

Staff training



Making the connection between learning and work

FOI advanced training workbook on Section 36

FOI Training - Section 36 workbook
20120620
Version: 1.0



Contents

Using this workbook	3
Aims and objectives	3
Introduction	3
Section 36 – an overview	4
What the Act says	5
Section 36 – different to other prejudice based exemptions	5
Main principles of section 36	6
The qualified person	7
Proof of the qualified person's opinion	8
Reasonable opinion	9
Level of prejudice	12
Public interest test under section 36	12
Relevant public interest arguments	13
Internal Review	17
Statistical information – section 36(4)	18
Case studies	20
Appendix	27
Suggested Answers to Questions and Exercises	27

Using this workbook

Aims and objectives

By the time you have completed this workbook, you should understand the principles of applying section 36 of the Freedom of Information Act 2000 ('the Act') and be able to provide answers to questions and issues that commonly arise in relation to section 36.

Introduction

This workbook accompanies the advanced training module on section 36. It aims to develop your understanding of the main provisions of section 36 – it will increase your knowledge about the key concepts of 'qualified person' and 'reasonable opinion' and what to consider in the public interest test. It sets out the main principles that are covered in the module, and includes some practical exercises for you to apply the legislation, using case examples and some invented scenarios. You will need to refer to the section 36 guidance when going through the workbook.

The workbook focuses on the ICO's interpretation of the exemption; while it doesn't provide a step-by-step guide to investigating complaints under section 50 FOIA, it does include principles that will inform decisions. It is intended to be used by staff who have some previous experience of applying parts of the Act and presumes that you will have an understanding of some main concepts, including the duty to confirm or deny, prejudice test and the public interest test. It contains some tips which are more useful for people in one part of the office than another, but it does not contain any policies or procedures specific to your job.

The case examples and questions won't always have straightforward yes or no answers; often there will be more than one possible response – the important thing is that you think about the rationale for your decisions and try to explain them fully.

Read boxes list the materials you should read at this point before you continue. Sometimes other materials will be referred to in the text. You may wish to look at these at some point but you do not need to read them before continuing.

Case officer tips boxes are aimed specifically at staff in complaints resolution roles.

Section 36 – an overview

Read:

Before starting this workbook, you should have attended the training module on section 36. You should be familiar with:

- what section 36 of the Act provides; the prejudice test and how the public interest test works;
- the section 36 guidance and the pro-forma for record of the qualified person's opinion – available on the Guidance index on the ICO website;

Although the following are written specifically for caseworkers, others may also find them helpful in understanding the ICO approach to section 36:

- Caseworker advice note 001: Section 36: common problems and issues, which summarises issues that may arise in casework investigation and gives guidance to caseworkers on how to address them (available on the FOI Policy Knowledge Base);
- Caseworker advice note 002: Section 36 Reasonable opinion – this explains the rationale for our current position on the interpretation of 'reasonable opinion' for the purposes of section 36 (available on the FOI Policy Knowledge Base).

There are also a range of policy lines to take (LTTs) on the FOI Policy Knowledge Base which mainly relate to public interest test factors that can be taken into consideration under section 36 – the workbook will highlight these lines when necessary.

You may have also attended other FOI Training modules, and some of you will have completed the FOI Training workbook, which considers section 36 in section 3.

What the Act says

Section 36 applies to:

- information held by a government department that section 35 does not apply to; and,
- information which is held by any other public authority.

Section 36 contains several separate prejudice-based exemptions, described as the 'limbs' or 'sub-sections' of the exemption.

These are:

- (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 Cabinet of the Welsh Assembly Government.*
- (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.*

The exemption has a broad scope, and can cover a wide range of information. There is a further explanation of the prejudice covered by the sub-sections of section 36(2) in the guidance document and in the training presentation. In particular, you should note that while Section 36(2)(c) could be viewed as a 'catch all' exemption, it should be reserved for situations where the prejudice envisaged is not covered by sections 36(2)(a) or (b), or by another exemption.

Section 36 – different to other prejudice based exemptions

Section 36 differs from other prejudice-based exemptions for the following reasons:

- it can only be engaged if the "**reasonable opinion of a qualified person**" has been given and that opinion is that

disclosure of the information would or would be likely to have one of the effects listed in section 36(2). The only circumstances in which the reasonable opinion is not required are in relation to statistical information (see the section on Statistical information below).

- When investigating a section 50 complaint about the application of section 36, the Commissioner does not have to agree with the level of prejudice stated in the qualified person's opinion, or that the opinion is correct – only that it is a 'reasonable opinion'. In that sense there is a lower threshold for engaging section 36 in comparison to other exemptions, and it is likely that in most cases we will find the exemption is engaged. However, it is a qualified exemption, which means that it is subject to the public interest test.

Main principles of section 36

The key messages to a public authority in the section 36 guidance are:

- Know who your qualified person is;
- Keep a full record of the process when you seek the qualified person's opinion;
- Be clear about which subsection of section 36 is engaged and why;
- State whether the prejudice 'would' occur, or 'would be likely to occur';
- Give proper consideration to the public interest test (unless the public authority is the Houses of Parliament, in which case the exemption is absolute).

These are good principles for all parts of the office to bear in mind when considering the application of section 36, whether from an investigations point of view, or a compliance point of view.

The ICO investigation of the application of any of the exemptions provided by section 36(2) will consider the following:

1. For the exemption to be engaged, the Commissioner must conclude that the qualified person gave the opinion, and that the opinion was objectively reasonable.

2. Once it is established the exemption is engaged, the Commissioner will consider the public interest test. Information must be disclosed if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

The qualified person

The 'qualified person' is specified in the Act itself (at section 36(5)) or by the authorisation of a minister. A Minister may authorise the public authority itself, or any officer or employee of the authority to be the qualified person. Where the qualified person is the public authority itself rather than a specific post, this means the highest decision-making body within the authority.

There isn't a definitive list of everyone authorised as a qualified person, but if there is any doubt then it is for the public authority to demonstrate that the person who gave the opinion is properly authorised. Contrary to the usual rule that powers can be delegated (for example, at the ICO, the Commissioner does not personally sign every decision notice), the opinion must actually come from the qualified person.

One of the first things you need to do is check that the opinion comes from the properly authorised qualified person. If the opinion is given by someone else, section 36 will not be engaged.

Test yourself 1

- a. Manchester City Council claims section 36(2)(b)(ii) based on an opinion given by the Deputy Chief Executive. Could they be the qualified person?
- b. First Contact receive a call from a public authority that wants to know who its qualified person is. The public authority is not listed in section 36(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. What advice should be given to the public authority?

The qualified person's opinion is required to engage the exemption. If a public authority claims section 36, but the opinion has not been provided by the correct qualified person, the exemption cannot

apply. The qualified person should give their opinion within 20 days in order to engage the exemption but if they have not done so, the internal review is an opportunity to correct this.

Proof of the qualified personal's opinion

Read

Case work advice note 001

Pro-forma for the record of the qualified person's opinion

As a matter of good practice, public authorities should keep a record of the qualified person's opinion in case of a complaint to the ICO.

Case officer tips

When investigating a section 36 case we require to see a record of the qualified person's opinion. This is in order to:

- confirm that the qualified person did actually give an opinion;
- establish what that opinion was; and
- assist us in deciding whether it was a reasonable opinion to hold, particularly if there are some doubts or uncertainty about its reasonableness

It is not to assess whether the opinion was reasonably arrived at.

It is good practice for public authorities to keep a record of the process by which the qualified person's opinion was sought and obtained. In reality, some public authorities won't record information in this way, but we require some evidence of how the opinion was given and what it was.

If the public authority has no record of the submission or the qualified person's opinion, we would accept a statement signed by the qualified person stating whether they saw the information in question, what factors they took into account and what their opinion was and when they gave it. A public authority can use the pro-forma on our website to provide us with this information.

