

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 November 2022

**Public Authority:** Ministry of Defence

**Address:** Whitehall  
London  
SW1A 2HB

#### **Decision (including any steps ordered)**

---

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking minutes of all meetings of the Ships' Names and Badges Committee since 1 January 2015. The MOD provided copies of the minutes it held but redacted some information on the basis of sections 26(1)(b) (defence), 36(2)(b)(i) and (ii) (effective conduct of public affairs), and 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that withheld information is exempt from disclosure on the basis of sections 26(1)(b) and 36(2)(b)(i) and (ii) of FOIA.
3. No steps are required.

#### **Request and response**

---

4. The complainant submitted the following request to the MOD on 9 March 2022:

'Please can you disclose the following information in an electronic format:

The membership of the Ships' Names and Badges Committee and details of any fees or honoraria its members receive for serving on it

The minutes of all meetings of the Ships' Names and Badges Committee since 1 January 2015'

5. The MOD contacted him on 7 April 2022 and confirmed that it held information falling within the scope of the request but considered section 26(1)(b) (defence) of FOIA to apply and explained that it needed additional time to consider the balance of the public interest test. The MOD issued a similar letter on 10 May 2022.
6. The MOD issued a substantive response to the request on 11 July 2022.<sup>1</sup> It provided the information sought by part 1 of the request and disclosed the minutes it held falling within the scope of part 2 of the request. However, the MOD explained that parts of the minutes had been redacted on the basis of sections 26(1)(b), 36(2)(b)(i) and (ii) (effective conduct of public affairs) and 40(2) (personal data) of FOIA. In relation to the qualified exemptions, the MOD explained that it had concluded that the public interest favoured withholding the redacted information.
7. The complainant contacted the MOD on the same day and asked it to conduct an internal review of this refusal.
8. The MOD informed him of the outcome of the internal review on 10 August 2022. The review upheld the application of the exemptions cited in the refusal notice.

## **Scope of the case**

---

9. The complainant contacted the Commissioner on 11 August 2022 to complain about the MOD's decision to withhold information falling within the scope of his request on the basis of section 26(1)(b) and sections 36(2)(b)(i) and (ii) of FOIA. He did not seek to challenge the MOD's application of section 40(2) of FOIA.

---

<sup>1</sup> This followed a decision notice being issued by the Commissioner on 7 June 2022 which required the MOD to provide the complainant with a substantive response to the request.

<https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4022105/ic-169719-p1x9.pdf>

## Reasons for decision

---

### Section 36 – effective conduct of public affairs

10. The MOD has withheld the vast majority of the redacted information on the basis of sections 36(2)(b)(i) and (ii). These state that:

'(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'

11. In determining whether sections 36(2)(b)(i) and (ii) are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- 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 the 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.

12. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that 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 not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most

reasonable opinion that could be held; it only has to be a reasonable opinion.

13. With regard to the process of seeking this opinion, the MOD sought the opinion of the Secretary of State for Defence on 9 June 2022 with regard to whether sections 36(2)(b)(i) and (ii) of FOIA were engaged. The qualified person was provided with a rationale as to why the exemptions could apply and copies of the withheld information. The qualified person provided their opinion that sections 36(2)(b)(i) and (ii) were engaged on 4 July 2022. The qualified person subsequently confirmed that the level of prejudice was set at 'would be likely' on 11 July 2022. Whilst the rationale as to why the exemption applies is contained in the recommendation to the qualified person, to which the latter's opinion simply agreed, the Commissioner is satisfied that this is an appropriate process to follow (and is in line with the approach taken by other central government departments).
14. Turning to the substance of the opinion, parts of the recommendation to the qualified person (to which, as explained above, the latter agreed) refer to the contents of withheld information itself. As a result the Commissioner cannot detail all aspects of the qualified person's opinion in this decision notice.
15. However, in summary, the qualified person concluded that disclosure of the parts of the information withheld on the basis of section 36 would expose the deliberations and advice regarding the ship/class naming process and the appointment of sponsors for those ships. Disclosure of such information would be likely to prejudice the ability of officials to operate effectively. This is because it would be likely to make any future advice and deliberations more guarded through concern that they would be disclosed in the future and subject to external scrutiny and criticism.
16. Having considered the content of the withheld information and taking into account the more detailed aspects of the qualified person's opinion, the Commissioner is satisfied that this was a reasonable opinion to come to. Sections 36(2)(b)(i) and (ii) are therefore engaged.

#### Public interest test

17. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

### Public interest arguments in favour of maintaining the exemptions

18. The MOD argued that it was against the public interest to undermine the effectiveness of the decision making process in respect of the naming of ships. It emphasised that disclosure of the withheld information would be likely to inhibit the frankness of future advice and recommendations for fear of negative public reaction and criticism. In the MOD's view release of the ships' names that were considered and not used but which may, or may not be, used in future would be likely to prejudice the ability of officials to operate freely and effectively in future, without interference or pressure from external sources.
19. Similarly, the MOD argued that the minutes contain details of discussions about proposed ships sponsors, the release of which could result in public debate and discussions on the merits of selecting individual sponsors before they have been formally approached. The MOD argued that the impact of such a debate would likely deter individuals from nominating sponsors or discussing reasons for nominations openly at Ships' Names and Badges Committee (SNBC) meetings. As a result, the MOD argued that it is reasonable for it to adopt the position that there is a need for a safe space on the basis that premature public or media involvement would be likely to prevent or hinder the free and frank exchange of views or provision of advice.

