

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 April 2015

Public Authority: The British Museum
Address: Great Russell Street
London
WC1B 3DG

Decision (including any steps ordered)

1. The complainant has made a number of requests to the British Museum for records on the subject of the Parthenon sculptures in its collection. The British Museum addressed each of the requests in turn; providing some parts of the requested information, withholding other parts, or otherwise explaining that it did not hold the requested information. The present complaint refers to one request and concerns British Museum's reliance on the exemptions set out at sections 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) of FOIA to withhold information. The Commissioner has decided that the withheld information engages the exemptions and that in all the circumstances the public interest in maintaining the exemptions outweighs the public interest in disclosure. He does not therefore require any steps to be taken as a result of this notice.

Request and response

2. On 11 October 2014 the complainant made six requests to the British Museum for information relating to its Parthenon sculptures. The complaint only refers to the British Museum's handling of one of these, the wording of which is reproduced below.

2. During the aforementioned period [1 January 2014 to the date of the request] has the Museum exchanged correspondence and communications (including emails) with the Department for Culture Media and Sport. The reference to the DCMS can include any member of the Ministerial team as well as any senior civil servant. I am only interested in the correspondence and communications which relate to

the Parthenon marbles. If the answer is yes can you please provide a copy of the correspondence and communications.

3. The British Museum responded to each of the requests on 7 November 2014. With regard to request 2, quoted above, the British Museum provided copies of relevant correspondence. However, it explained that parts of the information had been redacted under sections 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) and section 40(2) (third party personal data) of FOIA. It also considered that three additional items engaged the section 36(2) exemptions. Section 36(2) is qualified by the public interest test and the British Museum found that on balance the public interest favoured maintaining the exemptions.
4. The complainant contacted the British Museum on 11 November 2014 and asked it to reconsider its handling of the request and particularly the possibility that the section 36(2) exemptions had been applied too widely. This was completed and the outcome provided by the British Museum on 9 December 2014. The reviewer upheld the original decision to refuse the disclosure of the information under the exemptions cited.

Scope of the case

5. The complainant contacted the Commissioner on 18 December 2014 to complain about the British Museum's handling of the request specified above. The complaint itself was split into two parts. Firstly, the complainant queried whether the British Museum had located and considered all the relevant information it held that was captured by the request. Secondly, the complainant asked the Commissioner to consider whether the British Museum was correct to withhold some of the material it had identified under section 36 of FOIA.
6. The British Museum has responded to the Commissioner on each aspect of the complaint. With regard to the held, not-held question, the British Museum was concerned that it had been asked to consider an issue that the complainant had not raised with it at the internal review stage. Nevertheless, the British Museum explained what searches had been carried out for the information. On the strength of the explanation, the complainant has agreed that this element of the complaint could be removed from the scope of the Commissioner's investigation.
7. With regard to the second part of the complaint, and the decision to withhold pertinent information, the British Museum has informed the Commissioner that it considers the exemptions in section 36(2) were correctly applied and the public interest test properly exercised. The

Commissioner's consideration of the exemptions is set out in the remainder of this notice.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

8. The British Museum has applied sections 36(2)(b)(ii) and 36(2)(c) to the withheld information. These exemptions state that information is exempt information if, in the reasonable opinion of a qualified person, disclosure under the legislation –
 - (b) would, or would be likely to, inhibit –
 - (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.
9. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be engaged where a public authority has consulted with a qualified person and in the reasonable opinion of the qualified person the harm stated in the exemption would, or would be likely to, arise through disclosure. To find that a limb of section 36(2) has been correctly applied therefore, the Commissioner must be satisfied not only that the qualified person gave an opinion on the likelihood of the prejudice occurring but also that the opinion was reasonable in the circumstances.
10. The British Museum has informed the Commissioner that the qualified person at the organisation is the Director, as authorised by the Secretary of State for Culture, Media and Sport in December 2004. It has further confirmed that the opinion of the Director in post at the time of the request was sought on 7 November 2014, with the Director registering his approval of the application of the exemptions later that same day.
11. The Commissioner is satisfied that the Director of the British Museum meets the definition of a 'qualified person' set out at section 36(5) of FOIA. Furthermore, the Commissioner has been provided with a copy of a record signed by the qualified person that comprised one section for the submissions which explained why the opinion was being sought and one section for the qualified person's opinion. The record also indicated that the withheld information had been shown to the qualified person. Accepting therefore that a qualified person had given his opinion with regard to the request, the Commissioner's next step is therefore to

consider whether the opinion given by the qualified person on the application of section 36(2)(b)(ii) and section 36(2)(c) was reasonable in the circumstances.

