

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2013

Public Authority: Department for Culture, Media and Sport
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant requested copies of correspondence between the public authority and Arts Council England in relation to a funding settlement for Arts Council England following the 2010 spending review for Government Departments.
2. The Commissioner's decision is that:
 - The public authority was not entitled to withhold the disputed information on the basis of section 36(2)(b)(ii) FOIA.
 - The public authority was not entitled to withhold the names redacted from copies of the correspondence already provided to the complainant without explaining its basis for doing so under the terms of the FOIA.
 - The letter mentioned in Dame Liz Forgan's letter of 21 October 2010 to Rt Hon Jeremy Hunt MP (i.e. the letter she had previously received from him) is within the scope of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The public authority should disclose the names redacted from the copies of the correspondence already provided to the complainant or provide her with an explanation under the terms of the FOIA in support of the decision to redact the names in question.
 - The public authority should provide a response to the complainant in accordance with the provisions of the FOIA regarding the letter mentioned in Dame Liz Forgan's letter to Rt Hon Jeremy Hunt MP.

- The public authority should disclose the remaining information redacted from copies of the correspondence already provided to the complainant, save the names redacted, if the public authority considers the relevant names exempt from disclosure.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 18 June 2012, the complainant wrote to the public authority and requested information in the following terms:

'In the minutes of the National Arts Council meeting held on 25th October 2010 item 4.3 states:

It was noted that numerous discussions and exchanges of correspondence had been held with the Secretary of State, who had moved substantially to meet three key issues of concern for the Arts Council: 1) the phasing of cuts; 2) the level of capital grant in aid included in settlement; and 3) the extent to which DCMS wished to be directional with the Arts Council about the way in which it managed its budgets.

Under the Freedom of Information, please send me copies of all correspondence – written and email – between the DCMS (including Ministers) and the Arts Council relating to these three issues.'

6. The public authority initially responded on 27 July 2012. It informed the complainant that it held information within the scope of the request and that some of the information could be exempt from disclosure on the basis of section 36(2)(c) FOIA. However, the public authority also explained that it needed more time to consider the balance of the public interest and that it would write to the complainant again by 13 August 2012 with a final decision.
7. On 13 August 2012 the public authority informed the complainant that it had yet to reach a final decision and that it would write to her again by 20 August 2012.
8. The public authority issued a substantive response to the complainant on 14 September 2012. It explained that the information held was exempt from disclosure on the basis of section 36(2)(b)(ii) FOIA.

9. On 17 September 2012 the complainant requested an internal review of the decision to withhold the information held.
10. Following an internal review the public authority wrote to the complainant on 15 November 2012. It upheld the decision to withhold the information held on the basis of section 36(2)(b)(ii).

Scope of the case

11. On 15 November 2012 the complainant contacted the Commissioner to complain about the way her request for information had been handled. She specifically asked the Commissioner to review the public authority's decision to withhold the information held within the scope of her request and submitted that disclosure would be in the public interest.
12. On 9 May 2013 the public authority informed the Commissioner that, due to the passage of time, it no longer considered some of the withheld information exempt and would be disclosing it to the complainant. The complainant confirmed that she had received the disclosed information on 24 May 2013.
13. One of the documents disclosed to the complainant (a letter from Dame Liz Forgan to Rt Hon Jeremy Hunt MP¹ dated 21 October 2010) refers to a letter which Dame Liz Forgan had previously received from Rt Hon Jeremy Hunt MP. The complainant is of the view that this letter is within the scope of her request. She therefore asked the Commissioner to consider whether it should have been disclosed by the public authority.
14. The public authority also redacted some names from the documents disclosed to the complainant but it did not cite any exemption or explain why those names had been redacted. Other names had been disclosed. The complainant informed the Commissioner that she would like the names of senior officials disclosed, including those at the Arts Council England (ACE).
15. The scope of the investigation therefore was to determine whether the public authority was entitled to withhold the information it considered exempt on the basis of section 36(2)(b)(ii) which had not subsequently been disclosed. The Commissioner also considered whether the letter from Rt Hon Jeremy Hunt MP is within the scope of the request.

