

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 September 2014

Public Authority: The British Library

Address: St Pancras
96 Euston Road
London
NW1 2DB

Decision (including any steps ordered)

1. The complainant has requested information relating to correspondence between Daphne du Maurier and Victor Gollancz.
2. The Commissioner's decision is that the British Library (the Library) has correctly applied section 22 of the FOIA to the withheld information.
3. The Commissioner does not require the Library to take any steps as a result of this decision notice.

Request and response

4. On 16 April 2014, the complainant wrote to the Library and requested information in the following terms:

"I would like to request access to a collection of files which are classed as being closed until 2021.

I understand they include correspondence between Daphne du Maurier and Victor Gollancz.

I can see no reason why all the correspondence in the files should be classed as closed."

5. The Library responded on 7 May 2014. It refused to provide the requested information citing sections 22 and 43(2) of the FOIA as its basis for doing so.
6. Following an internal review the Library wrote to the complainant on 2 June 2014 and maintained its position. However, it provided the complainant with more contextual information and answered additional questions that he had not posed in his initial request.

Scope of the case

7. The complainant contacted the Commissioner on 10 July 2014 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the Library has correctly applied sections 22 and 43(2) of the FOIA to the withheld information.

Reasons for decision

9. The Library explained that in February 2014 the original papers in question, a set of correspondence between the author Daphne du Maurier and the publisher Victor Gollancz, were granted an export licence and were exported following their sale. In accordance with regulations relating to the export of cultural items, photocopies of the documents were lodged with the British Library prior to their export so as to preserve the national cultural record for future scholarly research.
10. The purpose of the export control system for works of art is to give an opportunity to retain in the UK cultural artefacts of outstanding national importance. The system is designed to strike a balance as fairly as possible between the various interests concerned – for instance, the protection of national heritage, the preservation of the national cultural research record, the needs and rights of an exporter or an overseas purchaser of cultural works, and the position of the UK as an international art market.
11. The requirement that deposit copies should be made of relevant manuscripts, documents and archives that are to be exported is longstanding and goes back to the 1956 Waverly Recommendations (Recommendation 9, Paras 220-239 – a copy of the relevant section is enclosed). This process of copying and deposit, with its necessary checks and balances, ensures that copies of papers of important research value are acquired and added to the national collection at no

cost to the public purse when they might otherwise cease to be available to scholars and students in the UK following the export of the originals overseas.

12. Such deposited copies are reserved from public access for seven years. This administrative policy was introduced on 01 March 1966, having been recommended by the Reviewing Committee for the Export of Works and Art and accepted by the Secretary of State for Education and Science on 15 February 1966.
13. The 13th Annual Report of the Reviewing Committee for the Export of Works of Art (1965-1966, paras 13-17) states that this policy was introduced as a response to the effect the copying requirement had had upon the sales value of the original documents when access was not so restricted (e.g. over the preceding 10 years between the implementation of the Waverly recommendations and the 1966 review), and the resultant risk that British owners of such heritage material would thereby suffer by not receiving the full market value for their property at sale (Para 15). This policy continues to be reflected in the current guidance for UK Export Licensing for Cultural Goods issued by the Arts Council England's Acquisitions, Exports, Loans & Collections Unit, which can be found at:

<http://www.artscouncil.org.uk/what-we-do/supporting-museums/cultural-property/export-controls/export-licensing/>
14. Section 22 of the FOIA says that information is exempt if, at the time a public authority receives a request for it:
 - the public authority holds it with a view to its publication;
 - the public authority or another person intends to publish the information at some future date, whether determined or not; and
 - in all the circumstances it is reasonable to withhold the information prior to publication.
15. In order to determine whether section 22 is engaged the Commissioner therefore considered the following questions:
 - When the complainant submitted the request, did the Library intend to publish the information at some date in the future?
 - If so, had the Library determined this date when the request was submitted?
 - In all the circumstances of the case, was it 'reasonable' that the Library should withhold the information from disclosure until some future date (whether determined or not)?

16. Section 22 provides a qualified exemption, so public authorities must consider whether the public interest in applying the exemption is greater than the public interest in providing the information. The Commissioner has also therefore considered the public interest arguments in this case.
17. The Library has confirmed it held the information at the time of the request.

Did the Library intend to publish the information at some date in the future?

18. In its submission to the Commissioner, the Library said that it understands that to rely on Section 22 there must have been a settled intention to publish the requested information prior to the request being received. 'Publication' means 'made available to the general public by some means, including by broadcast or inspection'.
19. The Library further explained that the papers in question are held with the intention that they will be made available to the public by inspection in February 2021, and were held with that intention on the date of the request. The papers were exported in February 2014 and the seven year reservation applied to the copies was applied as a matter of routine. This has been the case since the Secretary of State approved that policy of reservation back in February 1966. Evidence for the origination of the seven year reservation period, and by extension its longstanding and routine nature, can clearly be seen in paragraph 16 of the RCEWA 13th Annual Report from 1966.
20. The date that information is going to be published does not need to be definite for the exemption to apply. What is important is that, at the time an information request is made, a settled intention to publish the information in the future exists.
21. The Commissioner is satisfied that the Library has a settled intention to publish the information as detailed in paragraphs 17 and 18.

