

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 April 2023

Public Authority: Department for Culture, Media and Sport

Address: 100 Parliament Street

London

SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information regarding the transfer of a specific set of files to the National Archives.
2. The Department for Digital Culture, Media and Sport relies on sections 36(2)(c) and 40(2) to withhold requested information.
3. The Commissioner's decision is that Department for Digital Culture, Media and Sport has not persuaded him that section 36(2)(c) or 40(2) are engaged.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the withheld information.
5. The public authority 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 17 May 2021, the complainant wrote to Department for Digital Culture, Media and Sport (the "public authority") and requested information by saying as follows:

"I write to request the following information relating to exemptions given by the Secretary of State, DCMS, to the Cabinet Office concerning the transfer of a specific set of files to the National Archives. The files in question are:

CAB 164/1870 – 1901: "Peter Wright case ('Spycatcher' case)".

The Cabinet Office advises that in 2016, the Secretary of State granted a three-year extension to the deadline for the release of these files to TNA. Could you now please provide:

1. The certificate, letter or other communication by which this extension to the deadline was granted.
 2. The record of any subsequent certificate, letter or other communication, granted to the Cabinet Office and providing for a further extension to the deadline.
7. The public authority responded on 11 August 2021, confirming that it held information within scope of part 1 of the request and providing some of that to the complainant. However, it considered some information exempt from release under sections 36(2)(b)(i) and 40(2) of the Act. It also explained that it did not hold information within scope of part 2 of the request.
 8. Following an internal review, the public authority wrote to the complainant on 10 February 2022. It stated that it upheld its position.

Scope of the case

9. The complainant contacted the Commissioner on 11 February 2022 to complain that the public authority had withheld requested information from him.
10. As part of his investigation, the Commissioner wrote to the public authority on 25 October 2022. The Commissioner was seeking the public authority's submissions and evidence to support its usage of section 36, or any other exemption, to withhold requested information from the complainant.

11. To facilitate the public authority in providing its submissions, the Commissioner provided the link below, regarding the section 36 exemption.

<https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-foi-act-2000/#36>

12. On 31 March 2023, the public authority provided the Commissioner with its submissions and a copy of the withheld information.
13. The Commissioner considers he must determine whether the public authority correctly withheld requested information from the complainant.

Reasons for decision

14. Section 36(2) FOIA states:

“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,

or (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

15. 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.
16. The public authority’s submissions made no mention of the obtaining of the qualified person’s opinion. Accordingly, without an explanation or evidence about the involvement of a qualified person the Commissioner must find that section 36(2) is not engaged and that the withheld information must be communicated to the complainant.

Section 40 (2)

17. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure

of that personal data would be in breach of any of the data protection principles.

18. Section 3(2) of the Data Protection Act 2018 defines personal data as: "any information relating to an identified or identifiable living individual."
19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
20. On viewing the withheld information, the Commissioner could not discern any personal data and the public authority did not provide a submission on this exemption. Accordingly, the Commissioner finds this exemption not to be engaged.
21. Having found that the exemptions relied upon by the public authority are not engaged, the Commissioner directs that the withheld information be communicated to the complainant.

22. 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

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

23. 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.
24. 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

**Gerrard Tracey
Principal Adviser FOI
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**