¹ Who at the time was Secretary of State for Culture, Olympics, Media and Sport

Reasons for decision

Disputed information

16. The disputed information is information redacted from copies of correspondence primarily between senior officials at ACE and the public authority concerning negotiations in relation to a funding settlement for ACE following the public authority's spending review in 2010.

Section 36(2)(b)(ii)

17. Information is exempt from disclosure on the basis of section 36(2)(b)(ii) if in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

Was the qualified person's opinion reasonable?

18. The decision to engage section 36(2)(b)(ii) must be made by a *qualified person*. The decision to engage the exemption was made by the Ed Vaizey MP, Parliamentary Under Secretary of State for Culture, Communications and Creative Industries on 4 September 2012.
19. A qualified person in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.² The Commissioner accepts that Ed Vaizey MP was a qualified person at the time of the request and was therefore entitled to issue the opinion that the exemption was engaged.
20. The exemption at section 36(2)(b)(ii) can only be engaged on the basis of the *reasonable opinion* of the qualified person. Therefore, the Commissioner must also consider whether Ed Vaizey's opinion was reasonable or not (rather than whether the Commissioner specifically agrees with his decision). In deciding whether an opinion is reasonable, the Commissioner will consider the plain meaning of the word. The most relevant definition of *reasonable* in the Shorter Oxford English Dictionary is '*In accordance with reason; not irrational or absurd.*'
21. As reflected in the refusal notice issued on 14 September 2012, the qualified person was of the opinion that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. The public authority expanded on the qualified person's
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² Section 36(5)(a)

view in its submissions to the Commissioner. The qualified person was of the opinion that section 36(2)(b)(ii) was engaged because the disputed information reflects a robust debate between officials (still in post) and details issues that are still relevant to on-going discussions between ACE and the public authority in relation to the latter's current spending review. Disclosing the disputed information could therefore inhibit free and frank exchange of views between officials of ACE and the public authority and consequently affect the public authority's ability to deliver on its policies including the current spending review.

22. The Commissioner is satisfied that, in the circumstances, the opinion to engage section 36(2)(b)(ii) was in accordance with reason and certainly not irrational or absurd. It was reasonable to hold the opinion that disclosing the disputed information would be likely to inhibit free and frank exchanges in on-going discussions between ACE and the public authority in relation to the current spending review.
23. In view of the above, the Commissioner finds that the exemption at section 36(2)(b)(ii) was correctly engaged.

Public Interest Test

24. The exemption at section 36(2)(b)(ii) is however subject to a public interest test. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the disputed information.

Public authority's arguments in favour of disclosure

25. In favour of disclosure, the public authority recognised that open decision making may lead to increased trust and engagement between citizens and government. It acknowledged the public interest in knowing that the decision making process was conducted in an appropriate and transparent manner.
26. It also acknowledged that once an issue has been resolved and a position has been reached, there is value in allowing the public to see how decisions were reached and what issues were considered.

Public authority's arguments in favour of maintaining the exemption

27. ACE and the public authority must be able to have free and frank communications in order that the public authority may obtain best information and gain access to potentially sensitive information which may properly inform officials so that they can comprehensively advise the Secretary of State.