12. The submissions to the qualified person begin by briefly expanding on the section 36(2) exemptions that officials considered applied. Arguments were then put forward that demonstrated the nature of the prejudice it was considered could arise, the counter arguments to this position, and the other factors that had been taken into account. The section containing the qualified person's opinion separately considers the section 36(2)(b)(ii) and section 36(2)(c) exemptions.
13. For an exemption in section 36(2) to be engaged, it is not sufficient that a qualified person has given an opinion; that opinion must be reasonable. The test to be applied is not whether the opinion is the most reasonable opinion but only whether it is an opinion that a reasonable person could hold. In other words, an opinion will only be unreasonable if it is an opinion that *no* reasonable person could hold.
14. For each part of sections 36(2)(b) and (c), there are two possible limbs of an exemption upon which the reasonable opinion could be based, depending on the qualified person's views on the likelihood of the prejudice occurring. Firstly, the lower threshold which states that disclosure 'would be likely to' have an inhibitive or prejudicial effect or, secondly, the higher threshold which stipulates that disclosure 'would' be prejudicial or inhibiting. 'Would' means that the likelihood is more probable than not. 'Would be likely', on the other hand, refers to a lower level of probability than 'would' but still requires that the likelihood is significant.
15. The qualified person's opinion variously refers to 'would' and 'would be likely' in his explanations. However, the record itself has a separate box to mark the likelihood of prejudice that the qualified person considers applies, which the Commissioner has used as the accurate reflection of his opinion. In relation to the application of sections 36(2)(b)(ii) and 36(2)(c), the qualified person considers that 'would' and 'would be likely' applies respectively.
16. In his guidance on the exemption¹ (pages 7 and 8), the Commissioner explains that he will consider all relevant factors when assessing

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

whether the opinion was reasonable. These may include, but are not limited to, the following.

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of information and the timing of the request, for example, whether the request concerns an important ongoing 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.
17. For each of the exemptions, the Commissioner considers in turn the reasonableness of the qualified person's opinion.

Section 36(2)(b)(ii)

18. With regard to section 36(2)(b)(ii), which refers to the inhibition to the free and frank exchange of views, the Commissioner considers that it is about the process that may be inhibited rather than what is necessarily contained within the requested information itself. The key test is whether disclosure could inhibit the process of exchanging views.
19. The qualified person's opinion speaks of the inhibition to the ability of staff and others representing stakeholders in government to express themselves openly, honestly and completely or to explore extreme options. This in turn, could impair the quality of decision-making.
20. A side-effect of the damage to the quality of advice and deliberation is the harm that would occur to the standing of the government and the British Museum. Another corollary of this argument is that the British Museum's interests in taking the advice of and sharing matters with the government would be jeopardised by disclosing internal documentation against the wishes of sponsoring bodies.
21. When deciding whether a qualified person's opinion is reasonable, the Commissioner will acknowledge the evident importance that the authors of FOIA placed on the qualified person by making his or her opinion a condition of the application of the exemption. While this does not preclude the possibility of finding the qualified person's opinion was unreasonable, it does mean that any opinion should be afforded due weight and not dismissed lightly.
22. The Commissioner is satisfied that the qualified person's arguments not only correspond with the activity described in the exemption, namely

the free and frank exchange of views, but also correspond with the withheld information itself. The Commissioner considers that in circumstances where sensitive issues are the subject of deliberation, not least on a multi-agency basis, it is reasonable for the qualified person to find that disclosure would deter officials from as being as forthright with their views, with the quality of decision-making suffering as a result. Importantly, the information itself pertains to an ongoing issue – the stewardship of, and proper location for, the Parthenon sculptures – that is delicate and the subject of intense scrutiny and debate.

23. For this reason, the Commissioner considers that the qualified person's opinion is reasonable and therefore the exemption is engaged.

Section 36(2)(c)

24. Section 36(2)(c) refers to the prejudice that may *otherwise* apply. Allowing that the prejudice must differ from the prejudice referred to at section 36(2)(b), differently constituted Information Tribunals have found that the exemption may potentially apply to situations where it is envisaged there is a real risk disclosure could disrupt a public authority's ability to offer an effective public service or to meet its wider objectives.
25. With reference to this exemption, the qualified person considered that disclosure may prejudice the British Museum's and government's relationships with third parties, harming the ability of the British Museum and government to represent effectively their own interests.
26. The qualified person's opinion on the exemption is relatively brief, which makes the process of understanding the precise connotations of the argument more difficult. Notwithstanding this point, the Commissioner accepts it is not unreasonable to consider that a third party would be more reluctant to engage with a negotiating process where they consider that discussions would not be kept confidential. This is a similar argument to the one presented in connection with section 36(2)(b)(ii). However, insofar as the argument refers to the harm to the wider objectives of the British Museum, the Commissioner accepts that not only is the argument relevant to the exemption but that the qualified person's opinion is reasonable.

