

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 July 2020

Public Authority: Pubs Code Adjudicator
Address: Victoria Square House
Victoria Square
81 New Street
Birmingham, B2 4AJ

Decision (including any steps ordered)

1. The complainant has requested information regarding a voluntary agreement entered into by six companies. The Pubs Code Adjudicator ("the Adjudicator") refused to supply any information within the scope of the request as it believed that to do so would prejudice the effective conduct of public affairs.
2. The Commissioner's decision is that the Adjudicator is not entitled to rely on 36(2)(c) of the FOIA to withhold the requested information as the exemption is not engaged. She finds that section 36(2)(b)(i) and section 36(2)(b)(ii) are both engaged, but only in respect of some of the withheld information. Where the exemptions are engaged, the public interest favours maintaining the exemptions. The Adjudicator also failed to respond within 20 working days, thus breaching sections 10 and 17 of the FOIA.
3. The Commissioner requires the Adjudicator to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the information identified in the confidential annex to this notice.
4. The Adjudicator 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.

Background and Nomenclature

5. A significant proportion of public houses in the UK are in fact owned by one of just six businesses (Pub Owning Businesses or "POBs"). These POBs are Punch Pubs & Co, EI Group plc, Marstons plc, Star Pubs & Bars Ltd, Greene King plc, and Admiral Taverns Ltd.
6. In many cases, the POB will own the premises of a public house, which it then leases out to the publican. Often the publicans are "tied" to the particular POB, meaning that they are subject to restrictions on what products they are permitted to sell. Supporters of this system argue that Tied Pub Tenants ("TPTs") benefit from lower rents, bulk-buying discounts and other protections by virtue of being part of large company. Opponents argue that the restrictions prevent TPTs from offering the diversity and quality of products that they might otherwise be able to offer their clientele.
7. The Pubs Code, introduced in 2016, was aimed at redressing the perceived imbalance between individual TPTs and the large POBs to whom they are tied. As well as having an independent regulator to adjudicate on rent terms which may be unfair, TPTs also now have the right to request a Market Rent Only tenancy, which ends the "tie" to the POB. When TPTs have their regular rent reviews, they may request an assessment to find out what their potential rent might be if they were no longer tied – this is known as the MRO option and is subject to adjudication. A TPT then has the choice to decide whether to remain tied or to take the MRO option.
8. The Small Business, Enterprise and Employment Act 2015 created the office of a Pubs Code Adjudicator who is now responsible for overseeing the implementation of and resolving disputes arising under, the Pubs Code. The current Adjudicator is Ms Fiona Dickie – although at the time of the request, it was Mr Paul Newby.
9. Whilst it is the Adjudicator herself (or the office she occupies) who is the public authority for the purposes of the FOIA, all references to "the Adjudicator" within this notice should be read as referring to the corporate body and not the individual.

Request and response

10. On 6 May 2019, the complainant wrote to the Adjudicator and requested information in the following terms:

"I would be grateful if you could provide the following information under request of the Freedom of Information Act 2000:-

"Information relating to the consideration and preparation of the PCA Advice Note on Rent Dispute Clauses and Calderbank Letters dated July 2017. In particular:-

(a) correspondence, meeting and discussion notes, both internal and external, relating to the agreement with POBs mentioned within the said Advice Note;

(b) any correspondence, meeting and discussion notes, both internal and external, considering whether POBs may trigger rent dispute clauses during the MRO process in circumvention of Regulation 39(4)(g) of the Pub's Code Regulations 2016."

11. The Adjudicator responded on 10 May 2019. It stated that it considered that answering the request, as drafted, would be likely to exceed the cost limit and invited the complainant to refine his request. It provided advice and assistance to help him do so.

12. On the same day, the complainant, referring to his previous correspondence, refined his request in the following terms:

"I thought that it might be helpful if I was specific about the issue I am researching: that is paragraph 3.3 of the Advice Note where it states 'All six regulated POBs agree that they do not, or will not do this in future.'

"This conformation from POBs was presumably obtained through a consultation involving the PCA and the POBs. It is the correspondence and meeting notes in relation to this that are of specific interest." [sic]

13. The Adjudicator responded to the revised request on 8 July 2019. It confirmed that it held information within the scope of the request but argued that its disclosure would prejudice the effective conduct of public affairs. The Adjudicator thus relied on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to withhold the information

14. Following an internal review the Adjudicator wrote to the complainant on 2 August 2019. It upheld its original position.

