

CONSTITUTION COMMITTEE: 10 SEPTEMBER 2010

REPORT OF CITY & COUNTY SOLICITOR AGENDA ITEM: 6

DELEGATION UNDER S36 FREEDOM OF INFORMATION ACT 2000

Reason for this Report

1. At its meeting on 4 November 2004 the Executive approved a recommendation that, in relation to section 36 of the Freedom of Information Act 2000 (FOIA) the Scheme of Delegations provide: "...that the Monitoring Officer be the qualified person for the purposes of giving an opinion under s36 and for applying the public interest test in such cases."
2. The delegation and recommendation were based on the understanding of the FOIA before it came into force on 1 January 2005. In the light of subsequent experience and decisions of the Information Tribunal it is considered necessary to amend the delegation.

Background

3. On 4 November 2004 the Executive made formal delegations of the powers to make decisions under the FOIA which was due to come into force on 1 January 2005. Those delegations were superseded by the current Scheme of Delegations approved by Council on 20 July 2006. The current scheme however does not provide for decisions under s36 FOIA.
4. Unlike all other decisions under FOIA which are now exercised by Officers as required under the general Scheme of Delegations, s36 of FOIA requires that the exemption can only be used "... if, in the reasonable opinion of a qualified person, disclosure of the information under this Act ..." would have one of the effects set out in the section, which for the purposes of a local authority are:
 - Inhibiting, or being likely to inhibit, the free and frank provision of advice;
 - Inhibiting, or being likely to inhibit, the free and frank exchange of views for the purposes of deliberation; or
 - Prejudicing, or being likely to prejudice, the effective conduct of public affairs.

5. Under s36(5)(gb) of FOIA the qualified person is either the public authority itself, that is to say the Executive as making decisions under the FOIA is an Executive function, or “any officer or employee of the authority authorised by the Welsh Ministers or the Counsel General to the Welsh Assembly Government”.

Issues

6. It has been recognised that giving an opinion under s36 is a technical issue properly within the province of a Council’s Monitoring Officer. English Council Monitoring Officers have duly been authorised by the Secretary of State as the qualified person. No such authorisation has been issued by the Welsh Ministers or the Counsel General to the Welsh Assembly Government. The practice of other Welsh authorities who have dealt with this issue is also to delegate the matter to the Monitoring Officer.
7. The November 2004 delegation however, delegated both the power to give an opinion and to make decisions on the public interest test; that is whether to actually disclose the information requested. That was in part due to a misapprehension that it was in effect a single connected decision.
8. However since 1 January 2005 numerous decisions of the Information Commissioner and the Information Tribunal have confirmed that two separate decisions are involved:
 - The giving of an opinion by the qualified person as to whether and on what basis the section 36 exemption is engaged; and if it is engaged
 - A decision whether to disclose the information held after applying the public interest test contained in s2(2)(b) of FOIA
9. Further the Information Tribunal has held that it is not normally appropriate for the two decisions be made by the same person (as the current delegation requires). The reasons are essentially that the factors which need to be considered are different and there is potential to confuse the issues, and also that reserving the second decision to the qualified person is likely in practice to mean that the second decision cannot be the subject of an independent review should an applicant desire one. It is therefore now recommended that the delegation required deals with the first decision only, leaving the second decision, which is effectively no different to any other FOIA release decision, to be dealt with as with other FOIA decisions, by appropriate officers under the general scheme of delegations.

Reasons for Recommendations

10. To ensure that opinions given by the Monitoring Officer under s36 FOIA which form the basis of exemption decisions under that section are *intra vires*.

Legal Implications

11. Section 36 of the Freedom of Information Act 2000 ("FOIA") provides an exemption from the right to know if the disclosure of information, in the reasonable opinion of a 'qualified person', would prejudice the effective conduct of public affairs (Appendix 1 to this report sets out the precise wording of the relevant parts of this legislation). As stated in the body of this report (paragraph 5), the legislation defines the 'qualified person' for these purposes as either (i) the authority itself or (ii) any officer or employee of the authority authorised by the Welsh Assembly ("WAG"), and it is noted that WAG has issued no such authorisation (see paragraph 6). Accordingly, the 'qualified person' in relation to information held by Cardiff Council is Cardiff Council itself.
12. The Council's functions under FOIA are Executive functions (pursuant to section 13 of the Local Government Act 2000 ("LGA 2000") and the Local Authorities (Executive Arrangements) (Functions and Responsibilities) (Wales) Regulations 2007); and section 15 of the LGA 2000 provides that arrangements may be made by the Executive for the discharge of the same by a committee of the Executive or by an officer of the authority.
13. As noted in paragraphs 3 & 4 of this report, the Council's current Scheme of Delegations ('the Scheme' approved by Council on 20th July 2006) supercedes the scheme of delegations for FOIA functions previously approved by the Executive in November 2004, and under the current Scheme, general decisions in respect of FOIA functions are exercisable under the 'General Delegation' by the officer with responsibility for such matters, subject to the limitations set out therein. However, the giving of an opinion by a 'qualified person' under s. 36 FOIA is considered to be a technical issue properly within the province of a Council's Monitoring Officer (see paragraph 6 of this report) and therefore it is recommended that the Monitoring Officer should be authorised to be the 'qualified person' for these purposes.
14. Under the current Scheme, there is no specific delegation of the section 36 FOIA 'qualified person' role to the Monitoring Officer, and the same may not be covered under the Monitoring Officer's General Delegation. The Monitoring Officer is authorised 'to appoint proper officers or authorise an officer of the authority for any purpose the performance of which is an Executive Function where statute requires that the officer should be appointed or authorised for that specific purpose/s' (delegation reference LD1); and to carry out 'all proper officer functions not allocated to other officers ..' (delegation reference LD2) – referred to here as 'proper officer powers'. It is arguable whether the Monitoring Officer's 'proper officer powers' may be relied upon to authorise the Monitoring

Officer to be the 'qualified person' for the purposes of s.36 FOIA. However, for the avoidance of any doubt, and to ensure the robustness of decision making in this regard, it is recommended that the Executive should expressly authorise the Monitoring Officer to this effect, as set out in recommendation 3 of this report.

Financial Implications

15. There are no financial implications arising from this report.

RECOMMENDATIONS

Committee is recommended to:

- (1) note that the delegations under the Freedom of Information Act 2000 ('FOIA') agreed by the Executive on 4th November 2004 have been superseded by the current Scheme of Delegations approved by Council on 20th July 2006;
- (2) note that under the current Scheme of Delegations, general decisions in respect of FOIA functions are exercisable under the 'General Delegation' by the officer with responsibility for such matters, subject to the limitations set out therein; and
- (3) delegate to the Monitoring Officer the power to give opinions as the 'qualified person' for the purposes of s36 FOIA.

KATE BERRY

City & County Solicitor
17 August 2010

The following Appendix is attached :

Appendix 1 - Section 36 Freedom of Information Act 2000

The following Background Papers have been taken into account:

- *Lord Chancellor's Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000 : July 2009 (The National Archives)*

Section 36 Freedom of Information Act 2000 provides (so far as relevant):

- (1) This section applies to—
...
 - (b) information which is held by any other public authority.
- (2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
....
 - (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.
- (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.
- (5) In subsections (2) and (3) “qualified person”—
...
 - (gb) in relation to information held by any Welsh public authority (other than one referred to in section 83(1)(b)(ii)(subsidiary of the Assembly Commission), the Auditor General for Wales or the Public Services Ombudsman for Wales), means—
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Welsh Ministers or the Counsel General to the Welsh Assembly Government”,