In all the circumstances, is it 'reasonable' for the Library to withhold the information until some future date?

22. The ICO's guidance on section 22 explains that there is some overlap between the factors public authorities should take into account in deciding what is reasonable, and those which are relevant in balancing the public interest test.
23. A public authority has, however, first to determine whether or not it is reasonable in all the circumstances to withhold the information in order

to apply the exemption, before considering whether there is a public benefit in providing the information prior to publication. Public authorities should consider whether or not it is sensible, in line with accepted practices and fair to all concerned.

24. In considering what is reasonable in all the circumstances, a public authority may also wish to consider whether it is the right decision to manage the availability of the information by planning and controlling its publication.
25. The Library believes that this period of reservation remains 'reasonable in all the circumstances' of the request in that: it is a longstanding administrative provision that has been routinely applied since 1966 without major controversy; it is proportionate (the Library notes that the Committee reduced the reservation period to seven years from the ten years originally requested by the Antiquarian Bookseller's Association and Messrs. Sotheby and Company – Para 14 of the RCEWA 13th Annual Report); it is targeted (the Library actively seeks waiver of the reservation period from those overseas buyers who have a public service remit or are otherwise unlikely to suffer harm from early disclosure of the contents of their export purchase); and, it has a clearly and carefully defined purpose to balance the rights of all those involved in the export of UK cultural heritage items.
26. The Commissioner accepts that this is a legitimate argument and is in line with accepted practices. He therefore accepts that it is reasonable in all the circumstances for the Library to withhold the information.

The public interest test

27. When a public authority wishes to withhold information under a qualified exemption such as at section 22, it must carry out a two-stage process. First, it must decide that the exemption applies to the requested information. Then it must carry out the public interest test. This means that it must decide whether the public interest is better served by maintaining the exemption (and so withholding the information) or by disclosing the information.
28. Having decided that the exemption under section 22 applied to the information that the complainant had requested, the Library then went on to consider the public interest arguments.
29. Whilst the Library agrees that there is general public interest in providing immediate and wide access to information that might enlighten academic study into the lives and works of writers and artists of cultural importance, it maintains that there is a stronger public interest in maintaining the proper and efficient functioning of the

longstanding and efficient cultural export regulations that *inter alia* allow the Library and other cultural institutions to receive copies of cultural works that would otherwise be lost to the nation due to their export.

30. The functioning of these export arrangements would be undermined if the new owner of the material was unable to properly protect the market value of their supposedly exclusive asset. Harm to the confidence in the process resulting from premature disclosure would be extremely likely to lead to an increase in the number of refusals to deposit copies and would thereby undermine the public good represented by the availability of those copies (albeit delayed) to UK scholars.
31. This would in turn also result in an undesirable increase in the number of export licence applications that require further assessment by the Reviewing Committee for the Export of Works of Art, ultimately increasing the administrative cost of the export regulations to the public purse. These arguments have been reviewed by and are supported by the Arts Council England who is currently responsible for the process in question.
32. The Library also continues to believe that the reservation process that is protected by the application of the Section 22 exemption serves a general public interest in maintaining the position of the UK as an international art market; the credibility of this market would be undermined if the new owner of the material in question was unable to properly protect and/or exploit their investment due to premature 'competition' caused by early disclosure.
33. Such harm to confidence in the export process leading to a reluctance to purchase cultural works from the UK market at full international value was a very real outcome observed by the Reviewing Committee based on assessment of evidence to hand at the time, and the Library was advised by Arts Council England that this situation has not changed in the intervening years.
34. The Library therefore continues to believe that the factors in favour of maintaining the exemption in order to protect the integrity of the export process outweigh the factors in favour of immediate disclosure.

The Commissioner's decision

35. The complainant has argued that although the Library refers to its 'long-standing, generally-accepted and publicly documented' policy of holding the documents he does not consider it is actually binding.
36. The Commissioner has considered the representations of both parties carefully and acknowledges the complainant's comments in paragraph 35.
37. However, with regard to section 22 it should be noted that a public authority should also consider if it is "sensible, in line with accepted practices and fair to all concerned"¹ to withhold the information. As noted above the Library has explained that this is a long standing accepted practice. In addition, the Library believes that the reservation period remains 'reasonable in all the circumstances'.
38. The Library has also explained the potential consequences of not adhering to its existing policy with loss of credibility as well as greater expense to the public purse with an increasing administrative cost.
39. The Commissioner considers that it is reasonable in all the circumstances for the Library to withhold the information until some future date. For these reasons, the Commissioner considers that the Library correctly applied the exemption under section 22 of the FOIA to the information.
40. Although some of the public interest arguments provided by the Library relate to the exemption at section 43(2) – Commercial Interests, the Commissioner has taken these into consideration with regard to fairness.
41. The Commissioner considers that, on balance, the public interest is best served by the Library adhering to its established procedure.
42. The Commissioner has therefore decided that the Library is correct to withhold the requested information. As the Commissioner considers all the withheld information is exempt by virtue of section 22 he has not gone on to consider the application of section 43(2).

¹ <http://www.legislation.gov.uk/ukpga/2000/36/section/22>

Right of appeal

43. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

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