Scope of the case

15. The complainant contacted the Commissioner on 28 September 2019 to complain about the way his request for information had been handled. He did not accept that the claimed prejudice would occur and argued that the public interest would, in any case, favour transparency.
16. The Commissioner wrote to the Adjudicator on 13 January 2020 and asked for its submissions as to why it had applied the exemptions it had done. At the same time, she also sought copies of the withheld information.
17. When the Adjudicator initially provided copies of the documents that it wished to withhold, the Commissioner noted that the documents contained redactions. She asked the Adjudicator to supply unredacted versions of the documents and to explain why the redactions had been made.
18. The Adjudicator provided the Commissioner with a fresh version of the withheld information on 16 February 2020: this time with redactions marked, but the underlying information visible. The Adjudicator argued that the information it had redacted fell outside the scope of the request.
19. The Commissioner did not agree with the Adjudicator's assessment of the information which fell within the scope of the request. In the Commissioner's view (which is expanded upon below), some of the information that the Adjudicator had identified as being outside the scope of the request was in fact within scope and vice versa. She will expand on this point below and in the confidential annex to this decision notice.
20. Strictly speaking, the Qualified Person only provides an opinion on whether or not disclosure of the information that the public authority has withheld would cause prejudice. Only information relevant to a request can be "withheld". Information which was not considered to be in scope is not information which has been withheld – because it would not be disclosed, regardless of whether an exemption applied. It therefore follows that the Qualified Person has not given an opinion in respect of the newly within scope information.
21. The Commissioner considered whether it was appropriate for her to determine herself whether the new information would also engage the exemption. She decided that it was not. Section 36 is a peculiar exemption in that it relies solely on the opinion of the Qualified Person. It is not for the Commissioner to substitute her own opinion for that of

the Qualified Person – if the Qualified Person has not issued an opinion, the exemption cannot be engaged.

22. The Commissioner initially considered ordering an additional remedial step: requiring the Adjudicator to issue a fresh response in respect of the new information. However, in the course of preparing her decision, the Covid-19 pandemic hit the UK and the Commissioner took the exceptional decision to suspend her formal regulatory powers temporarily. Rather than place the entire case on pause, she therefore wrote to the Adjudicator setting out her view of the information which would and would not fall within the scope of the request. She asked the Adjudicator to look at the new information within scope and, if it still wished to rely on any limb of section 36, obtain a fresh opinion from the Qualified Person.
23. The Adjudicator responded on 6 July 2020. It noted that a new Pubs Code Adjudicator (Ms Dickie) had been appointed and it had therefore taken the opportunity to obtain a new opinion from its Qualified Person (Ms Dickie). The Adjudicator still wished to rely on the same three limbs of section 36, but provided some fresh analysis as to why the various limbs would be engaged.
24. The Commissioner thus considers that there are four questions which she must consider in turn, in order to reach her decision:
 - A. What information actually falls within the scope of the request?
 - B. Does this information engage the claimed exemptions?
 - C. If and to the extent that, the exemptions are engaged, where does the balance of the public interest lie?
 - D. Did the Adjudicator comply with the procedural aspects of the FOIA when responding to the request?

Reasons for decision

A. Scope

25. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) *to be informed in writing by the public authority whether it holds information of the description specified in the request, and*

(b) *if that is the case, to have that information communicated to him.*

26. The request refers to a statutory advice note ("the Advice Note") issued by the Adjudicator in July 2017. The advice contained in the Advice Note has now been withdrawn (although it had not been withdrawn at the point the request was made) but the document is still in the public domain.¹ The Advice Note sets out the Adjudicator's view on two matters: the triggering of dispute resolution clauses within a tied pub tenancy agreement and the interplay between "Calderbank Offer" letters and the a TPT's rights under the Pubs Code.

27. Within the Advice Note, paragraph 3.3 states that:

*"The PCA's view is that a POB should not trigger an arbitration clause in a tied agreement relating to a tied rent review if there is an outstanding PCA arbitration concerning the rent assessment proposal in connection with that rent review. **All six regulated POBs agree that they do not, or will not do this in future.**"*
[emphasis added]

28. The withheld information comprises of letters from the Adjudicator to five out of the six POBs (the Commissioner will refer to these companies as POB1, POB2, POB3, POB4 and POB5) and copies of the five responses that were received from those POBs. There are also copies of three letters sent, by the Adjudicator, to the sixth POB (POB6) and three letters received from POB6. Finally there are summary notes from two meetings the Adjudicator held with one of the POBs. One is labelled as a "draft" summary.

29. The Adjudicator drew the Commissioner's attention to the precise phrasing of the request in the complainant's correspondence of 10 May 2020:

"I thought that it might be helpful if I was specific about the issue I am researching: that is paragraph 3.3 of the Advice Note where it states 'All six regulated POBs agree that they do not, or will not do this in future.'

