information under FOIA.

The guiding principle (see LTT43) most relevant to this argument is (vii) robustness of officials.

The term 'chilling effect' can cover a number of related scenarios, which argue a progressively wider impact on frankness and candour :

- In relation to s35(1)(a) - the idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties make future contributions to that particular policy debate.
- In relation to s35(1)(b) - the idea that disclosing information falling under s35(1)(b) that relates to a "live issue" will affect the frankness and candour with which Ministers continue to debate that same issue.
- In relation to s35(1)(a) - the idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.
- In relation to s35(1)(b) - the idea that disclosing information falling under s35(1)(b) that relates to a "live issue" will affect the frankness and candour with which Ministers debate other, different "live issues" in the future.
- In relation to s35(1)(a) - the idea that disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.
- In relation to s35(1)(b) - the idea that disclosing information falling under s35(1)(b) that relates to an issue which is no longer "live" will affect the frankness and candour with which Ministers debate other, different "live issues" in the future.

It is conceivable that similar views, arguing a progressively wider "chilling effect", could also be presented in relation to the Public Interest Test under s35(1)(c) and (d).

The Tribunals response to such arguments

The Tribunal has generally endorsed the approach of considering such arguments in the context of the circumstances of the case, with particular reference to the potential disclosure in question.

It has also, however, consistently given less weight to such arguments than has been argued by the Public Authorities concerned and has been dismissive of the weight that should be attached to such arguments in the majority of cases it has heard so far. Comments made by various different Tribunals in this respect are provided below. It should be noted that these comments were all made in cases where the public authority was arguing a relatively wide ranging 'chilling effect', and maintaining that release of information relating to one issue / policy would affect the candour of debate on other, unrelated issues / policies :

Department for Education and Skills v the Information Commissioner (para 75) :

" [principle] (vii) In judging the likely consequences of disclosure on officials' future conduct, we are entitled to expect of them the courage and independence that has been the hallmark of our civil services since the Northcote - Trevelyan reforms."

Foreign and Commonwealth Office v The Information Commissioner (para 26) :

" we adopt two points of general principle which were expressed in the decision in *HM Treasury v the Information Commissioner EA/2007/0001*. These were first, that it was the passing into the law of the FOIA that generated any chilling effect, no Civil Servant could thereafter expect that all information affecting government decision making would necessarily remain confidential Secondly, the Tribunal could place some reliance in the courage and independence of Civil Servants, especially senior ones, in continuing to give robust and independent advice even in the face of a risk of publicity."

Source	Details
IT	DfES / The Evening Standard (19 February 2007)
	Scotland Office (08 August 2008)
	FCO (22 January 2008)
	HMT (07 November 2007)
	Evans / MOD (26 October 2007)
	Scotland Office (05 August 2008)
	FOE / ECGD - IT (20 August 2007)
	FOE / ECGD - High Court (17 March 2008)
	DWP (05 March 2007)
	Baker / DCLG (1 June 2007)
	O'Brien / BERR (7 October 2008)
	Cabinet Office / Lamb (27 January 2009)

Related Lines to Take

[LTT43](#), [LTT61](#), [LTT104](#), [LTT128](#), [LTT129](#), [LTT131](#), [LTT132](#), [LTT133](#)

Related Documents

[EA/2006/0006](#) (DfES), [EA/2007/0070](#) (Scotland Office), [EA/2007/0047](#)(FCO), [EA/2007/0001](#) (HMT), [EA/2007/0128](#) (Scotland Office), [EA/2006/0073](#) (ECGD IT), [\[2008\] EWHC 638](#) (ECGD High Court), [EA/2006/0040](#) (DWP), [EA/2006/0043](#) (Baker), [EA/2008/0011](#) (O'Brien), [EA/2008/0024](#) & [0029](#) (Lamb)

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