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FOI/EIR      FOI      Section/Regulation      s36      Issue      Section 36: Common problems and issues  
 Line to take:

The table below lists some problems and issues that may arise in section 36 cases and explains how we should address them.

Further Information:

### Problem/ issue

### Our response

There is insufficient evidence of the QP opinion e.g.

- The PA has not provided the submission made to the QP
- There is no documentary record of the QP's opinion

It is not clear whether the PA's arguments are actually those considered by the QP.

If the PA has no record of the submission or the QP's opinion, we would accept a signed statement from the QP stating whether they saw the information in question, what factors they took into account and what their opinion was and when they gave it. There is a form on our website that PAs can use to provide us with a record of the QP opinion.

Note that this is a *minimum* requirement in cases where there are no records of the actual process i.e. where we only have the PA's word for what happened.

There were flaws in the process (e.g. QP opinion not obtained) but these were corrected at internal review.

We accept that errors in applying an exemption can be corrected at the internal review stage. If the QP opinion was not given before the refusal notice was issued, s36 can still be engaged if the QP gives a reasonable opinion at internal review. The QP should base their opinion on the situation at the time of the request.

S36 is claimed for the first time at internal review or during our investigation

Public authorities have the right to raise s36 exemptions for the first time at internal review or during our investigation. In each case they are still required to obtain the reasonable opinion of the QP.

The QP has not specified level of prejudice (would/ would be likely to)

Give the PA an opportunity to confirm what the QP meant. If no confirmation received, apply 'would be likely to' unless there is clear evidence that the QP meant 'would'. For example, the QP's opinion may talk about the consequences of disclosure rather than possible consequences. If there is any doubt then apply 'would be likely to'

The PA claims s36 but has not obtained the QP opinion

If there is no QP opinion the exemption is not engaged. This applies in all cases except in relation to statistical information under s36(4).

The opinion has been given by someone other than the QP.

If another person is formally acting up i.e. they have been given the responsibilities of the QP's post, then accept it as a QP opinion.

Otherwise, do not accept it as a QP opinion. For example, if a more junior official is merely 'covering' while the QP post holder is on leave, they are not the QP.

A QP has not been authorised for this PA

(i.e. the PA is not listed in s36(5)(a)-(n), or in the archived list produced by the Ministry of Justice and there has been no specific authorisation by a Minister previously)

The PA should request an authorisation from a Minister of the Crown via the most relevant government department. If in doubt they should contact [informationrights@justice.gsi.gov.uk](mailto:informationrights@justice.gsi.gov.uk)

If no QP has been authorised s36 cannot be engaged (other than for statistical information).

If a QP has been authorised after the time for compliance but by the time of the internal review they can give their opinion and engage s36.

The PA has extended the time for considering the PIT under s10(3) without first obtaining the QP opinion.

There is a procedural breach of s17(1). S36 cannot be engaged until the QP opinion has been given.

Case officer doesn't really agree with QP opinion

The test is not whether we accept or agree with the opinion but whether it is a reasonable opinion to hold. It is only not reasonable if no reasonable person could hold it.

<p>The submission or the QP's reasoning includes irrelevant factors.</p>	<p>This approach means that it is likely that we will accept that the exemption is engaged more often than we used to.</p> <p>Concentrate first on the actual opinion rather than the reasoning process that led up to it. The opinion is simply that prejudice/ inhibition would/ would be likely to occur. Consider whether this is an opinion that any reasonable person could hold.</p> <p>If on the face of it, the opinion is not one that a reasonable person could hold or this is doubtful, consider the reasoning and the supporting arguments. They may shed light on why the QP came to their opinion.</p> <p>We are not concerned with the quality of the reasoning process itself, only the substantive opinion.</p>
<p>QP specifies "would"; case officer thinks "WBLT" more realistic but difficult to say "would" not reasonable</p>	<p>In theory we may consider that it is unreasonable to say that prejudice/ inhibition would occur but reasonable to say it would be likely to occur.</p> <p>This possibility is stated in our external guidance because we do not want PAs to claim 'would' in every case, simply in order to gain extra weight in the PIT. Remember that we have to accept or reject the QP's opinion as stated and if they say 'would' this will carry a greater weight over into the PIT than WBLT.</p> <p>In practice such situations are likely to be rare. It is more likely that we would accept 'would' as a reasonable opinion, even if we do not agree with it.</p>
<p>I have had to accept the QP opinion as reasonable even though I don't agree with it. Doesn't giving due weight to the QP opinion mean that the PI will always favour maintaining exemption?</p>	<p>No. The QP opinion is only about the likelihood of prejudice / inhibition (i.e. it would or would be likely to occur). If we accept that the opinion is reasonable we accept that the specified prejudice/ inhibition would or would be likely to occur, but we then go on to consider the severity, extent and frequency of that prejudice/ inhibition.</p> <p>If we consider that it would not be particularly severe or extensive or occur frequently then it is possible to find that the PI in maintaining the exemption does not outweigh the PI in disclosure.</p>
<p>The PA has applied s36(2)(b)(i) or (ii) but the content of the information is not notably 'free and frank'</p>	<p>S36(2) is about the effects of disclosing the information, not the content of the information. If the content clearly represents a free and frank exchange of views/ advice then it may be easier to accept that disclosing it could lead to prejudice / inhibition but disclosing more anodyne, less controversial information could also have that effect, depending on the circumstances of the case. Concentrate on how the prejudice/ inhibition could happen rather than how free and frank the information is.</p>
<p>Officials have applied the QP's opinion to information that the QP does not appear to have considered.</p>	<p>Consider whether the QP's opinion could be construed broadly to cover the exempted information, even if they did not specifically consider it. Bear in mind that it may not be feasible for the QP, who is a very senior official, to look at every piece of relevant information.</p> <p>If the QP's opinion can be broadly construed to cover the withheld information, accept that is covered by the QP's opinion.</p> <p>If the withheld information is not part of and clearly different from the information that the QP considered, then there is no QP opinion relating to that information.</p>
<p>Source Related Lines to Take  Related Documents   Contact Date</p>	<p>Details</p> <p><a href="#">Casework Advice Note 2,</a></p> <p>CW</p> <p>21/11/2011</p> <p>Policy Reference</p> <p><b>CWAN001</b></p>