"This conformation from POBs was presumably obtained through a consultation involving the PCA and the POBs. It is

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/807263/WITHDRAWN_2017_06_30_PCA_Advice_Note_Calderbank_Offer_Letters.pdf

the correspondence and meeting notes in relation to this that are of specific interest.” [emphasis added]

30. The Adjudicator argued that the complainant had been very specific in his request: he wanted correspondence in relation to the agreement set out in the Advice Note, not the content of the Advice Note as a whole. Therefore, it argued, any information within the correspondence which did not relate specifically to the agreement – even if it related to the broader Advice Note – would thus fall outside the scope of the request. When challenged by the Commissioner, the Adjudicator admitted that some of its redactions had been inconsistent but maintained that its broad approach to the scope of the request was correct.

“Following [the complainant’s] clarification, the PCA did not consider that the requestor was asking for information relating to the issuing of calderbank offer letters. It was determined that he was asking for specific information relating to the matter referred to at paragraph 3.3 of the Advice Note and for copies of documents considering whether POBs may trigger tied rent dispute resolution clauses during the MRO process. The information which we highlighted as not being in scope does not fall within these categories and is therefore not part of the information within the request.”

31. The Commissioner considers that, until late into her investigation, the Adjudicator had not correctly identified the information, within the documents it had withheld, that fell outside the scope of the request. Indeed she notes that some of its determinations about scope did not appear to accord with its own stated interpretation as outlined above. This is a point that the Commissioner has expanded on in the confidential annexe to this notice.
32. The Commissioner does accept that, whilst the original request of 6 May 2019 could have been read as seeking information about *any* aspect of the Advice Note, the refined request of 10 May 2019 narrowed the scope to only information relating to any consultation the Adjudicator had carried out with the POBs in respect of triggering dispute resolution clauses. In her view, such a reading of the request results in *less* information falling within the scope of the request than that which the Adjudicator originally identified.
33. Because a document-by-document discussion about which information does and does not fall within scope would be inseparable from the actual content of the information being withheld, the Commissioner has had to place this analysis within a confidential annex, which will only be provided to the Adjudicator, in order to preserve a meaningful right of appeal. Whilst she accepts that this may be frustrating to the

complainant, she notes that she has set out her interpretation of the scope of the request.

34. However, the Adjudicator's arguments about documents being only partially within the scope of the request do raise a broader point on which the Commissioner agrees: namely that the FOIA provides a right of access to *information* and not *documents*. A public authority is not required to consider whether an entire document can be disclosed if only part of that document falls within the scope of the request – although many authorities will often disclose the document in full if the remaining information can be safely disclosed.
35. For the avoidance of doubt, the Commissioner has only considered whether exemptions apply to the information which she deems to fall within the scope of the request.

B. Which limbs of the exemption are engaged?

36. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
37. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - (a) *would, or would be likely to, prejudice—*
 - (i) *the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
 - (ii) *the work of the Executive Committee of the Northern Ireland Assembly, or*
 - (iii) *the work of the Cabinet of the Welsh Assembly Government.*
 - (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.*
38. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide

her own opinion. The Commissioner's role is to establish that an opinion has been provided by the Qualified Person; to assure herself that that opinion is "reasonable" and to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

Who is the Qualified Person and have they given an opinion?

39. Section 36(5) of the FOIA sets out the individual who will be the qualified person for the purposes of the exemption. Section 36(5)(o) states that, in the case of non-departmental public bodies, a Minister of the Crown must either designate an individual within that public authority as the qualified person or must designate the public authority itself (as a corporate body) as the qualified person.
40. The Commissioner was originally informed that the Adjudicator himself, Mr Paul Newby, was the Qualified Person for the purposes of section 36 of the FOIA. The Commissioner was provided with a copy of a letter, signed by the then-Minister Margot James MP, authorising both Mr Newby (as the Adjudicator himself) and Ms Dickie (as the Deputy Adjudicator) to act as the qualified person for the purposes of section 36 of the FOIA.
41. During the course of her investigation, Ms Dickie replaced Mr Newby as the Adjudicator and she provided a second Qualified Person's opinion in respect of all the withheld information.
42. The Commissioner is satisfied that Ms Dickie has been appropriately authorised to act as the Qualified Person for the purposes of section 36 of the FOIA and that she gave an opinion on 6 July 2020. It is this second opinion which the Commissioner has focused on below.

Is the Qualified Person's Opinion reasonable?