Test yourself 2

Read the following extract. Do you think the public authority has provided adequate evidence of the qualified person's opinion? What advice would you give the public authority?

As part of the investigation for a section 50 complaint under the Act, a council informed the ICO that the qualified person met with the Scrutiny and Partnership Manager at some time between 31 May and 8 June 2011 to discuss the request. While no formal record of this meeting was kept, the council considers that its refusal notice in response to the request summarised the deliberations of the qualified person.

Reasonable opinion

The opinion provided by the qualified person must be 'reasonable'. In deciding whether an opinion is 'reasonable', the ICO will consider its plain meaning—

Reasonable: 'in accordance with reason; not irrational or absurd' (*Shorter Oxford English Dictionary* definition)

In considering whether an opinion is reasonable, the following should be considered (note: this is not an exhaustive list of factors to consider):

- Whether the nature of the prejudice identified in the opinion relates to the specific subsection of section 36(2) that is being claimed. If the opinion is not related to the specific subsection, the opinion is unlikely to be reasonable. It is not acceptable for the public authority to rely solely on a 'blanket' ruling; the opinion must be reasonable in the circumstances of the specific requests.
- The nature of the information and the timing of the request - for example whether the request concerns an important on-going issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of or involvement in the issue. We should also give some recognition to the fact the qualified person should be in a position to make a reasonable decision because of the seniority of their role.

The guidance goes into more detail on what constitutes a 'reasonable opinion' – but key things to remember are that for the opinion to be reasonable, it does not have to be 'correct', or the *only* or *most* reasonable opinion that could be held on the subject. We do not have to agree with or believe the opinion; we only have to accept that a reasonable person could hold it. This is in contrast to our approach to other prejudice-based exemptions, where we have to accept that the test of prejudice derived from *Hogan*¹ is satisfied, and, if we do not, the exemption is not engaged. In the case of section 36, we may disagree that the prejudice test is satisfied but we may nevertheless accept that a reasonable person could hold a different opinion to ours. This in effect means that the threshold for finding section 36 to be engaged is lower.

It is likely that the opinion will not be reasonable where it is clear that the prejudice identified by the qualified person in their opinion does not relate to the subsection of section 36 being claimed. The guidance goes into more detail on what types of arguments might be raised in relation to each subsection of section 36(2).

In reality, the threshold for finding the qualified person's opinion 'reasonable' is likely to be met in most cases and therefore, section 36 will be engaged. However, this doesn't automatically mean that the information shouldn't go out - remember that the public interest test needs to be carried out (unless the public authority is the Houses of Parliament).

Test yourself 3

Read the following case examples. Using the guidance and the factors explained above, consider whether the opinion provided is reasonable, and therefore, whether section 36 is engaged in each case. Explain your answers.

a. ICO Decision notice - case FS50407742 (Salford City Council)

¹ See our external guidance on the Prejudice test which refers to *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 & 0030, 17 October 2006)

Salford City Council claimed **section 36(2)(c)** (would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of public affairs) in response to a request for copies of internal manuals, books of procedures, FAQs, and worksheets for the purpose of deciding, or in dealing with claims to Housing Benefit or Council Tax Benefit. The opinion was provided by the Monitoring Officer.

The opinion focused on an exercise carried out by the Council to estimate the resources required to comply with the request. This found that the requested information consisted of 39 benefit manuals and 568 staff notes, running to some 4205 pages. The opinion explained that to comply with the request, it would take an officer an average of 3 minutes to review and scan each page, which would include the time required to make any redactions. Based on the estimate that 210 hours work would be required to comply with the request, the qualified person agreed that the task would be a clear diversion of resources.

b. ICO Decision notice – case FS50314945 (Legal Services Commission)

The Legal Services Commission refused a request for information concerning changes that impacted upon which legal firms were able to carry out prison law work under section 36(2)(b)(i) and (ii). The opinion was provided by the Chief Executive of the public authority. The requested information included draft ministerial submissions. The opinion stated that Ministers expect all submissions to be a frank expression of views, in line with the duty that applies to civil servants to provide appropriate advice to ministers.

The prison law reforms were still being implemented at the time the request was made and even though a decision had been made, the issue was, to some extent, still live.

Level of prejudice

The level of prejudice or inhibition stated can impact on whether the ICO finds an opinion reasonable. As the guidance explains, the qualified person's opinion should be clear on whether the prejudice 'would' occur, or 'would be likely to' occur.

In investigating section 36 cases we have to consider the opinion as stated in relation to whether prejudice would or would be likely to occur, and decide whether or not that was a reasonable opinion to hold. This contrasts with the ICO approach in relation to other exemptions (as described in our external guidance on the Prejudice test), where, if the authority has claimed that the prejudice would occur but failed to demonstrate this level of likelihood, we may still accept that the exemption is engaged on the basis of 'would be likely'.

It might be possible to find that it is unreasonable to think prejudice **would** occur (meaning that the opinion would be unreasonable and section 36 wouldn't be engaged) even though it is reasonable to think that prejudice **would be likely** to occur. However, such cases are likely to be rare.

If the qualified person has not specified how likely they consider the prejudice to be, then the Commissioner will apply the lower test of 'would be likely to'.

The level of prejudice stated will also affect the balance of factors in the public interest test. The greater the likelihood of the prejudice occurring, the greater is the public interest in favour of maintaining the exemption.

Public interest test under section 36

Read:

Guidance on the Public interest test
LTTs on the FOI Policy Knowledge Base

Section 36 is a qualified exemption (except in relation to the Houses of Parliament). As you will know, when an exemption is engaged, a public authority is required to weigh up the public interest factors in favour of maintaining the exemption against those in favour of disclosing the information. Because of the low threshold for

engaging section 36 in comparison to other exemptions, the public interest test plays an important part in deciding whether information should be disclosed.

The qualified person who gives the opinion may also be the person who carries out the public interest test, but does not have to be. However, the opinion and the public interest test shouldn't be conflated. The qualified person's opinion that disclosure would or would be likely to cause prejudice engages the exemption but does not override the separate need for a public interest test.

The qualified person's opinion is nevertheless relevant to the public interest test. The level of prejudice claimed in the qualified person's opinion will be given relevant weight in the public interest test. If the qualified person argued disclosure would prejudice or inhibit, and we accept this as a reasonable opinion – it will have more weight in favour of maintaining the exemption than if they argued disclosure would be likely to prejudice or inhibit.

Relevant public interest arguments

The public interest arguments put forward in favour of maintaining the exemption should relate to the interests that subsection of section 36(2) intends to protect. The weight of those arguments will depend on the severity and impact of the prejudice or inhibition and the likelihood (including the frequency) of its occurring. We also take into consideration the timing of the request in relation to the subject of the information.

The FOI Policy Knowledge Base has a range of detailed LTTs on factors we might consider when considering the public interest test that are relevant to section 36, these include 'chilling effect', record keeping arguments, 'safe space' arguments and advice to decision makers. The guidance on section 36 discusses these arguments in relation to section 36(2).

Test yourself 4

Read the following examples. In each case, assume the qualified person's opinion is reasonable - do you think the public interest favours the maintenance of the exemption or disclosure of the information? Explain how you've reached your answer.

Test yourself 4 - Example (a)

The Department for Education (DfE) received a request for the proposal form to set up a free school. This was one of the first proposals to set up free schools. At the time of the request, the DfE had approved the initial application, and the proposers had submitted a more detailed business case and plan, but the DfE has not made a final decision on the application. If an application is approved there is a statutory consultation process before the Secretary of State makes the final decision.

The DfE withheld the form under section 36(2)(c). The basis for this opinion was that disclosure would be likely to prejudice the approval process of Free School applications, together with the future operation of the Free Schools programme by discouraging future potential applicants. Prejudice to these processes would amount to prejudice to the effective conduct of public affairs.

The Commissioner accepted that it was a reasonable opinion that disclosure would be likely to prejudice the effective conduct of public affairs.