28. Ministers and their officials need to be able to think through all the implications of particular options. In particular, they need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects. Premature disclosure may lead to increased pressure to close off options before they have been fully thought through.
29. It is in the public interest for a certain amount of safe space to exist in order for officials of both ACE and the public authority to debate freely, frankly and fully. This includes exploring all the options including extreme ones in order to fully understand all the implications. Inhibiting the exchange of views is likely to impair the quality of decision making by the public authority. This would have an adverse effect on the ability to get the best possible outcome of those discussions for the public.
30. Much of the information represents a series of possible scenarios in respect of the outcome of the spending review from three years ago. As the current spending review is underway, disclosing the disputed information could detract significantly from, and undermine, that process, specifically impacting on those discussions between ACE and the public authority.
31. ACE has already withheld the disputed information. Therefore, disclosure could have a negative effect on the on-going and future relationship between the public authority and ACE.
32. If officials had known that their correspondence would be subject to publication, then their views would not have been as frank. Therefore, if the disputed information was disclosed, it is quite possible that the public authority's officials would be less likely to engage in discussions (oral or written) as part of the deliberative process in the future.
33. Disclosure is also likely to inhibit the way in which individual positions and views are recorded. In other words, the process of recording opinions could be impaired.
34. Disclosure is also likely to inhibit the ability of officials to express themselves openly, honestly and completely.

Balance of the public interest

35. The Commissioner agrees with the public interest in disclosure identified by the public authority. In his view, the public interest in knowing how decisions were reached in respect of the funding settlement for ACE in 2010 and the issues that were considered is a strong public interest factor in favour of disclosing the disputed information. The disputed information could assist the public in making informed judgements in relation to decisions taken by ACE following the spending review. It is

likely to also provide the public with a more detailed understanding of the various options/scenarios which were considered by ACE and the public authority. It is in the public interest to know the kind of options that were explored before the 2010 funding settlement was agreed.

36. The Commissioner accepts that there is a strong public interest in officials of ACE and the public authority as well as Ministers having free and frank exchanges in order to undertake rigorous assessments of different options. There is a recognised public interest in protecting information from premature disclosure where there is evidence that it could put pressure on officials and affect their ability to engage in free and frank discussions for fear that their views might be criticised prematurely. However, the circumstances are slightly different in this case. The disputed information primarily relates to the 2010 spending review and a funding settlement for ACE was agreed at the time. The protection being sought is primarily for on-going discussions between ACE and the public authority in relation to the spending review which was current at the time of the request and any such future reviews.
37. In the Commissioner's view, the public authority has not made a persuasive case in support of the severity of the impact that disclosure could have on on-going discussions. As the public authority has indicated, the disputed information largely relates to discussions about the 2010 settlement. It is reasonable to anticipate a spill over from those discussions to subsequent and future discussions and consequently also the likelihood that disclosure could affect the frankness of any later communications. However, the Commissioner does not consider that the impact it is likely to have would be likely to result in officials becoming less rigorous and candid in their assessment of options in relation to the current spending review, or affect the relationship between ACE and the public authority in such a way that could seriously impact on their ability to continue discussions over a new funding settlement. The disputed information is nearly three years old and in the main relates to a different set of circumstances. Whilst it is conceivable that it could have an impact on the frankness of future discussions if disclosed, the Commissioner does not consider that the impact is likely to be severe enough to significantly undermine the process.
38. The Commissioner also accepts that officials of ACE and the public authority should be able to consider various options including those that might be considered extreme or unpalatable to the public. He accepts that there is a strong public interest in protecting that safe space for officials to *think the unthinkable*. However, for the same reasons as above, he is not persuaded that disclosing the disputed information is likely to seriously impact on the ability of officials to do so in the current or future discussions.

39. in the circumstances of this case, the Commissioner does not accept the generic view that officials would no longer be frank in their discussions and also become less likely to engage in discussions in the future should the disputed information be disclosed. By the same token, he is also not persuaded that disclosing the disputed information is likely to inhibit the way in which individual opinions are recorded. He also does not accept that disclosure is likely to inhibit the ability of officials to express themselves openly and honestly. Whilst the Commissioner is not completely dismissive of such chilling effect arguments, he believes that they must be tailored to the particular circumstances of each case. Generic chilling effect arguments are likely to be viewed with scepticism and therefore less likely to be persuasive. The Commissioner's view is in line with those expressed by the Information Tribunal in a number of cases³ that since the passing into law of FOIA, no civil servant could expect that all information affecting government decisions would necessarily remain confidential. We should be able to rely on the courage and independence of civil servants especially senior ones in continuing to give robust and independent advice even in the face of a risk of publicity. Furthermore, there is no widespread evidence to suggest that since the advent of FOIA, officials no longer choose to communicate their views in forms which could be recorded, for example in writing. The public authority did not provide specific evidence to suggest that in the circumstances of this case, the disclosure of the disputed information could have a chilling effect on the candour of officials in future discussions on spending review.
40. Therefore, in all the circumstances of this case, the Commissioner finds that the public authority was not entitled to withhold the disputed information on the basis of section 36(2)(b)(ii).

