

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2021

Public Authority: Department for Business, Energy and Industrial Strategy ("BEIS")

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information concerning a structural review at the Pubs Code Adjudicator's office ("PCA").
2. The Commissioner's decision is that BEIS has appropriately relied on FOIA section 36(2)(b)(i)& (ii) - prejudice to effective conduct of public affairs – to withhold the requested information. The Commissioner also finds BEIS to be in breach of procedural section 17(1) in providing a late refusal notice.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

4. BEIS explained to the Commissioner that the PCA is an independent statutory office with functions conferred by Part 4 of the Small Business, Enterprise and Employment Act 2015 and regulations made under it, and the Adjudicator is appointed by the Secretary of State, in practice, the Business Secretary. There are certain requirements on the PCA to consult or obtain the consent of the Secretary of State – for example, under section 63 of the 2015 Act, in relation to the imposition of a levy; and in paragraphs 9, 10 of Schedule 1 to the Act, in relation to staffing arrangements and conflicts. Organisationally, staff at the PCA include secondees from central government, and the PCA works to an organisational framework agreed between it and BEIS.
5. In relation to BEIS' policy-making function in this field, exchanges with the PCA are also a valuable way for the Department to gain an

understanding of the sector and impacts of the statutory regime on it, so as to develop policy in this area: for example, the PCA may give helpful insights into the behaviour of regulated pub companies and the arguments put forward by tenant campaigners.

Request and response

6. On 9 December 2019 the complainant wrote to BEIS and requested information in the following terms:

" A copy of the Structural Review into staffing at the Pubs Code Adjudicator's office."
7. BEIS responded on 29 April 2020 with a refusal notice in reliance of the exemption at section 36(2)(b) – Prejudice to effective conduct of public affairs.
8. Following an internal review BEIS wrote to the complainant on 19 May 2020 upholding the initial response.

Scope of the case

9. The complainant contacted the Commissioner on 22 May 2020 to complain about the way his request for information had been handled. He stated:

"Unfortunately, it is clear that the request to BEIS has been passed to the PCA who have issued their standard response when refusing to disclose information which should be in the public domain."
10. The Commissioner considers the scope of her investigation to be the application of the FOIA section 36 exemption to the requested information.

Reasons for decision

11. Section 36(2) of FOIA states:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...

(b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation,"
12. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.
 13. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.
 14. BEIS has advised the Commissioner that the qualified person in this instance is the Parliamentary Under Secretary of State for Small Business, Consumers and Labour Markets, Paul Scully MP. BEIS confirmed that the Minister was provided with the information and the Commissioner has seen the submission to him and his response. The Commissioner is satisfied that, as a Minister, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA.
 15. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person *could* hold and not whether it is the *most* reasonable opinion. As stated, the critical issue is that the arguments being advanced by the qualified person not only link to the factors described in the exemption but also relate to the information to which the exemption has been applied.
 16. In seeking the advice of the qualified person, BEIS prepared submissions on 18 March 2020 which quoted the request, provided some context to the requested information, explained the operation of the exemptions cited and gave an overall recommendation that supported the application of the exemptions. By agreeing to the application of the exemptions, the qualified person effectively supported the arguments included in the submissions, including the acceptance that the prejudice described in sections 36(2)(b)(i) & (ii) would be likely to occur through disclosure. While the level of prejudice designated by

'would be likely' is lower than the alternative threshold, 'would' prejudice, it nevertheless still requires there to be a real and significant risk of the prejudice occurring.

17. The Commissioner notes that these exemptions are about the processes which may be inhibited, rather than the specific content of the information. She considers that the issue is whether disclosure would or would be likely to inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank.
18. With respect to each of the limbs of section 36(2)(b), the submission explains that the PCA shared the report of the Organisational Development and Design Review which took place between October - December 2018, with BEIS to support proposed changes to its staffing structure which required Secretary of State approval. It explained its concerns that disclosure would result in inhibiting the PCA's readiness to share information if its sponsor department sought to disclose information that it considered should be kept in a safe space for ongoing management discussion.
19. BEIS explained that the PCA is not obliged to share all the information it holds and therefore could choose to share only information it is required to provide (see paragraph 4 above). It is likely that a reluctance on the part of the PCA to share information would limit the extent to which BEIS officials can engage with the PCA, deliberate matters with them, and in turn provide advice to ministers. While the information in this request relates to PCA organisational and staffing matters, which the PCA has shared on this occasion, undermining the confidence the PCA has in sharing sensitive information in future would be likely to limit the provision of full and frank advice and the free and frank exchange of views between the PCA and BEIS, for the purposes of deliberation. The PCA has made clear its concerns in this regard.
20. The Commissioner is satisfied that the arguments presented are ones that relate to the activities described by the exemptions cited. She also considers the opinion that disclosure of the information would be likely to result in the prejudice being claimed, to be one that a reasonable person could hold. She has therefore found that sections 36(2)(b)(i) and (ii) are engaged.
21. Each of the limbs of section 36(2) is a qualified exemption, which means that they are subject to the public interest test set out in section 2(2)(b). The Commissioner has therefore considered the arguments in favour of disclosing the information and those in favour of maintaining the exemption.

