

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 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 correspondence involving the Minister for Sport or the Secretary of State for the then Department for Digital, Culture, Media and Sport, now Department for Culture, Media and Sport ("DCMS") regarding the European Super League from 12 – 30 April 2021 inclusive. DCMS responded after the Commissioner served a Decision Notice requiring it to do so. It refused to provide the requested information and cited provisions of section 36 (prejudice to the effective conduct of public affairs) as its basis for doing so.
2. The Commissioner's decision is that DCMS is entitled to rely on section 36 as its basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 28 October 2021, the complainant made the following request for information under the FOIA:

"Please could you provide me with the details of any correspondence (redacted if required) involving either the Minister for Sport and/or the then Secretary of State for the Department for Digital, Culture, Media and Sport that mentions the 'European Super League' (or its abbreviated term the 'ESL') between April 12th 2021 and April 30th 2021 inclusive."

5. DCMS acknowledged the request on 25 November 2021 and advised that it had "determined that some of this information may be exempt from release under section 36 (Prejudice to effective conduct of public affairs) of FOIA. This is a qualified exemption and, as such, it is necessary to carry out a public interest test to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". It advised that it "hope to let [the complainant] have a substantive response to [their] request by 24 December".
6. DCMS did not send a response by this date and the complainant contacted the Commissioner. DCMS did not provide a response to the complainant when the Commissioner asked it to do so informally. The Commissioner served a decision notice on 19 April 2022 ordering DCMS to respond.¹
7. On 6 July 2022, the complainant finally received a response. DCMS refused to provide the requested information. It cited the following exemption provisions as its basis for doing so: - section 36(2)(b)(i) and (ii) – prejudice to the effective conduct of public affairs.
8. Given the delays the complainant has experienced, the Commissioner decided to take forward their complaint about the response without them having first exhausted DCMS' internal review process.

Scope of the case

9. The complainant contacted the Commissioner on 11 July 2022 to complain about the way his request for information had been handled.
10. The Commissioner has considered whether DCMS is entitled to rely on the provisions of section 36 that it has cited as its basis for withholding the requested information.

¹ [ic-159475-r015.pdf \(ico.org.uk\)](#)

Reasons for decision

11. Under sections 36(2)(b)(i) and 36(2)(b)(ii) of FOIA, information is exempt information where, in the reasonable opinion of a qualified person ("QP"), disclosure 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 purpose of deliberation
12. Information may be exempt under sections 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore a range of options, when providing advice or giving their views as part of the process of deliberation.
13. It is engaged where the public authority's QP states that, in their opinion, it is engaged and that this opinion is reasonable. In relation to section 36 'reasonableness' is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
14. First, the Commissioner is satisfied that, in this case, the Minister for Sport, Tourism, Heritage and Civil Society is authorised as QP under section 36(5)(c) of FOIA. DCMS did not confirm the post holder's name in its submissions to the Commissioner. The Commissioner understands, that at time the opinion was given, the post holder was Nigel Huddleston MP.
15. DCMS has provided the Commissioner with copies of its submissions to the QP and confirmation of his opinion. These show that the QP's opinion was sought on 27 June 2022. The submissions show that the QP was provided with copies of the emails which were considered to be exempt under section 36. The Commissioner notes that the QP was not given any reasons to consider as to why section 36 might or might not apply. Further comment on this is made later in this notice.
16. Based on what DCMS submitted to him, the Commissioner is also satisfied that the QP gave an opinion on 1 July 2022. This is considerably late as evidenced by the fact that the Commissioner had to issue a decision notice requiring DCMS to comply with its statutory

obligation to provide a response. The Commissioner notes that there was a timeliness marker on the submission to the QP. He also notes with disappointment that this marker did not give any indication to the QP of the urgency of the matter.