The Commissioner considered the following arguments in the public interest test:

For disclosing the information:

- There is a general public interest in transparency and in understanding how decisions which could affect people's lives are taken. This contributes to an ability to hold the government to account.

- There was a specific public interest in the free schools programme because it represented a change in national educational policy. There was therefore a need for transparency about the programme and the approval process. The weight of this argument was increased because the information concerned the education of children and involved a significant expenditure of public money, and because this was one of the first proposals.

- The free schools programme generated significant debate and disclosure of this information would inform that debate.

- Disclosure of the information would help those directly affected by this proposal to have an informed debate and to make representations to the council or their MP.

For maintaining the exemption:

- If the proposal were turned down, placing information about a failed proposal in the public domain might lead to negative publicity for the proposers and deter them from making a subsequent proposal. It would not be in the public interest to discourage a future potentially valid proposal.

- Placing a proposal form in the public domain before a final decision had been made could cause to a breakdown of trust between the DfE and other potential proposers and it is likely that proposers would be less candid in future. This would be likely to adversely affect the application process.

- Placing a proposal form in the public domain at this stage would also be likely to deter some future proposers altogether, which means that potentially valid proposals would be lost.

Test yourself 4 - Example (b)

West Berkshire District Council refused a request for the names of members of the Assessment Sub-Committee, which took a decision not to investigate a complaint made against a councillor, under section 36(2)(c), as disclosure would be likely to prejudice the effective conduct of public affairs.

The Scrutiny and Partnership Manager provided the opinion between 31 May and 8 June. While there was no formal record of the qualified person's opinion, during the course of the ICO's investigation the council provided a signed statement from the qualified person to confirm his opinion had been given. The opinion stated that section 36(2)(c) applied because disclosure would be likely to lead to a further round of "needless and unreasonable" complaints directed against the members of the committee when they had already

considered the issue, which may affect their willingness to perform their public function; and the consideration of escalated complaints is time consuming and expensive to administer.

The Commissioner found that it was reasonable for the qualified person to conclude that the council's ability to provide an effective public service would be likely to be prejudiced as a result of the disruption potentially created by the release of the requested information.

The Council put forward the following arguments for maintaining the exemption:

- Disclosure of the names of the members on the committee would be likely to invite complaints about them and it might open up the possibility that the council would have to revisit matters that had already been considered. Ultimately, this could lead to the diversion of the council's resources from areas that had a greater benefit to the public it serves, which would not be in the public interest.
- The council would not be able to operate a process which could be shown to be free of bias if the members of an Assessment Sub-Committee could be approached directly and repeatedly by a complainant, and that this would not be in the public interest.
- The council has a duty of care to those persons who work with and for it. As such, steps should be taken to protect individuals from harassment as far as it would be reasonable to do so. This has particular resonance where an individual has been asked to judge on a complaint because of the probability that the complaint will not be resolved to everyone's satisfaction.

In considering the public interest arguments in favour of disclosure, the council acknowledged the need for transparency in its decision making processes. However, it argued that this transparency had been achieved by publishing the names of all the members of the Standards Committee, from which the relevant members of the Assessment Sub-Committee are drawn. Furthermore, the complainant had been informed of the political balance of the committee. Therefore, the council considered that the public

interest in transparency and accountability has been satisfied; to go further would in all likelihood only serve to disrupt the Council.

Internal Review

Public authorities should carry out an internal review if an applicant is dissatisfied with the authority's first response to their request. The internal review gives the public authority the chance to make a fresh decision based on all the available evidence that is relevant to the situation at the date of the request. Where the public authority has withheld information under section 36, the internal review allows the qualified person to reconsider their opinion and allows the public authority to reassess the public interest test.

While the qualified person should take the opportunity to reconsider their opinion, we recognise that in some cases they may be unwilling to do so. However, this does not mean that a public authority should not carry out an internal review; at the very least they should reconsider the public interest test.

Case example

ICO Decision Notice: FS50349124 (West Yorkshire Police Authority)

In this case, the public authority had refused the applicant's request for an internal review as it did not believe that this would be "*credible*" due to the requirement that section 36 can only be cited where the opinion of a senior official within the public authority is that the exemption is engaged.

The Commissioner noted in the Other Matters section of the decision notice:

The position of the public authority appears to be that it would not be conceivably possible for a less senior member of staff to overturn the decision of the Chair that the information should be withheld.

The view of the Commissioner is that it should be possible to carry out a credible internal review where section 36 has been cited. Consideration of the balance of the public interest should be separate to the opinion of the QP; therefore, an internal review that considers whether the correct conclusion was reached as to the balance of the public interest need not comment on the qualified person's opinion.

Statistical information – section 36(4)

The qualified person's opinion is not required if the requested information being withheld under section 36(2) is 'statistical'. The public authority should still explain why section 36(2) applies, but they do not need to seek the qualified person's opinion.

Caseworkers will need to be satisfied that the information is 'statistical'. LTT52 on the FOI Policy Knowledge Base explains the ICO interpretation of statistical information. Although LTT52 is specifically in relation to section 35, the same principles are relevant to the interpretation of 'statistical information' under section 36(4).

Case example

ICO Decision Notice: FS50348636 (The School Food Trust)

In this case, the public authority refused a request for the costs of ingredients for primary school meals under section 36(2)(c). The public authority also claimed that the information was statistical. In assessing whether it was statistical, the Commissioner looked at the definition set out in the guidance issued by the Ministry of Justice, and relied upon by the Tribunal in *DWP v ICO* (EA/2006/0040, 5 March 2007). This states that:

"Statistical information used to provide an informed background to government policy and decision making or in ministerial communications will usually be founded upon the outcomes of mathematical operations performed on a sample of observations or some other factual information. The scientific study of facts and other observations allows descriptive approximations, estimates, summaries, projections, descriptions of relationships between observations, or outcomes of mathematical models, and so on, to

be derived.

A distinguishing feature of statistical information is that it is founded to at least some degree on accepted scientific or mathematical principles. Statistical information is therefore distinguished by being (i) derived from some recorded or repeatable methodology, and (ii) qualified by some explicit or implied measures of quality, integrity, and relevance.

This should not imply that the term 'statistical information' only applies to where standards of methodology and relevant measures are particularly high. What distinguishes statistical information is that the limitations of the methodology, and the relevant measures of quality, and so on, allow for a rational assessment of the validity of the information used as an informed background to the formulation and development of government policy."

Our view is that 'statistical information' means the following:

- the product of mathematical or statistical analysis;
- the analytical model or method used;
- the data fed into the analytical model.

But it is not simply a view or opinion that happens to be expressed numerically.

In this case the withheld information consists of factual information provided by local authorities, showing how much each spent on the ingredients for primary school meals. This information was intended to be used for (amongst other things) the Trust's 'Annual Survey of take up of school meals in England'. This included statistical information on the costs of school meals and percentage increases in ingredients costs. Bearing this in mind the Commissioner is satisfied that the outstanding withheld information is statistical information.

Case studies

The following exercises are aimed at consolidating most of the issues on section 36 into two examples based on actual cases and a series of questions of the type that anyone dealing with section 36 may be asked. You should refer back to the guidance, CWANs and LTTs for assistance.

Exercise 1

Adapted from decision notice FS50371162 (Nottingham City Council)

The request

On 29 November, the applicant requested:

'all written communications including emails and any associated documents to and from named individuals relating to processes and procedures for FOI requests.'

On 10 June 2011, the public authority provided a refusal notice, withholding the information under section 36(2)(b)(i) and (ii). On 12 June 2011 the applicant requested an internal review. On 1 July, the public authority provided its internal review, stating that its position was the same, and apologising for the delay in responding to the original request, acknowledging that it was a breach of s10(1).

During the course of the Commissioner's investigation the Council disclosed some of the information it had previously withheld; the information it disclosed included an email from the Deputy Chief Executive giving details of the new internal FOI procedures. The Council continued to withhold five internal emails under section 36(2)(b)(i) and (ii).