The public interest test

27. The test to be applied is whether the public interest in maintaining the exemption outweighs the public interest in disclosure. If the public interest is evenly balanced then the information should be released.
28. When considering where the balance of the public interest lies, the Commissioner considers that the qualified person's opinion should be afforded a degree of weight befitting his or her senior position. However,

the Commissioner will make up his own mind on the severity of that prejudice.

29. The Commissioner has found it appropriate for the purposes of this notice to consider together the public interest test related to the exemptions.

The public interest in favour of disclosure

30. The public interest in disclosure will always attract some weight simply by virtue of the inherent importance of transparency and accountability. The British Museum has accepted that the position for disclosure is further strengthened in this case because of the legitimate public interest that exists in knowing more about the British Museum's and the government's stance on the continued status of the marbles, which possess immense cultural importance, and where they should be exhibited. This interest will be particularly strong where, as here, it relates to negotiations with external bodies.
31. Behind the British Museum's arguments is the acknowledgement that disclosure would demonstrate to the public that proper standards of integrity were being upheld and would remove any suspicion that the facts surrounding the controversial issue had been manipulated.

The public interest in favour of maintaining the exemption

32. As stated, the British Museum has recognised the general strength of the public interest in information relating to the Parthenon sculptures. However, with respect to the withheld information in question, it considers this is clearly outweighed by the need for the Museum and other interested parties to have a safe space in which to consider fully the policy options available and to reach impartial and appropriate decisions. In the British Museum's view, and following the opinion of the qualified person, the value of the information to the public would not justify the damage to the quality of decision-making on a live, sensitive and high-profile issue.

The balance of the public interest

33. It is clear that the issues relating to the British Museum's stewardship of the Parthenon marbles has attracted, and continues to attract, considerable public attention. This reflects the significance of the pieces themselves and Greece's attempts to have the sculptures returned. On the one hand, this may lend weight to the arguments for disclosure. On the other, however, it may also magnify the importance of ensuring that the British Museum is able to operate effectively in a sphere requiring considerable tact and diplomacy.

34. In deciding where the balance of the public interest lies, the Commissioner has focused on two principal factors; the timing of the request and the content of the withheld information itself.
35. With regard to the timing of the request, the Commissioner observes that the communications captured by request 2 largely focus on the discussions leading up to the convening of the 19th Session of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in case of Illicit Appropriation (UNESCO). This was held at the beginning of October 2014 and included a discussion of the Parthenon sculptures reunification issue, with an important aspect of the discussion relating to the possibility of the relevant parties entering into a mediation process.
36. As evidenced by the information provided to the complainant, officials had only reported back from the Restitution Committee a few days before the request was made. It was understood that the Committee did not mark the end of the deliberation process, with the government planning to review its strategy in light of the discussions. This demonstrates that the particular phase of the decision-making was not settled at the time of the request and was still subject to detailed consideration. This, in the Commissioner's view, would reinforce the expectation of confidentiality of the internal discussions and substantiate the British Museum's safe space arguments.
37. Regarding the content of the withheld information itself, the Commissioner notes that the British Museum has not withheld all of the information captured by the request but has only sought to protect the information in respect of which it considers the need for safe space is particularly acute. While this means that the complainant has not been able to see the entirety of the exchanges between officials, the Commissioner believes that the disclosed information does give a reasonable indication of the direction and substance of the government's and the British Museum's views on the strategy that should be adopted. The Commissioner considers that this would go some way towards satisfying the public interest in transparency, particularly when the government's and the British Museum's fundamental position with regard to the Parthenon sculptures has been openly and repeatedly expressed – namely that the sculptures were appropriately acquired by the British Museum and that the trustees of the British Museum are independently responsible for the stewardship of its entire collection.
38. In accepting the reasonableness of the qualified person's opinion, the Commissioner recognised the inhibitive effect of disclosure and the damage this would cause to the quality of decision-making. Though he considers there is a public interest in the 'full picture', he also considers that there will be times in which there are compelling reasons for

allowing officials a safe space in which to make decisions. This, in his view, is one of those times. Further, the Commissioner has found that the value of the information to the public is not sufficient to justify the prejudice that would be caused by disclosure.

39. For this reason, the Commissioner has found that the exemptions in section 36(2) are engaged and that in all the circumstances the public interest in disclosure is outweighed by the public interest in maintaining the exemptions.

Right of appeal

40. 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

41. 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.
42. 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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