17. Secondly, the Commissioner has considered the reasonableness of the QP's opinion.
18. The Commissioner is disappointed to note that DCMS included more detail in its submissions to the QP regarding the public interest test than about the engagement of the exemption in the first place. The QP's opinion should be given solely about whether the provisions of the section 36 exemption are engaged with respect to the withheld information. Factors relating to the public interest in maintaining that exemption may be relevant as background to help the QP provide an opinion. The Commissioner would have expected more information in the submission to help the QP determine whether or not the exemption was engaged in the first place, although he recognises that some of the content of the public interest test consideration may have been used by the QP to assist in his consideration of that.
19. Based on the limited submissions provided to the QP, the Commissioner is satisfied that the QP had sight of the withheld information and sight of the text of the relevant provisions of section 36. The submission included a request that the QP give his opinion as to whether disclosure "would be likely" to cause the aforementioned inhibitions. The Commissioner is broadly satisfied that the QP, given their ministerial role, is likely to have an understanding of the relevant issues of transparency versus the need to protect the safe space in which this particular subject can be discussed. The Commissioner notes that the onus is on the public authority to demonstrate that the opinion is a reasonable one and would have preferred more evidence to show how the opinion was arrived at.
20. In light of the above, the Commissioner is prepared to accept that the QP's opinion about withholding the information is one a reasonable person might hold although he would have preferred to see the QP being given more information for and against engaging the exemption. This would have demonstrated more clearly that the QP had arrived at a reasonable opinion. Nevertheless, the Commissioner finds that DCMS was entitled to rely on section 36(2)(b)(i) and section 36(2)(b)(ii) of FOIA to withhold the information. The Commissioner will go on to consider the public interest test associated with these provisions.

Public interest test

21. DCMS did not make additional submissions to the Commissioner regarding its position and, instead, drew the Commissioner's attention to its own submissions on relevant public interest factors that it gave to the QP.
22. DCMS, in its submissions to the QP, set out the following point in favour of disclosure.
 - General public interest in greater transparency noting, in particular, the heightened media interest in this subject.
23. The complainant argued that insufficient weight had been given to the public interest in transparency in this case.
24. In its submissions to the QP, DCMS stressed the importance of maintaining a safe space in which officials could give candid advice. It drew particular attention to some of the information that had been withheld in this case. It said that officials would leave ministers unprepared if they were dissuaded from giving advice freely and frankly. It also observed, with respect to other information, that disclosure would have a chilling effect on meetings if attendees felt they were unable to speak candidly and in confidence on matters concerning them.
25. The Commissioner recognises the importance of brevity when presenting arguments to a busy minister in order to obtain their opinion for the purpose of asserting the application of section 36. However, he is disappointed that DCMS did not provide him (that is, the Commissioner) with any further arguments in support of its position regarding the balance of public interest.

The balance of public interest

26. The matter was not live at the time of the request although it had recently been so. The European Super League (ESL) was a proposed club football competition to be contested between 20 European football clubs. It was announced in April 2021 but a further announcement that the project was suspended came on 21 April 2021.² There then followed international legal disputes related to the ESL. Subsequently, the UK government has created a new independent regulator for English

² [European Super League timeline: Game changer - football's volatile 72 hours - BBC Sport](#)

football whose role would include preventing English clubs participating in similar leagues.³

27. While the matter was not live at the time of the request, at least in respect of the participation of English football clubs, it was still a relatively recent topic that had been considered by DCMS. As such, arguments as to the importance of protecting a safe space for discussion carry more weight than they would if the matter was purely historical.
28. Given the paucity of DCMS' submissions and the lack of specificity in what submissions there are, the Commissioner is not wholly convinced as to the merits of its arguments. He acknowledges that there is a clear public interest in transparency around this topic which has caused a great deal of controversy and discussion.
29. However, by a narrow margin, the Commissioner is satisfied that the public interest favours maintaining the section 36 provisions cited. In reaching this view, he has had particular regard for the relatively recent creation of the information in question with respect to the request. He recognises that the delay that the complainant has experienced has been frustrating but his focus must be on the circumstances prevailing at the time of the request.
30. The Commissioner would add that he expects public authorities to make stronger and clearer arguments in support of their position that relate specifically to the information that has been requested. He draws DCMS attention to the narrow margin by which he reached his decision which was due, in part, to the paucity of its arguments.

³ [Football regulator: UK government confirms new independent body - BBC Sport](#)

Right of appeal

31. 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

32. 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.
33. 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
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