



Information Commissioner's Office
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INFORMATION COMMISSIONER

Understanding the formulation and development of government policy in the context of FOI: invitation to bid

Outline

The Information Commissioner is inviting bids to research and produce a report to further his understanding of government policy making in the context of freedom of information. The end product will be a report which will need to be complete by March 2009.

Aim

The aim of the project is to research and produce a study of policy formulation and development in central government, to assist in the further development of the Commissioner's policy framework for casework related to the exemption under section 35(1)(a) of the Freedom of Information Act 2000 - *information which relates to the formulation or development of government policy.*

Background

Since 2005 the Commissioner has issued a number of formal decision notices that have considered information withheld under section 35(1)(a) of the Freedom of Information Act. A number of his decisions have also been appealed to the Information Tribunal. Section 35 is a qualified exemption, which means that even if information is exempt a public authority must consider whether the public interest in maintaining the exemption outweighs disclosure. When assessing cases where a government department has claimed the exemption the Commissioner must first consider whether the information requested falls within the definition in the exemption and if it does then go on to consider the public interest test, this will include a consideration of what the effects of disclosure will be and public interest factors in favour of disclosure.

In order to continue to issue authoritative Decision Notices on section 35, it is necessary for Commissioner to properly understand, in some detail, the context in which policy making takes place and process by which government policy is formulated and developed. This understanding will assist with both establishing

if the exemption is engaged or not and weighing of the public interest test in section 35(1)(a) cases.

Having reviewed his experience to date the Commissioner wishes to carry out a research project to enhance his knowledge of some of the issues that have arisen out of casework involving section 35(1)(a).

A review of cases to date has identified that the section 35(1)(a) exemption has been claimed for information relating to different kinds or levels of policy (e.g. “high level” policy such as the decision to introduce an identity card scheme, and “lower level” policy such as the mechanics of how to revise funding distribution in schools).

It has also identified that, although the wording of the exemption appears to envisage a process whereby a policy moves through clearly defined sequential stages of policy formulation, development and implementation, in reality the process may not be so clearly defined. Government departments have argued that policy formulation, development and implementation all feed into each other to form an ongoing “seamless web” of policy formulation and development. The Commissioner’s approach to section 35 currently focuses on stage the process has reached, generally seeking to identify a point at which a substantive policy decision is made. The Information Tribunal (e.g. in the DfeS decision EA/2006/006) have suggested that distinction between the stages can and should be drawn

There is also a need to explore in more detail what can be characterised as Government policy as opposed to just policy, For example, whether involvement by cabinet ministers is an essential ingredient.

The new focus on delivery in modern government and the relatively recent development of greater involvement by Ministers in managing delivery can make the identification of information falling with the exemption difficult.

The Commissioner and the Tribunal have also considered the issues of the effects of disclosing information relating to government policy formulation and development. In particular there has been consideration of:

- The wider “chilling effect” of disclosure on the giving of free and frank advice
- The wider impact of disclosure on record keeping and use of non-recorded methods for giving advice

To date the Tribunal and Commissioner have been dismissive of “chilling effect” arguments and suggested effects on record keeping and have rejected these arguments in many decisions but have accepted them in certain scenarios. Mitting J in the recent ECGD High Court judgement commented that chilling

effect arguments put forward by such people such as Lord Turnbull (ex- Cabinet Secretary) should not be dismissed and should be given due weight.

Ex Civil servants such as Lord Burns (previously Permanent Secretary at the Treasury) have also expressed views as to how more information about policy making could be disclosed: *“Lord Burns stresses that he would favour the publication of Whitehall analysis rather than civil service recommendations as to which of various options ministers should follow”* (FT April 2007).

There is a clear need to explore these positions in more detail to enable the Commissioner to have a deeper understanding of the process of policy making and assist in his assessment of the effects government departments claim will arise from disclosure under FOI.

There is also relevant experience to be drawn upon from Countries with similar systems of government and Freedom of Information laws. Some of consideration of this context was undertaken by the ICO prior to 2005 but not with the explicit focus as set out in this proposal.

The Commissioner has previously highlighted the leading role played by NZ in developing a regime where information relating to policy making is routinely disclosed.

The Commissioner also hopes that publication of the results of this research will help to de-mystify the process of government policy formulation and development, stimulate debate about what information should be protected by section 35, encourage further thinking about proactive release of policy related information and so promote a culture of openness.

Deliverables

The key deliverable is a report (and following summary presentation to ICO staff) which provides:-

- An overview of literature covering the background and context of government policy making.
- An overview any policy lifecycles and models currently used in central government.
- An exploration of what is meant by the term “government policy”.
- Case studies that track the evolution of government policy from initiation to completion and examples of subsequent development, this will also include examples of information generated at each stage.
- Evidence and analysis of interviews or with ex senior civil servants and/or Ministers on the realities of how the process works and the impact of disclosure of policy information under FOI.

- An overview of overseas experience on the interaction between Freedom of Information laws and policy formulation and development, how the policy process compares to the UK and evidence of impacts disclosure of policy information under FOI. This should also include an overview covering examples of information disclosed or withheld relating to policy formulation and development and information placed into the public domain on a proactive basis.

Method

The Commissioner is not intending to prescribe the method by which the report is produced or the way in which any research is undertaken. He welcomes proposals. The successful bidder will have proven expertise in the subject area being able to demonstrate a good existing knowledge of the issues and the interrelation between them. The report should be written in a style that engages the reader and a successful bidder should be able to point to previous examples of work where they have dealt with similar subject matter.

It is expected that at the start of the project there will be a meeting with the Commissioner's staff to discuss its conduct and to establish a regime for monitoring progress. The Commissioner's staff will be available during the course of the project for consultation. Towards the end of the project the Commissioner should be provided with a draft report which can be discussed and agreed before production of the final version. At the project's conclusion there should be a formal presentation of the report to the Commissioner's staff.

There is an appropriate budget for the project and along side the skills and expertise, appropriate value for money will be the key factor in selecting the successful bidder.

Timescale

Whilst the Commissioner would wish to see the study completed as quickly as possible, it is essential that it is completed by March 2009. Proposals should include an expected completion date. He intends to award the contract by 14 November 2008 and expects to receive proposals by the 29 October 2008.

Copyright

The rights of the author(s) to assert authorship will be respected but copyright in the work will rest with the Commissioner to whom all intellectual property rights in the work will be assigned.

The Commissioner may grant to the author(s) a copyright licence for reasonable use of the work by the author(s) for their own purposes, for example publication in journals.

Evaluation

Factors used by the Commissioner to evaluate the bids received will include:-

- **the confidence the Commissioner has that the bid will meet his aims and provide the key deliverable**
- **the breadth and depth of expertise behind the bid**
- **added value that the bid brings to the Commissioner's stated requirements**
- **ability to deliver within the required timescale**
- **cost**

Bids

Bids from those interested in undertaking the project should be sent to –

**Lisa Adshead
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF
Fax: 01625 545677
E-mail: lisa.adshead@ico.gsi.gov.uk**

They should arrive no later than **0900 on Friday 31 October 2008.**

If you wish to discuss any aspect of this brief prior to submitting a bid, please contact the project coordinator:

**Steve Wood
Assistant Commissioner**

**Tel: 01625 545706
E-mail: steve.wood@ico.gsi.gov.uk**