### Public interest arguments in favour of disclosing the information

20. The complainant argued that the assertion that disclosure of the information would be likely to prejudice the ability of officials to operate freely and effectively in the future was not supported by any reasoning. He also argued that it was implausible to argue that disclosure would be likely to prejudice professional civil servants' ability to act professionally. The complainant also noted that the MOD's internal review had suggested that disclosure of the withheld information could result in a public debate on this issue, but in his view such an outcome would be a positive development.
21. For its part the MOD acknowledged that the disclosure of the withheld information would provide a clearer understanding of how decisions regarding vessel names and ship sponsors are made. Release of information would demonstrate openness, accountability and transparency on this topic, and increase trust and confidence in the decisions made by the SNBC.

### Balance of the public interest

22. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider

the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.

23. The Commissioner agrees with the MOD that there is a need for a safe space to discuss matters associated with the naming of ships free from external comment and examination. Having considered the content of the withheld information – which consists of detailed minutes recording the free and frank exchange of views and advice – the Commissioner does not consider it to be a hypothetical argument that disclosure of such information would be likely to impact on this safe space. Rather this is a genuine risk. Moreover such an outcome would, in the Commissioner's opinion, be likely to impact on the effectiveness of this process.
24. Furthermore, the Commissioner also accepts that disclosure is likely to impact on the candour of future comments or advice – given the risk of encroaching on this safe space. The Commissioner acknowledges the complainant's view that professional civil servants should not be dissuaded from offering advice and views for fear of disclosure. As a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice or offering views, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. In the circumstances of this case having considered the content of the withheld information, and the free and frank nature of the minutes, the Commissioner is persuaded that disclosure would be likely to risk the candour of future discussions.
25. With regard to the public interest in favour of disclosing the information, the Commissioner agrees that there is a public interest, albeit arguably a somewhat limited one, in allowing the public to better understand how decisions regarding vessel names and ship sponsors are made. Disclosure of the withheld information would directly meet and address this public interest.
26. However, in the Commissioner's view there is a significant, and arguably greater, public interest in ensuring that the effectiveness of the ship naming decision process is not undermined. Given the deleterious impact that disclosure of the information withheld on the basis of section 36 would be likely to have on this process, and the limited public interest in the disclosure of the information, the Commissioner has concluded that the public interest favours maintaining the exemptions contained at sections 36(2)(b)(i) and (ii).

## **Section 26 – defence**

27. The MOD withheld a very small amount of information contained within the minutes on the basis of section 26(1)(b) of FOIA. This states that information is exempt if its disclosure would, or would be likely to, prejudice the capability, effectiveness or security of any relevant forces.
28. In order for a prejudice based exemption such as section 26 to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
29. In its internal review response the MOD argued that disclosure of information that discloses details of any amendments to the ship building schedule could provide an indication of delayed capability and suggest vulnerabilities in the UK's ability to fulfil its defence objectives. In its submissions to the Commissioner the MOD also identified a number of further reasons why the disclosure of the specific information that had been withheld on the basis of section 26(1)(b) would be likely to prejudice defence interests. As these submissions referred to the content of the withheld information itself the Commissioner has not included such submissions in this notice. The MOD confirmed that it was relying on the lower limb of prejudice, ie that disclosure 'would be likely to' have the impact envisaged.
30. The complainant argued that the MOD's explanation of why section 26(1)(b) applied was purely hypothetical.
31. In terms of the first criterion set out above, the Commissioner accepts that the type of harm that the MOD believes would be likely to occur if

the information was disclosed is applicable to the interests protected by section 26(1)(b) of FOIA.

32. With regard to the second and third criteria, having considered the content of the withheld information and the MOD's submissions to him, the Commissioner is satisfied that disclosure of the information would be likely to reveal potential vulnerabilities in the UK's defences or assist adversaries of the UK in the specific ways identified by the MOD in its additional submissions. As result the Commissioner is satisfied that there is a causal relationship between disclosure of the information and the prejudice section 26(1)(b) is designed to protect. It is also clear that any such prejudice would be real and of substance. Furthermore, the Commissioner is satisfied that the likelihood of prejudice occurring is clearly one that is more than hypothetical; rather he is satisfied that given the content of the withheld information, and the detailed operational information it contains, disclosure of it would be likely to prejudice the capability, effectiveness or security of UK forces.

#### Public interest test

33. Section 26 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.
34. The MOD acknowledged that there was public interest in promoting openness, accountability and transparency in defence matters. As noted above, the MOD accepted that disclosure would broaden public understanding of the processes, discussions and decisions made by the SNBC. However, the MOD argued that there was a far greater public interest in ensuring that the capability, effectiveness or security of the armed forces was not undermined and therefore the public interest favoured maintaining the exemption.
35. As set out above the Commissioner accepts there is a public interest in the disclosure of the information on this subject, albeit arguably a limited one. In his view such an interest is significantly outweighed by the greater public interest in ensuring that the effectiveness and security of UK armed forces is not undermined. In reaching this conclusion in this case the Commissioner wishes to emphasise that the amount of information withheld on the basis of section 26(1)(b) is very limited.



## Right of appeal

---

36. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**