43. When assessing how reasonable a qualified person's opinion is, it is not for the Commissioner to substitute her own judgment as to the likelihood of prejudice occurring. The qualified person has a better understanding of the way that their public authority operates and the significance of particular information. The Commissioner's published guidance states that:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.

*"This is not the same as saying that it is the **only** reasonable opinion that could be held on the subject. The qualified person's*

*opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that **no** reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the **most** reasonable opinion that could be held; it only has to be a reasonable opinion."*

44. Given the broad discretion granted to the qualified person, in determining whether an opinion is "reasonable", the Commissioner looks for any reason to suggest that it is *unreasonable*. This will most usually be the case where the arguments in relation to prejudice do not relate to the claimed exemption or where claims of prejudice are rendered moot by the qualities of the specific information being withheld – such as when the information in question is already in the public domain. However, the Commissioner will consider each case on its own individual merits.
45. It is not necessary for the Commissioner to make a considered assessment of the likelihood and severity of the prejudice that might result from disclosure in order to find that the exemption is engaged. However, such an assessment is likely to form part of the public interest test.
46. In order to engage section 36, a public authority can either argue that disclosure *would* cause prejudice or that disclosure *would be likely* to cause prejudice.
47. For a public authority to demonstrate that prejudice *would* apply, it must show that it would be more likely than not that the claimed prejudice would result from disclosure. With regard to "likely to prejudice", the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*".
48. The first Qualified Person's Opinion did not state clearly whether prejudice "would" occur or whether it "would be likely to" occur: indeed, throughout, it referred to prejudice which "would or would be likely to occur" – despite these being separate tests. However, the second Opinion made clear that the Adjudicator wished to apply the higher test that disclosure "would" cause prejudice.
49. The Adjudicator applied three "limbs" of the exemption to the withheld information: 36(2)(b)(i); 36(2)(b)(ii) and 36(2)(c). Whilst a public authority is entitled to apply more than one limb of section 36 to the same information, it must be able to justify why each limb applies.

Section 36(2)(b)(i) – “frank provision of advice”

50. This limb of the exemption will apply where disclosure of information would or would be likely to inhibit the free and frank provision of advice. Whilst “advice” is not specifically defined within the FOIA, the Commissioner’s guidance lists examples which she considers would be likely to come under consideration:²

“Examples of ‘advice’ include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views.”

51. The Commissioner had some difficulty in identifying the Qualified Person’s arguments in respect of 36(2)(b)(i) because they were mixed with the arguments relevant to 36(2)(b)(ii) and, for the most part, were better-suited to that exemption. However, she considers that the following passage broadly sums up the main thrust of the Opinion:

“The Pubs Code is a complex piece of legislation about which there have been and continue to be conflicting opinions as to the interpretation and application of various provisions. As well as the regulated businesses communicating with the PCA, it is important that the PCA is able to communicate uninhibited in a full and frank way with the regulated businesses about matters which concern potential interpretations of complex and controversial areas of the Pubs Code. In a situation where the interpretation of a provision may be controversial, the PCA must be free to express their views on the interpretation internally, and engage in related discussions with the regulated businesses, regardless of whether such an interpretation may later ultimately be considered to be correct or incorrect, without fear that the discussions may be made public to potentially embarrass or hinder the regulator.”

52. The Commissioner notes that the primary focus of section 36 is on the processes themselves rather than the content of the information actually withheld. It is not necessary for the information to contain notably “free and frank” advice to engage the exemption. The question for the Commissioner to consider is: is it unreasonable to suppose that the

² <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

person who provided the original advice (or another person considering providing advice) would be dissuaded from providing similar advice in the future – if they considered that that information would be made public?

