

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

### **Decision notice**

**Date:** 22 May 2023

**Public Authority:** Department for Culture, Media and Sport  
**Address:** 100 Parliament Street  
London SW1A 2BQ

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

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1. The complainant has requested correspondence about the Grade II Listed 'Pluto pavilion' at Sandown, Isle of Wight. The Department for Culture, Media and Sport ("DCMS"), after considerable delay, refused to provide it citing section 36(2)(b)(ii) as its basis for doing so.
2. The Commissioner's decision is that DCMS is entitled to rely on section 36(2)(b)(ii) as its basis for refusing the request. However, it contravened its obligations under sections 10 in failing to provide a response within 20 working days.
3. No steps are required.

#### **Request and response**

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4. On 13 August 2021 the complainant made a request to DCMS in an email where the subject line referred to "The Grade II Listed 'Pluto pavilion' at Sandown, Isle of Wight". This email contained a request for information of the following description.

"Please supply copies of all correspondence relating to the above listed item. Include correspondence covering both internal and with external

bodies subject to FOI obligations. Please include all types of documents, including any minutes of discussions. The items should date from 1/11/2020 until the present day”.

5. On 13 September 2021 DCMS wrote to tell them that it needed further time to consider the public interest in respect of section 36 and that it intended to respond to them by 11 October 2021. It did not do so and the complainant wrote to DCMS on 16 October 2022 reminding it to do so. They did not hear from DCMS again until 23 June 2022 when it provided a refusal notice. It confirmed it was relying on section 36 as its basis for withholding the requested information.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 7 July 2022 to complain about the way their request for information had been handled.
7. Although the complainant had not been through the internal review process, the Commissioner concluded it was not necessary for them to do so given the length of time they had had to wait for an initial refusal from DCMS. The Commissioner considers that the scope of his investigation is to decide whether DCMS is entitled to rely on section 36(2)(b)(ii) as its basis for withholding that information which it holds that is within the scope of the request.

### **Reasons for decision**

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8. Section 36(2)(b)(ii) 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—  
  
(ii)the free and frank exchange of views for the purposes of deliberation
9. For a government department, the exemption will be engaged if, in the reasonable opinion of a minister of the Crown, disclosure would or would be likely to have these effects. This person is usually referred to as the Qualified Person (“QP”).
10. The public authority provided the Commissioner with a copy of a submission it had prepared for one of its ministers, setting out the arguments both for and against engaging the exemption. It did not

provide the Commissioner with a copy of an email (or other communication) confirming the date that the QP gave their opinion. DCMS also did not confirm the name of the QP in question. The submission was addressed to the Parliamentary Under Secretary of State (Minister for Sport, Tourism, Heritage and Civil Society). The Commissioner understands from the gov.uk website that the person in that post at the time was Nigel Huddleston MP.<sup>1</sup>

11. The Commissioner does not need to share Mr Huddleston's opinion for it to be reasonable – providing that it identifies the applicable interest and is neither irrational nor absurd.
12. The opinion recognised that "Releasing this information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. We believe that releasing the [information] would have a 'chilling effect' on officials and impact the 'safe space' in which they can discuss matters candidly".
13. The Commissioner accepts that it is neither irrational nor absurd to consider that civil servants might be less candid in providing advice or opinions if they feared that those opinions would subsequently be published. He also accepts that it is an opinion that can be reasonably held in the circumstances of this case.
14. The Commissioner is satisfied that Mr Huddleston was the QP and was entitled to provide such an opinion. However, in the absence of evidence, it is not clear when he gave the formal opinion. Arguably, without such evidence, the Commissioner could conclude that no reasonable opinion has been given and uphold the complaint on that basis. The Commissioner specifically asked DCMS for this information in a letter of 30 November 2022. As discussed further in the Other Matters section of this notice, DCMS failed to provide a timely response to the Commissioner's enquiries.
15. On this occasion, the Commissioner is prepared to conclude, on the balance of probabilities, that the QP did give his opinion and that he did so at some point between 31 May 2022 (when his opinion was sought) and 23 June 2022. It is clear that the opinion was explicitly sought, albeit after the time for compliance with the request, namely within 20 working days. It was also considerably after 13 September 2021, the date on which DCMS told the complainant that it needed further time to respond because it was considering the balance of public interest test in

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<sup>1</sup> [Parliamentary Under Secretary of State \(Minister for Sport, Tourism, Heritage and Civil Society\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/people/nigel-huddleston)

respect of section 36. Given that it had not yet sought (or obtained) the opinion of the QP – a necessary step before citing section 36 - DCMS had no legal basis to seek to delay further its response in order to consider the balance of public interest in respect of that exemption. Without the QP's opinion, the exemption cannot be engaged in the first place.

16. As the Commissioner is nevertheless satisfied that exemption is engaged in relation to all the withheld information, he has gone on to consider the balance of the public interest.

### **Public interest test**

17. The complainant did not provide any specific arguments about the public interest in disclosure and the Commissioner observes that, although not required, it would have been helpful had he done so.
18. In its submissions to the QP, DCMS noted a general public interest in transparency and a particular public interest in disclosing the information in this case. It said: "There has recently been some media interest in the delisting of properties. Consequently, the correspondence being released would be of public interest. However, we do not feel this public interest is greater than the interest in withholding this information"
19. It had set out its view that there was a stronger public interest in protecting the safe space around which this matter could be discussed and in avoiding a chilling effect on future conversations. It said "Ministers and government officials require a safe space to discuss options and advice freely and frankly with the department, and to reach conclusions based upon these discussions".
20. The Commissioner has made further comment in a Confidential Annex to this notice which makes specific reference to the withheld information. Were he to put that detail on the face of this Notice, this would, of itself, disclose aspects of the content of that information.
21. In the absence of any detailed submissions from the complainant and having conducted an internet search using the subject of the request as a search term, the Commissioner was unable to identify any specific

public interest factor which would add weight to the general public interest in transparency.<sup>2</sup>

22. Having considered the withheld information, the Commissioner accepts that there is a public interest in the circumstances of this case in maintaining a safe space in which views can be exchanged and discussed freely and frankly. He is less convinced that disclosure would have an inevitable chilling effect on future discussions on any subject. He observes that this is a somewhat speculative argument.
23. However, on balance, he has concluded that the public interest favours maintaining the exemption in this case. He has made further comments in a Confidential Annex to this notice.

### **Procedural matters**

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24. Section 1(1) of 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.”

25. Section 10(1) of FOIA states that a public authority must respond to a request promptly and “not later than the twentieth working day following the date of receipt”.
26. It is clear that DCMS missed this date by some considerable margin. In doing so, it contravened its obligations under section 10 of the FOIA.

### **Other matters**

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27. The Commissioner is disappointed that DCMS’ response to his enquiries was considerably delayed. He is also disappointed that DCMS did not
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<sup>2</sup> [Celebrating Sandown - PLUTO & the Pavilion at Browns Golf Course & Cafe on 15 Sep 2018 \(onthewight.com\)](http://onthewight.com)

appear to provide full detail of the QP's opinion as outlined above despite being asked for it.

28. The Commissioner has published a list of what evidence he expects public authorities to provide when they assert reliance on section 36.<sup>3</sup>

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<sup>3</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-record-of-the-qualified-person-s-opinion/>

## Right of appeal

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29. 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)

30. 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.
31. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**