Section 40(2) – personal information

41. In view of his finding that the public authority was not entitled to withhold the disputed information on the basis of section 36(2)(b)(ii), the Commissioner considered whether the names redacted from correspondence should have been withheld by the public authority. In light of the Commissioner's responsibilities under the Data Protection Act 1998 (DPA), he has a duty to take positive steps to prevent the disclosure of personal information under the FOIA if to do so would be in breach of the DPA. As mentioned, the public authority did not cite any

³ See, *DfES v The Evening Standard* EA/2006/0006, *HM Treasury v the Information Commissioner* EA/2007/0001 and *Scotland Office v the Information Commissioner* EA/2007/0128

exemption in support of its position or explain why those names were redacted.

42. Therefore, in order to assist him in making an informed decision, the Commissioner asked the public authority to provide him with an explanation in support of its decision to withhold some names from the disclosed documents. The public authority did not respond to the Commissioner's request.
43. The exemption at section 40(2) prevents the identities of third parties from being revealed under the FOIA in breach of the DPA. Information is exempt from disclosure on the basis of section 40(2) if it constitutes third party personal data and either the first or second condition in section 40(3) is satisfied. The first condition states that disclosing the information would contravene any of the data protection principles. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless one of the conditions in schedule 2 [DPA] is met...'

44. The redacted names are clearly the personal data of the officials. It is information from which they can be identified. However, in order to determine whether disclosing the names would be fair and therefore not in contravention of the first data protection principle, the Commissioner has to consider a number of factors including the level of seniority of the officials and the extent which they can be held responsible or accountable for the information contained in the correspondence. The Commissioner is unable to make that determination in this case in the absence of the requested representations from the public authority.
45. The Commissioner therefore orders the public authority to disclose the redacted names to the complainant or provide her with an explanation under the terms of the FOIA justifying the decision to redact the names.

Additional information in scope

46. As mentioned, the complainant argued that the letter from mentioned in Dame Liz Forgan's letter to Rt Hon Jeremy Hunt MP is within the scope of her request.
47. The Commissioner asked the public authority to clarify why the letter in question was not included in the disputed information. The public authority did not respond.
48. In the absence of the requested representations from the public authority, the Commissioner considers that the letter is within the scope of the request. The public authority should therefore provide a response

to the complainant in accordance with the provisions of the FOIA regarding the letter in question.

Other matters

49. The FOIA does not stipulate a time limit for public authorities to issue internal reviews. However, as a matter of good practice, the Commissioner considers that a public authority should take no more than 20 working days to issue an internal review and in exceptional circumstances, 40 working days.
50. The Commissioner therefore wishes to record his concern that it took the public authority over 20 working days to issue the outcome of its internal review to the complainant. He expects the public authority to complete internal reviews of responses to requests for information more promptly in future.
51. Section 17(2) FOIA allows a public authority to extend the statutory 20 working day limit if it requires more time to determine whether or not the balance of the public interest lies in maintaining the exemption. It does not allow a public authority additional time to consider whether the exemption(s) are engaged. It was not clear from the public authority's response of 27 July 2012 if it had actually determined that the exemption at section 36(2)(b)(ii) was engaged.
52. The Commissioner would like to record his concern at the public authority's response of 27 July 2012. The public authority should have clearly stated that it considered the exemption at section 36(2)(b)(ii) was engaged.

Right of appeal

53. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

54. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
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