53. In considering this limb of the exemption, the Commissioner has had regard to the Adjudicator's statutory role as the regulator of the Pubs Code. Given that the POBs are regulated by the Adjudicator and the Adjudicator is responsible for the interpretation of the Pubs Code, the Commissioner has difficulty in understanding why the Adjudicator would be seeking advice from those it is charged with regulating. The Qualified Person's Opinion does not provide any arguments suggesting why the Adjudicator would need advice from those it regulates.
54. Whilst the Commissioner does recognise that the Adjudicator may need a safe space to discuss issues arising under the code with the POBs that it regulates, this is different to receiving "advice" of the type envisaged by this limb of the exemption. She is therefore not convinced that it is reasonable to suggest that correspondence *from* the POBs is likely to contain advice to the Adjudicator.
55. Furthermore, the Adjudicator informed the Commissioner that it is empowered by section 60 of the Small Business, Enterprise and Employment Act 2015 to issue statutory advice "on any matter relevant to the Pubs Code." Given that the Adjudicator has a statutory power to issue formal advice, the Commissioner considers that it would be unreasonable to suggest that disclosure might affect the Adjudicator's ability or willingness to do so in future.
56. However, the Commissioner also recognises that advice can be both formal and informal. From her own experience as a regulator, she recognises that there are occasions when a piece of discreet advice can be more effective than exercising formal powers. This because it allows the entity being regulated to adjust its ways of working in order to avoid a significant breach of the legislation later on. An informal approach can be more effective because formal (and thus, public) action could push a POB into adopting a defensive position because it wishes to defend its corporate reputation. An informal approach can also be more *cost-effective* if it removes the need for both parties to go through a process of litigation.
57. The Adjudicator has also pointed out that, at the point the withheld information was created, the Pubs Code was a relatively fresh piece of legislation and all the parties were learning what its implications might be. It was therefore to be expected that the POBs would wish to communicate more regularly with the Adjudicator than they would now

that the legislation has matured and that there is a more extensive volume of case precedent (and statutory advice) that can be consulted.

58. The Commissioner therefore recognises that there is a value in preserving a "safe space" in which POBs can seek and be provided with informal advice from the Adjudicator. She considers it reasonable to suppose that, were this safe space to be removed, it would deter the POBs from seeking informal advice and it might affect the candour of advice the Adjudicator felt able to give. To the extent that disclosure of the withheld information would impinge upon this safe space, the Commissioner therefore accepts that the Qualified Person's Opinion would be reasonable and the exemption would thus be engaged.
59. Turning to the information that has actually been withheld, the Commissioner has considered each document individually but with the principles outlined above in mind.
60. In respect of the correspondence between the Adjudicator and POB6, the Commissioner considers that this correspondence is significantly different from the correspondence between the Adjudicator and the remaining five POBs – not least because there was more than one round of correspondence.
61. However, the content of that correspondence is also different because it comprises an exchange of views between POB6 and the Adjudicator. Where the information falls within the scope of the request, POB6 was clearly trying to understand the Adjudicator's view of the way the Pubs Code applied. The Adjudicator was, in return, offering its view.
62. The Adjudicator confirmed to the Commissioner that POB6's opinion on disclosure had been sought and it had not objected to disclosure. Whilst this suggests that POB6 would not be deterred from seeking advice in this way in the future, it does not render the Qualified Person's Opinion unreasonable. The Qualified Person also commented that:

"on balance disclosing any of the information would create an unfair disclosure, singling out some businesses in relation to their responses and have a chilling effect on the confidence of POBs to interact openly with the regulator, as POBs would consider that such interactions would not be confidential. A safe space is required to avoid the risk that POBs will not share matters with the PCA, and it would otherwise be much more difficult for the PCA to regulate the industry where areas of the Code do need a degree of purposive interpretation to enable the framework to work as Parliament intended."

63. The prejudice envisaged under this limb of the exemption does not just apply to the Adjudicator's relationship with POB6 – if disclosure of this correspondence could deter *any* of the remaining POBs from seeking informal advice from the Adjudicator, inhibition (and thus prejudice) would be caused and therefore the exemption would be engaged.
64. Neither of the notes from the two meetings is a verbatim transcript of the conversation which took place. However, it is clear from the information that the POB in question, whilst keen to protect its own interests, also wished to know what the Adjudicator's view on the matter was.
65. The Commissioner considers that it is reasonable to expect that the meetings in question would have been different in character had both parties involved been aware that the meeting notes would subsequently be placed into the public domain. It is also reasonable to expect that other POBs may be dissuaded from seeking such meetings in future. This material will thus also engage the exemption.
66. In addition to the actual content of the correspondence, the Commissioner also considered whether the exemption would apply to the identities of each POB. Whilst the names of the six POBs are in the public domain, the contents of their correspondence is not.
67. The Commissioner considers that, were POB6 to be identified (even if the contents of the correspondence remained withheld), an adverse inference might be drawn as to the contents of the communication and the matters discussed. She considers that this would damage, potentially unfairly, POB6's reputation and this would dissuade both POB6 and the remaining POBs from engaging with the Adjudicator in future. As revealing the names of the other five POBs would reveal the identity of POB6, the Commissioner has concluded that revealing the identity of any of the POBs would cause prejudice and thus engage the exemption.
68. Finally, the Commissioner has considered the five letters sent to and the response received from, the remaining five POBs.
69. The correspondence *from* the Adjudicator was sent first. It does not contain any information which the Commissioner would regard as constituting advice from the Adjudicator to the POBs. The responses, once again, do not constitute advice, nor do they reveal the content of previous advice. As this correspondence therefore bears no relation to any advice offered by the Adjudicator, the Commissioner considers it would be unreasonable to assume that the Adjudicator would be inhibited from providing advice in the future, if this information was to

be disclosed. She therefore cannot conclude that the exemption is engaged.