The qualified person's opinion

The qualified person's opinion was given on 10 June 2011 by the council's Director of Legal and Democratic Services who is also its Monitoring Officer. This was at the same time as the initial response was provided and before the completion of the internal review.

During the course of his investigation the Commissioner contacted the council and requested details of the information and evidence considered by the qualified person in arriving at his opinion that

disclosure of the requested information would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation. He also requested a copy of the qualified person's opinion.

The council responded by providing the Commissioner with a copy of the qualified person's opinion which it subsequently quoted verbatim in its final refusal notice issued to the complainant on 9 September 2011.

The qualified person considered all of the withheld information when arriving at his conclusion. He also considered evidence from the council's Information Governance Officer in relation to the emails she sent. The qualified person's opinion considered evidence as to how the processes listed in section 36(2)(b)(i) and (ii) in relation to proposed changes to the freedom of information processes would be inhibited by disclosure.

The qualified person notes in his opinion that the advice provided and views exchanged were expressed in a strong and forceful manner. He therefore concludes that if the officers concerned (including himself) knew that such advice and views could be made public there was a real likelihood that they would be inhibited from further participation in the debate which could be detrimental to the effective management of the council's functions.

The complainant does not agree with the qualified person's conclusion. He argues that by virtue of the council's Disposal and Retention Schedule v3 March 2009, council officers could not claim not to know that their emails relating to its business might be disclosed at some stage in the future. In particular, he refers to paragraph 12.2 which states that messages relating to or evidence of council business should be managed appropriately by employees as they may need to be disclosed at some future date e.g. for a freedom of information request.

Part A – Are the relevant sub-sections of section 36 engaged? On the basis of the information above, consider whether the opinion was given by the 'qualified person', and whether it is reasonable.

Public interest arguments in favour of disclosure

The council accept that there is a clear public interest in it 'having transparent systems supporting decisions on the way its functions are delivered'.

The complainant believes that there is a public interest in knowing the advice provided and views exchanged by councillors and senior council officers regarding the development and implementation of new sign-off processes and procedures for dealing with freedom of information requests. The complainant believes that by knowing this information the public would be able to understand why the council felt it necessary to introduce a new process and also form an opinion as to whether the changes would improve the previous one.

The complainant also believes that there is a public interest in knowing that all facets of the new process had been properly considered and any concerns considered and addressed.

Public interest arguments in favour of maintaining the exemption under section 36(2)(b)(ii)

The council has argued that it would be detrimental to the effective management of its functions if its staff were inhibited from addressing difficult issues and expressing the necessary and frank views in relation to them if they knew there was a real likelihood that their comments would be made public. The council has also argued that if staff knew their comments would be made public there was a real likelihood that they would be inhibited from further participation in debate which could also be detrimental to the effective management of the council's functions. In the present case the council has argued that the views expressed by its officers and councillors were clearly linked to proposed changes to the administrative arrangements for dealing with freedom of information requests. Furthermore, such comments were linked to the deliberations concerning the details of those arrangements.

Part B – Should the information be disclosed? Consider the public interest test arguments given above in favour of maintaining the exemption and in favour of disclosure. Explain where you think the balance of public interest lies and why.

Exercise 2
Adapted from decision notice FS50399720 (Ealing Council)

The request

On 30 May 2011, the council received a request for the report into the theft of a laptop, which resulted in them receiving a civil monetary penalty of £80,000 from the ICO. At the time the report was produced, the civil monetary penalty notice had not been served, although the notice of intent had been issued.

On 2 June, the council responded by directing the applicant to the civil monetary penalty (CMP) notice on the ICO's website. On the same day, the applicant contacted the council to advise them he wanted the council's own report into the incident.

On 8 June, the council provided a refusal notice, claiming section 36(2)(b)(i) and (ii). The applicant requested an internal review. The internal review upheld the application of section 36(2)(b)(i) and (ii) and that the public interest favoured maintaining the exemption.

The qualified person's opinion

The opinion was provided by the monitoring officer, before the refusal notice was provided to the applicant. The qualified person had been involved in advising on the legal position on the incident which led to the report.

The qualified person's opinion was summarised in the decision notice as follows:

The withheld report was prepared in December 2010, in anticipation of the ICO CMP notice (eventually issued in February 2011). The report represented best practice, as a mature organisation sought to understand and learn from its mistakes. The report took the form of an update, summarising the data breach, the remedial action taken and liaison between the council and the ICO. Whilst the report is high level, the council considered that it contained sufficient detail to enable informed discussion by its intended audience (the Corporate Board).

In formulating their opinion, the qualified person took the view that the withheld report would not have been either useful or effective if it had been written in anticipation of possible public disclosure. Had the authors believed that the report would be disclosed, the report

would have been so bland and uninformative as to be useless for the purpose of informing the Corporate Board; both in terms of the errors made and steps taken to prevent a recurrence. It was important that the report was full and frank to enable Corporate Board members to challenge and question the content. The qualified person concluded that disclosure of the report would result in future reports being less free and frank, with the effect that a target audience would be less able to consider, advise upon and implement the best way forward for the council. The qualified person concluded that disclosure of the report "would or would be likely to inhibit the free and frank provision of advice."

Although the Council claimed that both sub-sections b(i) and b(ii) were engaged, the qualified person's opinion appears to relate mainly to the provision of advice under b(i). The Commissioner's analysis of the opinion and the public interest test also focussed on inhibition to the free and frank provision of advice.

Part A - Is the exemption in section 36(2)(b)(i) engaged?

Public interest in favour of maintaining the exemption

The council has argued that, whilst there is a public interest in transparency around how the council managed the data protection incident, disclosure of the internal methods used to minimise the risk would expose the council to further risk. This would defeat the primary objective of these activities, namely securing adequate data security.

In relation to the specific details of the withheld information, the council has argued that disclosure would be likely to result in future inhibition in relation to the giving of advice. This so-called 'chilling effect' describes scenarios where disclosure of information created as part of an advice-giving process results in advisors/those participating in the advice process being less likely to be free and frank in their future contributions. In this case, the council has argued that disclosure would result in future advice being so bland and uninformative as to be unfit for the purpose of facilitating decisions. This would hinder the decision-making process and, thus, affect the council's ability to function effectively.

The council has also argued that, in view of the sensitivity of the data associated with the security incident, disclosure of any further details about this matter would result in needless distress being

caused to individuals. Even without explicit details being made available, the publicising of the potential for sensitive personal data to be accessed by unauthorised parties would create unnecessary alarm.

In a similar way, disclosure and any ensuing publicity would also alert those responsible for the theft of the laptop to the nature of the stored information. This could increase the risk of the information being accessed and understood.

Public interest in favour of disclosing the information

The council has only provided generic public interest arguments in favour of disclosure, namely that it would promote better government through: transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.

The Commissioner considers that disclosure would show that the council has confidence in its decision making processes. It would also contribute to public understanding of the issues documented in the publically-available CMP notice.

More specifically, the Commissioner considers that disclosure would demonstrate to the public that the council has taken robust steps to address the security implications of the incident and that measures have been put in place to ensure that there is not a recurrence. This would improve public confidence in the workings of the council.

Part B – Should the information be disclosed? Consider the public interest test arguments in favour of maintaining the exemption against those in favour of disclosure. Explain where you think the balance of the public interest lies and why.

Exercise 3

Common issues and problems

1. The ICO receive a complaint about a request that had been refused. In the course of the Commissioner's investigation, the public authority claims section 36 for the first time. Do we accept the late claim of section 36?
2. In the course of the Commissioner's investigation, it becomes apparent that the public authority has claimed section 36 but has not obtained the qualified person's opinion. What should the caseworker advise the public authority to do?
3. The public authority has not provided any evidence of the qualified person's opinion to the Commissioner. What should the case worker ask the public authority to do?
4. A case officer doesn't think the qualified person's opinion is believable, and therefore doesn't think that section 36(2) is engaged. Explain what advice his manager should give him.
5. A central government department refused a request under section 36(2). The requester wants an internal review of the decision. The department's minister advises that his opinion is the same as it was when he gave it originally, and that he will not consider changing his mind. An official calls the helpline as they are not sure whether they can carry out a meaningful internal review. What advice would you give them?