The public interest

22. BEIS acknowledged that there is a public interest in understanding the staffing levels of a public body required to deliver its statutory functions and therefore how public money is used to that effect. In this regard BEIS advised that this interest is served through the publication of the PCA's annual report, which includes sections on staffing and operational resilience and a remuneration and staff report¹.
23. BEIS advised the qualified person that the PCA had received the same FOI request as in this case and withheld the information in reliance of section 36 . PCA's view is that the advice it received on the structure and organisation of the regulator should be provided in a safe space for senior management to consider and wider disclosure could have a de-stabilising effect on a small team of staff. PCA considered this to be especially so because "the full report has not been shared with PCA staff".
24. BEIS explained its view that although the requested information may further public understanding of these issues, this must be balanced against the public interest in maintaining the ability of the PCA management board to share information with BEIS in a safe space. Disclosure of the information, particularly where the PCA considers it should not be disclosed, would likely affect the confidence of the PCA in sharing such information with BEIS and would likely inhibit the free and frank exchange of views between the PCA and BEIS officials.

The Commissioner's view

25. The Commissioner considers that there is always significant public interest in government departments operating in an open and accountable manner. She believes that greater transparency leads to better public understanding of particular issues and enables the public to assist in the decision making process where possible. It therefore follows that transparency of government departments' actions and the spending of public money must carry significant weight when balancing the public interest.
26. The Commissioner understands that the Structural Review is information relating to a small number of individuals, around 20 staff. The organisational review involved the views of all staff through interviews

¹ <https://www.gov.uk/government/publications/pca-annual-report-and-accounts-01-april-2018-to-31-march-2019>

individually and through an anonymous survey. The recommendations resulting from such a review have significant importance for those involved. She notes that transparency regarding such matters as a review of the structure of an organisation is often helpful in assisting those staff in understanding the review. However, disclosure to the world at large under the FOIA cannot be considered to hold the same significance.

27. The Commissioner understands the complainant's particular reasons for requesting this information, however, such reasons do not necessarily carry a significant weight in considering the public interest. The Commissioner notes that the complainant has been advised that the withheld information will be provided to him personally outside of the FOIA.
28. The Commissioner accepts the importance assigned by BEIS to the relationship between it and its partner organisations and Executive Agencies. As part of the organisational sponsor relationship, and the formal statutory relationship, it is important that BEIS officials have the confidence of the PCA in engaging with them, and sharing information.
29. In the circumstances described by BEIS she also accepts that disclosure of the requested information would be likely to undermine the relationship between the PCA and BEIS and therefore negatively impact BEIS' ability to best fulfil its departmental sponsorship role. The Commissioner considers that the public interest in maintaining a beneficial working relationship carries significant weight. She acknowledges that both the full and frank provision of advice and the exchange of views to assist decisions on matters such as PCA staffing, its annual levy and the ongoing statutory review of the Pubs Code best serve the public interest.
30. The Commissioner notes that civil servants are expected to be robust in meeting their responsibilities and not easily deterred from expressing their views or sharing information by the possibility of future disclosure of information. Nevertheless, she accepts that the PCA could choose to share only the information it is required to share. She notes both BEIS and PCA's concern that disclosure of the information would be likely to inhibit future full and frank discussions on how to manage the PCA office and would likely have a chilling effect on both the PCA's ability to seek support in the future, and the interaction it has with BEIS as its sponsor body. Such inhibition or reluctance to engage further would not assist with successful interaction allowing for the fullest briefing of ministers.
31. The Commissioner also notes that at the time of the request the Structural Review report had not been shared with the small team of PCA staff. Consequently the public interest in disclosure is weakened as those individuals involved with the Review had not been provided with

the content of the withheld information. The Commissioner understands that recommendations resulting from the review have now been implemented. As referenced above in paragraph 26 she understands that the complainant had an interest in the Structural Review and its impact on staff. However, the public interest in disclosure holds significantly less weight.

32. In considering all the circumstances of the case the Commissioner's decision is that the public interest favours maintaining the exemption and withholding the requested information.

Section 17 – timeliness of refusal

33. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled (a) to be told whether the public authority holds the information and (b) to have the information communicated to him or her, if it is held and is not subject to an exemption.
34. In cases where a public authority is relying on a Part II exemption to refuse to disclose information (as in this case), under section 17(1) the authority must issue a refusal notice within the time for complying with section 1(1).
35. The complainant submitted his request on 9 December 2019. BEIS provided a refusal notice after 98 working days, on 29 April 2020. As BEIS failed to confirm, within the time for compliance, that it held information within the scope of the request and was withholding that information under the exemption at section 36, it has breached section 17(1) FOIA.
36. The Commissioner accepts that the length of the delay was exacerbated by the onset of the Covid-19 pandemic, however, notwithstanding this there was already a substantial delay before the impact of the pandemic.

Right of appeal

37. 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

38. 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.
39. 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

Susan Hughes
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