Section 36(2)(b)(ii) – Free and Frank Discussion

70. This limb of section 36 is similar in nature to 36(2)(b)(i) in that it also recognises the value of and seeks to protect a “safe space” for public authorities to operate in.
71. There are occasions where a public authority may need to have a candid discussion, either internally or with external stakeholders about important matters. Being unable to thrash out important matters, and provide honest, open views can impair the quality of decision-making.
72. When pressed by the Commissioner, the Adjudicator noted that, although it had some powers to acquire information from any POB covered by the code, the powers involved would only apply in circumstances related to a specific complaint. The Adjudicator would not have the legal powers to compel POBs to provide information such as that which has been withheld here.
73. Once again, the main focus is on the process itself rather than the exact content of the information that is being withheld – although the more factual the information, the less reasonable it will be to claim that its disclosure would cause prejudice.
74. The Commissioner considers that the arguments of the Qualified Person noted above apply equally, if not even more so, to the correspondence with POB6 and the meeting notes. It is clear that a process of engagement and discussion of what was then a previously unexplored issue was taking place at the time this information was created. There is a clear value in the parties involved being able to have a frank discussion about the issues raised. The Commissioner accepts as reasonable the suggestion that such discussions would be inhibited in future if information of this kind were released.
75. The same considerations also apply to the linking of the name of each POB with its correspondence.
76. Equally, the correspondence between the Adjudicators and the remaining five POBs does not have the nature of a discussion or the exchange of points of view. The correspondence is solely factual. In addition, the Commissioner notes that because of the small proportion of each document that falls within the scope of the request, the information that has actually been withheld is indistinguishable from that which is already in the public domain. The Commissioner cannot therefore consider that the Qualified Person’s opinion is reasonable in

respect of these documents and therefore the exemption is not engaged.

Section 36(2)(c) – “Otherwise” Prejudice

77. As noted above, section 36(2)(c) can apply to the same information to which either 36(2)(b)(i) or (ii) applies. However, the public authority must be able to demonstrate that some form of prejudice would occur that would *not* be covered by any other exemption.

78. The Tribunal in *Evans v Information Commissioner EA/2006/0064*, concluded that the appropriate approach to the exemption was:

*“if the same arguments are to be advanced [as for the other parts of the exemption], then the prejudice feared is not ‘otherwise’. Some prejudice **other than** that to the free and frank expression of advice (or views, as far as section 36(2) (b) (ii) is concerned) has to be shown for section 36(2) (c) to be engaged.”* [emphasis added]

79. The Commissioner has looked closely at the Qualified Person’s opinion but cannot identify any arguments which are not covered by the other limbs of the exemption. She therefore finds that the Qualified Person is not reasonable in this regard and thus section 36(2)(c) is not engaged in respect of any of the withheld information.

C. The balance of the public interest

80. Whilst the Commissioner has found that the Qualified Person’s opinion is reasonable in respect of some of the information and thus section 36 is engaged, she must still consider whether or not the balance of the public interest lies in maintaining the exemption. She must balance the interests of transparency against the prejudice that she has already determined would occur.

The complainant’s position

81. The complainant provided a detailed submission, setting out why he considered the public interest favoured transparency.

82. The complainant pointed out that the way the Adjudicator appeared to have applied the exemption (the complainant of course was disadvantaged by not having had sight of the withheld information) suggested that virtually every piece of external correspondence would be exempt from disclosure. He argued that there would clearly be a public interest in understanding the width and breadth of the discussions being had between the POBs and the adjudicator. As the Adjudicator had

not claimed any formal confidentiality agreement, there could be no reasonable expectation of confidentiality.