Appendix

Suggested Answers to Questions and Exercises

Test yourself 1 - Qualified person

- a. To find out who the qualified person for a local authority is, you need to refer to the archived list of qualified persons produced by the Ministry of Justice. The list specifies that for a 'Principal local authorities' (first-tier councils) in England, the qualified person is: the Monitoring Officer; and the Chief Executive.

At first glance, as the Deputy Chief Executive isn't authorised by the Ministry of Justice it would appear that they could not be the qualified person for the purposes of section 36. However, there are two circumstances when it is possible that they could be:

- Check if the Deputy Chief Executive is the Monitoring Officer of the local authority – if so, they are authorised to act as the qualified person.
- If the Deputy Chief Executive is officially 'acting up' as the Chief Executive (for example if there was no Chief Executive in post), they are also authorised to act as the qualified person.

If neither of these situations apply, the ICO would reject the application of section 36.

- b. The public authority needs to ask for an authorisation from a Minister of the Crown, via the appropriate government department. We should direct them to contact the Ministry of Justice at informationrights@justice.gsi.gov.uk.

Test yourself 2 – proof of qualified person's opinion

This would not be enough proof for the purposes of the Commissioner's investigation. While the opinion might be reasonable, as explained in the caseworker tip box above the example, for the purposes of the complaint, as a minimum, we would need to see more evidence of the opinion. This could be the completed pro-forma, or else, a signed statement from the qualified

person giving the same information. This should include the date when they gave the opinion, which is not clear in the example given here.

Test yourself 3 – reasonable opinion

- a. In this case, we did not accept the qualified person's opinion was reasonable. There appears to be a misunderstanding about what the exemption covers. Section 36(2)(c) solely relates to the prejudice to the effective conduct of public affairs that would arise as a result of disclosure of the information. It does not, as the council suggests, concern the process of collating and scrutinising information in the lead up to a decision regarding what, if any, information should be disclosed in response to a request. The arguments presented by the public authority are more properly suited to section 12 of FOIA.
- b. In this case, it is reasonable to think that disclosing a ministerial submission would inhibit free and frank provision of advice, particularly bearing in mind the timing of the request, which was made not long after the announcement. Even if the ICO considers that disclosure of the information in this case would not lead to the inhibition, it doesn't necessarily follow that the contrary view is unreasonable.

Test yourself 4 – public interest test

- a. This is taken from decision notice FS50412840 (Department for Education). The Commissioner found that the balance of the public interest test was in favour of maintaining the exemption for the following reasons (see paragraphs 37-44 of the decision notice for more detail):

Public interest in disclosure:

The Commissioner accepted that there was a strong public interest in increasing public understanding about the free schools programme both locally and nationally. Disclosure would also help the public to participate in the debate about this free school in particular. If the proposal were accepted it would involve the expenditure of large amount of public money and have a potentially significant effect on the education of children in the area.

- Weight of these arguments

The timing of the request was important in weighting this argument. The application had not yet been approved, and so the consultation process had not yet started. The public interest in disclosure would be higher at the time of any consultation.

Public interest in maintaining the exemption:

The Commissioner had already accepted that it was reasonable to think that prejudice to the effective conduct of public affairs would be likely. He went on to consider the severity and the frequency or extent of that prejudice. This was affected by the nature of the information and the timing of the request.

- Weight of these arguments

In relation to the nature of the information, the proposal form contained a significant level of detail. In relation to timing, as noted above, the DfE had not yet approved the proposal. While proposers would expect public scrutiny of their proposals during any subsequent consultation period, they would not expect scrutiny of the detail of their proposal at this stage. Disclosure would be likely to deter unsuccessful proposers from reapplying and other proposers for applying at all. The prejudice would therefore be frequent and potentially widespread.

On this basis the public interest in maintaining the exemption was sufficiently strong to outweigh the public interest in disclosure.

- b. This example was taken from decision notice FS50401571 (West Berkshire Council). The Commissioner decided that the public interest favoured disclosure. His analysis of the public interest arguments was as follows:

Public interest in maintaining the exemption:

Diversion of resources resulting from having to revisit complaints: the Commissioner accepted that any diversion of resources from other areas of work to deal with re-opened issues would not be in the public interest. He gave 'some weight' to this argument.

Possibility of bias if members of the Sub Committee could be approached directly: the Commissioner gave no weight to this, firstly because it was not part of the QP's opinion and secondly because the request was received after the complaint had been dealt with, so the decision on that complaint could not be affected by bias.

Members could be subjected to harassment: the Commissioner gave limited weight to this argument. Complainants are in any case given the names of members of the full Hearing Panel, and the Sub-Committee is drawn from this. Members should expect some level of scrutiny of their decisions and they are expected to be robust in making their decisions.

Preserving the integrity of the complaints procedure: The Commissioner recognised that there is a public interest in this. The Standards Committee, of which the Assessment Sub-Committee is a part, plays an important role in the functioning of the council by ensuring that complaints against councillors are dealt with in a structured and fair way; this in turn promotes public trust in the council.

The Commissioner also noted that concerns that, if the information were disclosed, complainants would approach the Council repeatedly to reopen issues that had been decided, could be dealt with by other means, namely provisions in the complaints procedure or s14 FOIA.

Public interest in disclosure:

The Council had acknowledged a public interest in transparency about its decision making processes. The Commissioner identified more specific arguments for disclosure:

Members should be accountable for the decisions they make.

Disclosure would enable the public to be content that decisions were fair and consistent.

Disclosure would also show that the make-up of the Sub Committee is without bias and there are no conflicts of interest.

While the information already disclosed went some way to satisfying these public interest arguments, it was necessary to disclose the names in order to meet the public interest identified.

The outcome of the public interest test was that the public interest in maintaining the exemption did not outweigh the public interest in disclosure.

Case studies

Exercise 1
Adapted from decision notice FS50371162 (Nottingham City Council)

Part (a) – is section 36(2) engaged – you should consider:

- **was the opinion given by the qualified person as specified in section 36(5)**
Yes. The opinion was provided by the Monitoring Officer who is the correct qualified person
- **was that opinion reasonable?**
Yes. While officers would have a general expectation that emails could be disclosed under FOIA, this does not mean that it was unreasonable to think that disclosing this email correspondence could inhibit the free and frank provision of advice or exchange of views. The decision notice points out that officers would also be aware that disclosure under FOIA is subject to relevant exemptions. The Commissioner found that both b(i) and b(ii) were engaged.

Note that the qualified person's opinion didn't specify whether the prejudice would, or would be likely to occur – therefore, in this case, the Commissioner considered the lower threshold of 'would be likely to'.

Part (b) – should the information be disclosed - i.e. Does the public interest favour disclosure?

The Commissioner found that the public interest in maintaining the exemption outweighed the public interest in disclosure. The

following is a summary of the public interest test in the decision notice.

Public interest in maintaining the exemption

There was a need for views to be exchanged in a free and frank manner to assist with the Council's internal deliberations. The Commissioner had accepted that the qualified person's opinion (that disclosure would be likely to inhibit the free and frank exchange of views) was a reasonable one. The decision notice refers to this as "an important piece of evidence" in the assessment of the balance of the public interest. This meant there was some weight in the case for maintaining the exemption. It was in the public interest to avoid the harm that disclosure would cause to the Council's processes of deliberation.

Public interest in disclosure

Disclosure of the requested information would promote transparency by shedding light on how the council considered the issues and made decisions regarding the changes to its FOI procedures.

Weighing the arguments

The key factor in deciding the balance of public interest was how far the requested information would add to public understanding. In this case the Council had provided the requestor with details of the new sign-off process in response to his FOIA request, in particular in an email from the Deputy Chief Executive. The Commissioner found that disclosure of the additional, withheld information would not add to the public's understanding of how the new procedures were developed and implemented. This reduced the potential weight of the public interest in disclosure.

The Commissioner found that the public interest in avoiding the harm that would be caused by disclosure outweighed the public interest in disclosure.

Accepting that it is reasonable to think that prejudice could occur means that there is some weight in the public interest in maintaining the exemption. In this case this outweighed the public interest in disclosure because the public interest in disclosing this particular information was limited.

Exercise 2
Adapted from decision notice FS50399720 (Ealing Council)

Part A – is the exemption engaged – you should consider:

- **was the opinion given by the qualified person as specified in section 36(5)?**

Yes. The opinion was given by the Monitoring Officer. Monitoring Officers in local authorities are authorised as the qualified person in accordance with section 36(5)(o).

- **and was that opinion reasonable?**

Yes. The reasons for this finding were as follows:

The qualified person did not specify the level of prejudice in this case. The Commissioner therefore considered the opinion in terms of 'would be likely' to inhibit.

The Commissioner's consideration of whether the opinion was reasonable is given at paragraphs 31-33 of the decision notice:

The withheld report consists of an update to the Corporate Board, informing it of actions taken in response to the incident. It seems clear that it therefore constitutes a form of advice. Also, in view of the qualified person's previous involvement in the subject of the report, it is likely that their opinion was based on a sound understanding of the relevant issues.

In relation to the potential for disclosure to result in inhibition, at the time the report was produced, the authors of the report would have been aware of the impending CMP notice and the associated reputational risk and public scrutiny which would ensue. It seems reasonable to conclude that, given the seriousness of the issues, the report writers would have wanted to ensure that the Corporate Board were presented with comprehensive, frank advice.

Whilst, in terms of content, the report is, in the council's own words 'quite high level', it contains sufficient detail to enable appraisal of and discussion around the measures taken in

response to the incident. Having considered the content of the report and the broader context, the Commissioner is satisfied that it was a reasonable opinion that the disclosure of the report would be likely to result in the inhibiting of the free and frank provision of advice. He has, therefore, concluded that the council correctly engaged the exemption.

Part B – should the information be disclosed?

In this case, yes. The balance of public interest was found to be in favour of disclosure. The public interest arguments can be summarised as follows:

Public interest in maintaining the exemption:

Chilling effect: disclosure would result in future advice being bland and uninformative which would hinder the decision-making process which in turn would affect the council's ability to function effectively.

- The weight of this argument was significantly reduced because the information in the report is high-level; it did not contain significantly more detail than was already in the public domain from the CMP and the associated ICO press release. There is further guidance on the effect of information already in the public domain in our external guidance Information in the public domain.
- Furthermore, the chilling effect was reduced because the Council's consideration of the incident had concluded. Decisions regarding actions to be taken after the theft of the laptop and the council's response to the issuing of the CMP notice were not in train at the time of the request. Arguments about a chilling effect on future unrelated discussions carry little weight.

Disclosure would alert those responsible for the theft of the laptop to the nature of the stored information.

This could increase the risk of the information being accessed and understood. The weight of this argument was significantly reduced because of the 'high-level' nature of the report.

Disclosure of the internal methods used to minimise the risk would expose the council to further risk. This is an argument about data security, not the provision of advice. It may be relevant to section 36(2)(c) or possibly to a different exemption such as section 31. It is not relevant to the exemption claimed.

Case officer tip:

In dealing with a case where the public authority raises such arguments, we can tell the authority that they are not relevant to the exemption claimed, but that they may be relevant to other exemptions and give them the opportunity to make additional arguments under these exemptions.

Disclosure would result in needless distress being caused to individuals; even publicising the potential for sensitive personal data to be accessed by unauthorised parties would create unnecessary alarm. Given that the report was not significantly more detailed than information already in the public domain, it was not clear that distress would be caused to individuals. In any case, such arguments are not relevant to the exemption claimed.

Public interest in disclosure

General public interest in transparency: Disclosure would promote transparency, accountability, public debate, better public understanding of decisions and hence informed and meaningful participation of the public in the democratic process.

Public interest in transparency around the issue: Disclosure would inform the public as to how the council managed the data protection incident. It would also contribute to public understanding of the issues documented in the CMP notice. The public interest in knowing how the council managed and responded to the issues documented in the CMP notice is directly linked to the principles of accountability and transparency around decision making.

Public confidence in the council: Disclosure would demonstrate to the public that the council has taken robust

steps to address the security implications of the incident and that measures have been put in place to ensure that there is not a recurrence. This would improve public confidence in the workings of the council.

Effect of other means of scrutiny

The Commissioner considered to what extent the public interest was already met by the ICO's investigation and the information in the published CMP and hence whether the weight of public interest in disclosure of this information was reduced. His conclusion was that while the public interest had already been served to some extent by the ICO's investigation and publication of details relating to the incident, FOIA provides for a different but equivalent right to scrutiny of public authorities. Therefore the fact of the ICO's investigation did not reduce the weight of the public interest in disclosure of this information.

There is a further discussion of the effect of other means of scrutiny in our published guidance on the Public interest test and LTT233

Balance of the public interest

Some of the public interest arguments for the exemption were simply not relevant. Nevertheless, accepting the opinion as reasonable meant that there was some weight in the other arguments for the exemption. However, this weight was severely limited because of the high level nature of the information and the information already in the public domain, and also because of the timing of the request. There were strong public interest arguments for disclosure which outweighed the public interest in maintaining the exemption.

Exercise 3

Common issues and problems

1. The ICO receive a complaint about a refused request. In the course of the Commissioner's investigation, the public authority claims section 36 for the first time. Do we accept the late claim of section 36?

We should accept the late claim of section 36. As LTT21 explains in more detail, a public authority is able to raise a new exemption or exception for the first time either before the Commissioner or the First Tier Tribunal and both must consider any such new claims. The public authority must still seek the opinion of the qualified person, and the application of section 36 should be based on the circumstances at the time the request was made (see LTT92 for more detail). There will be a technical breach of 17(1) for a late citing of the exemption (see LTT63 - Failure to specify an exemption/ exception on which the pa later relies -for more detail on this).

2. In the course of the Commissioner's investigation, it becomes apparent that the public authority has claimed section 36 but has not obtained the qualified person's opinion. What should the caseworker advise them to do?

Two possible outcomes:

a. The case worker could issue a decision notice to find that the exemption is not engaged and order disclosure of the information;

or

b. The most likely action will be for the case worker to ask the public authority to go back and obtain the qualified person's opinion, ensuring that the opinion is based on circumstances at the time that the request was received. This will in effect be a breach of 17(1) as it will amount to a late claim of section 36.

3. The public authority has not provided any evidence of the qualified person's opinion to the Commissioner. What should the case worker ask the public authority to do?

The case worker should ask the public authority to provide documentary evidence of the opinion, including details of when it was given.

If the public authority has no record of the submission or the qualified person's opinion, we would accept a signed statement from the qualified person stating whether they saw the information in question, what factors they took into account and what their opinion was and when they gave it. The case worker should point them to

the pro-forma on our website that public authorities can use to provide us with a record of the qualified person's 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 public authority's word for what happened.

4. A case officer doesn't think the qualified person's opinion is believable and therefore, doesn't think that section 36(2) is engaged. He asks his manager for advice – explain what advice his manager should give him.

The test is not whether we accept, believe 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.

This approach means that it is likely that we will accept that the exemption is engaged in most cases.

The qualified person's 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 as part of the public interest test.

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.

5. A central government department refused a request under section 36(2). The requester wants an internal review of the refusal. The department's minister advises that his opinion is the same as it was when he gave it originally, and that he will not consider changing his mind. An official calls the helpline as they are not sure how to proceed – whether they can carry out a meaningful internal review. What advice would you give them?