83. In addition, the complainant noted that any discussions around the activities of POBs and any perceived need for guidance had taken place without any input from TPTs. Any “free and frank” discussion should therefore, the complainant argued, involve TPTs if it were to justify special protection.
84. Furthermore, the complainant highlighted the core principle of “fair and lawful”, in the Pubs Code and the Adjudicators role in ensuring fairness and lawfulness in the industry. The Advice Note cautioned POBs against invoking contractual clauses when a referral to the Adjudicator was in progress. However, the wording of paragraph 3.3 of the Advice Note (“do not, or will not”) would, the complainant argued, suggest that, during the course of the conversations which form the withheld information, one or more of the POBs must have admitted that it did (at the time) utilise such a practice. Such an admission would, the complainant suggested, indicate that the POB in question was acting, at best, unfairly and possibly unlawfully. There would thus be a clear public interest in such an admission being made public. At the very least, any TPTs who had been subject to such a practice would be entitled to know that they had been dealt with unfairly.
85. Finally, the complainant argued that the timing of the request (when a further advice note was due to be issued) should reduce the need to continue to protect information created two years previously. The timing also favoured disclosure, he argued, because any considerations about a new advice note would be better informed by understanding the considerations that led to the original Advice Note being issued.

The Adjudicator’s view

86. The Commissioner considers that the Adjudicator’s arguments, as to why the public interest should favour maintaining the exemptions, would have benefitted from being clearly delineated from its arguments about prejudice. Reasons as to why prejudice would or would not be likely to occur are different to the reasons why the public interest would or would not favour maintaining the exemption. Nevertheless, the Commissioner has identified several themes.
87. Firstly, the fact that prejudice would be arise from disclosure of the information itself adds weight to the public interest in favour of maintaining the exemption. When the information was created, the legislation itself was still relatively new. All the players involved were still trying to understand how it would work in practice. At the time

there was a strong public interest in allowing these discussions to take place in a "safe space" and that safe space still needed to be preserved.

88. The Adjudicator argued that the timing of the request was sensitive as a further advice note was under consideration at the time the request was submitted. It argued that:

"The information relates to discussions between the regulator and the regulated POBs, undertaken at that time for the purpose of considering whether there were circumstances which would justify regulatory action by the PCA."

89. Finally, the Adjudicator drew attention to its need to be an effective regulator. There would be a strong public interest in ensuring that the Pubs Code was enforced and thus, any disclosure of information which hampered the Adjudicator's ability to regulate would be harmful to the public interest.

The Commissioner's view

90. The Commissioner's view is that, where the exemption is engaged in respect of the information that has been withheld, the balance of the public interest favours maintaining the exemption.
91. When considering the balance of the public interest, the Commissioner starts by noting that the Qualified Person has issued a reasonable opinion that prejudice would result from disclosure of the information in question.
92. Whilst the probability of prejudice does not mean that information must automatically be exempt, there will always be an inherent public interest in protecting a public authority from the prejudice it believes would result from disclosure. The Commissioner must therefore consider whether there is a sufficiently compelling public interest which would justify the public authority being expected to bear the prejudice. Clearly the more severe the prejudice and the more likely it is to occur, the more compelling the public interest in disclosure will need to be.
93. A public authority should not expect to be able to rely on any limb of section 36 to save itself from embarrassment alone. The fact that a public authority may have made a mistake, or changed its view, will not in itself be sufficient to show that there is a public interest in withholding the information. However, a public authority does have a right to a safe space to discuss ideas candidly.
94. The complainant has rightly drawn the Commissioner's attention to the Adjudicator's position as a regulator of the POBs. Given the small number of POBs and the frequency with which the Adjudicator would

need to communicate with them, there is a potential risk that a small public authority, like the Adjudicator, unconsciously begins to absorb the arguments of those it is required to regulate. The Commissioner is not suggesting that this *has* occurred, merely that there is a risk that it *might* and therefore an increased public interest in the Adjudicator being seen to be acting in an impartial and independent fashion.

95. The Commissioner is also conscious that the Adjudicator was established in order to help correct a perceived imbalance between large POBs, with considerable financial resources and individual pub tenants. There is a public interest in understanding how the Adjudicator is discharging its functions.
96. On the issue of timing, the Commissioner does not consider that the proximity of the request and the Adjudicator's considerations about the issuing of a fresh advice note enhance the public interest in maintaining the exemption. She considers it unlikely that the discussions that were had prior to the issuing of the previous advice note would have a bearing on a new advice note as those discussions would have been superseded.
97. Whilst there may have been a public interest in disclosure, had the POBs been benefitting from greater clarity on the application of the Pubs Code, the Commissioner considers that, given that the Adjudicator has issued a statutory Advice Note, the same interpretation is now available to both parties.
98. Nevertheless, the Commissioner does recognise that the discussions that are recorded in the withheld information would have been had with a reasonable expectation on behalf of the POBs that they were taking place in a "safe space."
99. The Commissioner, drawing on her own experience as a regulator, recognises that there is a regulatory benefit from being able to have free and frank discussions with and provide candid advice to, stakeholders. There is a strong public interest in allowing these discussions to take place unimpeded.
100. The Commissioner recognises that the need to protect the safe space had diminished in the two years between the information being created and the request being submitted. The issuing of the Advice Note was no longer a "live" issue at the time the request was made. The original discussions took place in the context of there being no statutory advice – and therefore no settled interpretation of the Pubs Code. Even if the Adjudicator was reconsidering its statutory advice at the time the request was made, those discussions would be different because they would relate to the adequacy of the Adjudicator's statutory advice.