The public authority can still carry out an internal review. While we don't expect an official to overturn the decision of the qualified person, they should at least review the public interest test.

FOI advanced training workbook on Section 36

Suggested Answers to Questions and Exercises

Test yourself 1 - Qualified person

- a. To find out who the qualified person for a local authority is, you need to refer to the archived list of qualified persons produced by the Ministry of Justice. The list specifies that for 'Principal local authorities' (first-tier councils) in England, the qualified person is: the Monitoring Officer; and the Chief Executive.

At first glance, as the Deputy Chief Executive isn't authorised by the Ministry of Justice it would appear that they could not be the qualified person for the purposes of section 36. However, there are two circumstances when it is possible that they could be:

- Check if the Deputy Chief Executive is the Monitoring Officer of the local authority – if so, they are authorised to act as the qualified person.
- If the Deputy Chief Executive is officially 'acting up' as the Chief Executive (for example if there was no Chief Executive in post), they are also authorised to act as the qualified person.

If neither of these situations applies, the ICO would reject the application of section 36.

- b. The public authority needs to ask for an authorisation from a Minister of the Crown, via the appropriate government department. We should direct them to contact the Ministry of Justice at informationrights@justice.gsi.gov.uk.

Test yourself 2 – proof of qualified person's opinion

This would not be enough evidence for the purposes of the Commissioner's investigation. While the opinion might be reasonable, as explained in the caseworker tip box above the example, for the purposes

of the complaint, as a minimum, we would need to see more evidence of the opinion. This could be the completed pro-forma, or else, a signed statement from the qualified person giving the same information. This should include the date when they gave the opinion, which is not clear in the example given here.

Test yourself 3 – reasonable opinion

- a. In this case, we did not accept the qualified person's opinion was reasonable. There appears to be a misunderstanding about what the exemption covers. Section 36(2)(c) solely relates to the prejudice to the effective conduct of public affairs that would arise as a result of disclosure of the information. It does not, as the council suggests, concern the process of collating and scrutinising information in the lead up to a decision regarding what, if any, information should be disclosed in response to a request. The arguments presented by the public authority are more properly suited to section 12 of FOIA.
- b. In this case, it is reasonable to think that disclosing a ministerial submission would inhibit free and frank provision of advice, particularly bearing in mind the timing of the request, which was made not long after the announcement. Even if the ICO considers that disclosure of the information in this case would not lead to the inhibition, it doesn't necessarily follow that the contrary view is unreasonable.

Test yourself 4 – public interest test

- a. This is taken from decision notice FS50412840 (Department for Education). The Commissioner found that the balance of the public interest test was in favour of maintaining the exemption for the following reasons (see paragraphs 37-44 of the decision notice for more detail):

Public interest in disclosure:

The Commissioner accepted that there was a strong public interest in increasing public understanding about the free schools programme both locally and nationally. Disclosure would also help the public to participate in the debate about this free school in particular. If the proposal were accepted it would involve the expenditure of large amount of public money and have a potentially significant effect on the education of children in the area.

- Weight of these arguments

The timing of the request was important in weighting this argument. The application had not yet been approved, and so the consultation

process had not yet started. The public interest in disclosure would be higher at the time of any consultation.

Public interest in maintaining the exemption:

The Commissioner had already accepted that it was reasonable to think that prejudice to the effective conduct of public affairs would be likely. He went on to consider the severity and the frequency or extent of that prejudice. This was affected by the nature of the information and the timing of the request.

- Weight of these arguments

In relation to the nature of the information, the proposal form contained a significant level of detail. In relation to timing, as noted above, the DfE had not yet approved the proposal. While proposers would expect public scrutiny of their proposals during any subsequent consultation period, they would not expect scrutiny of the detail of their proposal at this stage. Disclosure would be likely to deter unsuccessful proposers from reapplying and other proposers for applying at all. The prejudice would therefore be frequent and potentially widespread.

On this basis the public interest in maintaining the exemption was sufficiently strong to outweigh the public interest in disclosure.

- b. This example was taken from decision notice FS50401571 (West Berkshire Council). The Commissioner decided that the public interest favoured disclosure. His analysis of the public interest arguments was as follows:

Public interest in maintaining the exemption:

Diversion of resources resulting from having to revisit complaints: the Commissioner accepted that any diversion of resources from other areas of work to deal with re-opened issues would not be in the public interest. He gave 'some weight' to this argument.

Possibility of bias if members of the Sub Committee could be approached directly: the Commissioner gave no weight to this, firstly because it was not part of the QP's opinion and secondly because the request was received after the complaint had been dealt with, so the decision on that complaint could not be affected by bias.

Members could be subjected to harassment: the Commissioner gave limited weight to this argument. Complainants are in any case given the names of members of the full Hearing Panel, and the Sub-

Committee is drawn from this. Members should expect some level of scrutiny of their decisions and they are expected to be robust in making their decisions.

Preserving the integrity of the complaints procedure:

The Commissioner recognised that there is a public interest in this. The Standards Committee, of which the Assessment Sub-Committee is a part, plays an important role in the functioning of the council by ensuring that complaints against councillors are dealt with in a structured and fair way; this in turn promotes public trust in the council.

The Commissioner also noted that concerns that, if the information were disclosed, complainants would approach the Council repeatedly to reopen issues that had been decided, could be dealt with by other means, namely provisions in the complaints procedure or s14 FOIA.

Public interest in disclosure:

The Council had acknowledged a public interest in transparency about its decision making processes. The Commissioner identified more specific arguments for disclosure:

Members should be accountable for the decisions they make.

Disclosure would enable the public to be content that decisions were fair and consistent.

Disclosure would also show that the make-up of the Sub Committee is without bias and there are no conflicts of interest.

While the information already disclosed went some way to satisfying these public interest arguments, it was necessary to disclose the names in order to meet the public interest identified.

The outcome of the public interest test was that the public interest in maintaining the exemption did not outweigh the public interest in disclosure.

Case studies

Exercise 1
Adapted from decision notice FS50371162 (Nottingham City Council)

Part (a) – is section 36(2) engaged – you should consider:

- **was the opinion given by the qualified person as specified in section 36(5)**
Yes. The opinion was provided by the Monitoring Officer who is the correct qualified person
- **was that opinion reasonable?**
Yes. While officers would have a general expectation that emails could be disclosed under FOIA, this does not mean that it was unreasonable to think that disclosing this email correspondence could inhibit the free and frank provision of advice or exchange of views. The decision notice points out that officers would also be aware that disclosure under FOIA is subject to relevant exemptions. The Commissioner found that both b(i) and b(ii) were engaged.

Note that the qualified person's opinion didn't specify whether the prejudice would, or would be likely to occur – therefore, in this case, the Commissioner considered the lower threshold of 'would be likely to'.

Part (b) – should the information be disclosed - i.e. Does the public interest favour disclosure?

The Commissioner found that the public interest in maintaining the exemption outweighed the public interest in disclosure. The following is a summary of the public interest test in the decision notice.

Public interest in maintaining the exemption

There was a need for views to be exchanged in a free and frank manner to assist with the Council's internal deliberations. The Commissioner had accepted that the qualified person's opinion (that disclosure would be likely to inhibit the free and frank exchange of views) was a reasonable one. The decision notice refers to this as "an important piece of evidence" in the assessment of the balance of the public interest. This meant there was some weight in the case for maintaining the exemption. It was in the public interest to avoid the harm that disclosure would cause to the Council's processes of deliberation.

Public interest in disclosure

Disclosure of the requested information would promote transparency by shedding light on how the council considered the issues and made decisions regarding the changes to its FOI procedures.

Weighing the arguments

The key factor in deciding the balance of public interest was how far the requested information would add to public understanding. In this case the Council had provided the requestor with details of the new sign-off process in response to his FOIA request, in particular in an email from the Deputy Chief Executive. The Commissioner found that disclosure of the additional, withheld information would not add to the public's understanding of how the new procedures were developed and implemented. This reduced the potential weight of the public interest in disclosure.

The Commissioner found that the public interest in avoiding the harm that would be caused by disclosure outweighed the public interest in disclosure.

Accepting that it is reasonable to think that prejudice could occur means that there is some weight in the public interest in maintaining the exemption. In this case this outweighed the public interest in disclosure because the public interest in disclosing this particular information was limited.

Exercise 2

Adapted from decision notice FS50399720 (Ealing Council)

Part A – is the exemption engaged – you should consider:

- **was the opinion given by the qualified person as specified in section 36(5)?**

Yes. The opinion was given by the Monitoring Officer. Monitoring Officers in local authorities are authorised as the qualified person in accordance with section 36(5)(o).

- **and was that opinion reasonable?**

Yes. The reasons for this finding were as follows:

The qualified person did not specify the level of prejudice in this case. The Commissioner therefore considered the opinion in terms of 'would be likely' to inhibit.

The Commissioner's consideration of whether the opinion was reasonable is given at paragraphs 31-33 of the decision notice:

The withheld report consists of an update to the Corporate Board, informing it of actions taken in response to the incident. It seems clear that it therefore constitutes a form of advice. Also, in view of the qualified person's previous involvement in the subject of the report, it is likely that their opinion was based on a sound understanding of the relevant issues.

In relation to the potential for disclosure to result in inhibition, at the time the report was produced, the authors of the report would have been aware of the impending CMP notice and the associated reputational risk and public scrutiny which would ensue. It seems reasonable to conclude that, given the seriousness of the issues, the report writers would have wanted to ensure that the Corporate Board were presented with comprehensive, frank advice.

Whilst, in terms of content, the report is, in the council's own words 'quite high level', it contains sufficient detail to enable appraisal of and discussion around the measures taken in response to the incident. Having considered the content of the report and the broader context, the Commissioner is satisfied that it was a reasonable opinion that the disclosure of the report would be likely to result in the inhibiting of the free and frank provision of advice. He has, therefore, concluded that the council correctly engaged the exemption.

Part B – should the information be disclosed?

In this case, yes. The balance of public interest was found to be in favour of disclosure. The public interest arguments can be summarised as follows:

Public interest in maintaining the exemption:

Chilling effect: disclosure would result in future advice being bland and uninformative which would hinder the decision-making process which in turn would affect the council's ability to function effectively.

- The weight of this argument was significantly reduced because the information in the report is high-level; it did not contain significantly more detail than was already in the public domain from the CMP and the associated ICO press release. There is further guidance on the effect of information already in the

public domain in our external guidance Information in the public domain.

- Furthermore, the chilling effect was reduced because the Council's consideration of the incident had concluded. Decisions regarding actions to be taken after the theft of the laptop and the council's response to the issuing of the CMP notice were not in train at the time of the request. Arguments about a chilling effect on future unrelated discussions carry little weight.

Disclosure would alert those responsible for the theft of the laptop to the nature of the stored information. This could increase the risk of the information being accessed and understood. The weight of this argument was significantly reduced because of the 'high-level' nature of the report.

Disclosure of the internal methods used to minimise the risk would expose the council to further risk. This is an argument about data security, not the provision of advice. It may be relevant to section 36(2)(c) or possibly to a different exemption such as section 31. It is not relevant to the exemption claimed.

Case officer tip:

In dealing with a case where the public authority raises such arguments, we can tell the authority that they are not relevant to the exemption claimed, but that they may be relevant to other exemptions and give them the opportunity to make additional arguments under these exemptions.

Disclosure would result in needless distress being caused to individuals; even publicising the potential for sensitive personal data to be accessed by unauthorised parties would create unnecessary alarm. Given that the report was not significantly more detailed than information already in the public domain, it was not clear that distress would be caused to individuals. In any case, such arguments are not relevant to the exemption claimed.

Public interest in disclosure

General public interest in transparency: Disclosure would promote transparency, accountability, public debate, better public understanding of decisions and hence informed and meaningful participation of the public in the democratic process.

Public interest in transparency around the issue: Disclosure would inform the public as to how the council managed the data protection incident. It would also contribute to public understanding of the issues documented in the CMP notice. The public interest in knowing how the council managed and responded to the issues documented in the CMP notice is directly linked to the principles of accountability and transparency around decision making.

Public confidence in the council: Disclosure would demonstrate to the public that the council has taken robust steps to address the security implications of the incident and that measures have been put in place to ensure that there is not a recurrence. This would improve public confidence in the workings of the council.

Effect of other means of scrutiny

The Commissioner considered to what extent the public interest was already met by the ICO's investigation and the information in the published CMP and hence whether the weight of public interest in disclosure of this information was reduced. His conclusion was that while the public interest had already been served to some extent by the ICO's investigation and publication of details relating to the incident, FOIA provides for a different but equivalent right to scrutiny of public authorities. Therefore the fact of the ICO's investigation did not reduce the weight of the public interest in disclosure of this information.

There is a further discussion of the effect of other means of scrutiny in our published guidance on the Public interest test and LTT233

Balance of the public interest

Some of the public interest arguments for the exemption were simply not relevant. Nevertheless, accepting the opinion as reasonable meant that there was some weight in the other arguments for the exemption. However, this weight was severely limited because of the high level nature of the information and the information already in the public domain, and also because of the timing of the request. There were strong public interest arguments for disclosure which outweighed the public interest in maintaining the exemption.

<p>Exercise 3 Common issues and problems</p>
--

1. The ICO receive a complaint about a refused request. In the course of the Commissioner's investigation, the public authority claims section 36 for the first time. Do we accept the late claim of section 36?

We should accept the late claim of section 36. As LTT21 explains in more detail, a public authority is able to raise a new exemption or exception for the first time either before the Commissioner or the First Tier Tribunal and both must consider any such new claims. The public authority must still seek the opinion of the qualified person, and the application of section 36 should be based on the circumstances at the time the request was made (see LTT92 for more detail). There will be a technical breach of 17(1) for a late citing of the exemption (see LTT63 - Failure to specify an exemption/ exception on which the pa later relies -for more detail on this).

2. In the course of the Commissioner's investigation, it becomes apparent that the public authority has claimed section 36 but has not obtained the qualified person's opinion. What should the caseworker advise them to do?

Two possible outcomes:

a. The case worker could issue a decision notice to find that the exemption is not engaged and order disclosure of the information;

or

b. The most likely action will be for the case worker to ask the public authority to go back and obtain the qualified person's opinion, ensuring that the opinion is based on circumstances at the time that the request was received. This will in effect be a breach of 17(1) as it will amount to a late claim of section 36.

3. The public authority has not provided any evidence of the qualified person's opinion to the Commissioner. What should the case worker ask the public authority to do?

The case worker should ask the public authority to provide documentary evidence of the opinion, including details of when it was given.

If the public authority has no record of the submission or the qualified person's opinion, we would accept a signed statement from the qualified person stating whether they saw the information in question, what factors they took into account and what their opinion was and when they gave it. The case worker should point them to the pro-forma on our website that

public authorities can use to provide us with a record of the qualified person's 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 public authority's word for what happened.

4. A case officer doesn't think the qualified person's opinion is believable and therefore, doesn't think that section 36(2) is engaged. He asks his manager for advice – explain what advice his manager should give him.

The test is not whether we accept, believe 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.

This approach means that it is likely that we will accept that the exemption is engaged in most cases.

The qualified person's 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 as part of the public interest test.

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.

5. A central government department refused a request under section 36(2). The requester wants an internal review of the refusal. The department's minister advises that his opinion is the same as it was when he gave it originally, and that he will not consider changing his mind. An official calls the helpline as they are not sure how to proceed – whether they can carry out a meaningful internal review. What advice would you give them?

The public authority can still carry out an internal review. While we don't expect an official to overturn the decision of the qualified person, they should at least review the public interest test.