101. However, whilst the public interest in preserving the safe space has diminished, it has not diminished to the point that it is outweighed by the interest in transparency.
102. To breach this safe space by ordering disclosure would, in the Commissioner's view, deter other POBs from engaging with the Adjudicator in such a way in future. The POBs would still engage with the Adjudicator, but they would do so in a manner that would be more cautious, less candid and with a greater focus on protecting corporate reputations. This would be harmful to the public interest.
103. The Commissioner also recognises that the Pubs Code will have matured considerably since the information was first created. At that time, all the parties involved would have been unsure about exactly what the legislation meant and how it would operate in practice. She considers that the conversations that would have taken place at that time would be of limited use in understanding the conversations that would have taken place around the issuing of the more recent advice note – which reduces any public interest in disclosure.
104. Conversely, disclosure would have a harmful effect on the willingness of the POBs to engage with the Adjudicator in future, in a manner that is beneficial to the public interest.
105. The Commissioner is therefore satisfied that the public interest in maintaining the exemption is strong and there is no compelling public interest in disclosure which would override it. She is therefore satisfied that both limbs of the exemption are engaged in relation to some of the information and that, where it is, the public interest favours maintaining the exemption.

D – Procedural Matters

106. Section 10 of the FOIA states that a public authority must, unless an exemption applies, inform a requestor whether or not it holds information relevant to the request "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
107. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

- (a) states that fact,*
- (b) specifies the exemption in question, and*

(c) *states (if that would not otherwise be apparent) why the exemption applies.*

108. The Adjudicator failed to provide its substantive response to the complainant's revised request until 8 July 2019. It therefore failed to comply with its duty under section 1(1)(a) or issue its refusal notice within the statutory deadline.

109. The Commissioner therefore finds that the Adjudicator breached both section 10 and section 17 of the FOIA in responding to the request.

Other matters

110. The Commissioner is mindful that the Adjudicator is a small public authority and therefore unlikely to receive large volumes of information requests. Section 36 of the FOIA is a complex exemption and therefore she considers that some further comments would be of assistance, should the Adjudicator wish to rely on this exemption in future.

111. Whilst the second Qualified Person's Opinion was considerably better in all these respects, in view of her role in promoting best practice, the Commissioner considers it prudent to note these matters.

112. Firstly, the Commissioner recognises that, whilst an opinion must be given by the Qualified Person, that Person will often rely heavily on the submissions placed before them. There is nothing to prevent the Qualified Person from simply stating "I agree" in respect of the submission – but it should be explicit that the Qualified Person is adopting the submission in its entirety and not offering up a separate opinion. If the Qualified Person's opinion departs from the submission in any way, that should also be explicit.

113. Secondly, the Qualified Person's opinion needs to be explicit as to which threshold test it believes applies to the withheld information. The Qualified Person should state whether the prejudice they have identified *would* occur or, whether it *would be likely to* occur. These are two separate thresholds. Where there is a greater than 50% chance of prejudice resulting then prejudice "would" occur. If the chance of prejudice is less than 50% but still more than just a hypothetical possibility then the prejudice "would be likely to" occur.

114. Finally, the Qualified Person's opinion and, where relevant, the submission supporting it, should only focus on the prejudice (or negative consequences) that they believe would (or would be likely to) result from disclosure and the individual limbs of the exemption they believe would be engaged. The opinion should certainly not become infected

with arguments as to where the balance of public interest might lie. The Qualified Person's opinion should identify the prejudice(s) and demonstrate that it meets the appropriate threshold test.

115. The Commissioner draws attention to her template for recording the Qualified Person's opinion and she would recommend that all public authorities follow (or, at least, have regard to) it when applying the section 36 exemption.³

116. When supplying withheld information to the Commissioner for the purposes of an investigation, a public authority should provide an unredacted copy of the document – even if it believes that part of the document does not fall within the scope of the request. It is good practice for the public authority to highlight any information it believes to be out of scope in a different manner to information subject to redactions.

³ <https://ico.org.uk/media/for-organisations/documents/2260004/record-of-the-qualified-persons-opinion.doc>

Right of appeal

117. 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@justice.gov.uk

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

118. 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.

119. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF