

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 May 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 relating to a meeting between Oliver Dowden and Lord Brownlow regarding the proposed Great Exhibition 2.0. The then Department for Digital, Culture, Media and Sport (now the Department for Culture, Media and Sport or DCMS) refused the request under section 36(2)(b)(ii) and (ii) (prejudice to the effective conduct of public affairs), and section 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that the exemptions at section 36(2)(b)(ii) and (ii) are engaged. However he finds that the public interest in maintaining these exemptions does not outweigh the public interest in disclosure.
3. The Commissioner requires DCMS to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant, with the exception of the names of junior members of staff.
4. 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

5. On 7 January 2022 the complainant submitted the following request to DCMS:

This request concerns the meeting between Oliver Dowden and Lord Brownlow registered as being held on 18th January 2021 as to "To discuss plans for Great Exhibition 2.0".

Please provide a copy of: -All email correspondence between Dowden or the department, and Brownlow of his representatives or private office, concerning this meeting (setting up and summing up) and any attachments to these emails.

Please confirm you have checked whether any messages were sent via any private email used by Dowden for work purposes to Brownlow related to this meeting.

-The minutes of this meeting.

-Any reports, annexes of reference documents provided for and/or utilised at the meeting.

-The attendance list for this meeting.

-Any texts, WhatsApps, or other messages between Dowden and Brownlow related to this meeting.

6. On 4 February 2022, DCMS confirmed to the complainant that it held information relevant to their request. It advised that it would need to extend the time taken to complete its public interest test considerations in respect of the exemption at section 36 (prejudice to the effective conduct of public affairs) of FOIA.
7. The complainant contacted the Commissioner on 11 March 2022 since they had not received a substantive response to their request. The Commissioner issued a decision notice on 20 April 2022 requiring DCMS to respond.¹
8. DCMS issued a refusal notice on 20 June 2022, disclosing some of the requested information. It refused the remainder in reliance on the

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020204/ic-160860-l0d5.pdf>

exemptions at section 36(2)(b)(ii) and (ii), and section 40(2) (personal data) of FOIA.

9. The complainant requested an internal review on 21 June 2022. In this correspondence they also asked for a copy of the opinion obtained by the qualified person in respect of section 36(2)(b)(ii) and (ii).
10. DCMS communicated the outcome of that review on 31 August 2022. The internal review upheld the original refusal. DCMS also advised the complainant that "no opinion was given to the Freedom of Information team, as this is not common practice". DCMS confirmed that "the Secretary of State was content with the use of the exemption".

Scope of the case

11. The complainant contacted the Commissioner on 2 September 2022 to complain about the way their request for information had been handled.
12. The complainant did not accept that all of the withheld information was exempt from disclosure. He also asked the Commissioner to consider the fact that DCMS had not obtained an opinion from the qualified person as required by section 36.
13. DCMS did not provide the Commissioner with any arguments concerning its reliance on section 40(2). However, during the course of the Commissioner's investigation DCMS advised that it had provided the complainant with an attendee list with redactions to junior staff names. The complainant has not raised any complaint about this redacted information; therefore the Commissioner has excluded it from the scope of his investigation. Nor has the Commissioner considered section 40(2) in respect of the remaining withheld information.

Reasons for decision

Section 36: prejudice to the effective conduct of public affairs

14. Section 36(2)(b) of FOIA provides that information is exempt if in the reasonable opinion of a qualified person (QP), disclosure of the information 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.

15. Section 36(5) sets out who may act as the QP in relation to a public authority. In the case of government departments, any Minister of the Crown may act as the QP.²
16. The Commissioner has published guidance on section 36³ which explains that the QP's opinion does not have to be one with which the Commissioner would agree, nor the most reasonable opinion that could be held. The opinion must be in accordance with reason and not irrational or absurd.
17. As is his usual practice the Commissioner asked DCMS for a copy of any submission provided to the QP, and any record of the QP having expressed an opinion.
18. DCMS confirmed that the QP in this case was the then Secretary of State for DCMS. It did not name the individual, but the Commissioner understands that the post was held by Nadine Dorries MP at the time of the request. The Commissioner accepts that as a Minister of the Crown Ms Dorries was authorised to act as the QP.
19. DCMS provided the Commissioner with copies of its submissions to the QP, which included copies of the requested information. The submission was dated 18 May 2022, ie after the Commissioner's decision notice requiring DCMS to respond to the request. It set out public interest considerations favouring withholding the information, and public interest considerations favouring disclosure, albeit that none of these considerations referred to the content of the requested information.
20. DCMS did not provide the Commissioner with any written record of the QP's opinion, but stated that it was received on 8 June 2022.
21. There is no statutory requirement to document the qualified person's opinion. However the Commissioner's published guidance sets out his view that:

"You should record the opinion and the evidence used to come to this opinion. Should the requester make a complaint, this evidence will support the ICO in assessing whether the substantive opinion was reasonable (rather than assessing the quality of the reasoning

² Defined at section 8(1) of the Ministers of the Crown Act 1975 as "the holder of an office in [His] Majesty's Government in the United Kingdom".

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

process). Without such evidence, it may be harder for the ICO to find the qualified person's opinion was reasonable."

22. The Commissioner's guidance goes on to explain that:

"If your discussions with the qualified person are oral rather than in writing, we expect you to keep a full contemporary record of the discussion and the decision. The [Record of the qualified person's opinion](#) will help to provide a full account of the submissions provided to the qualified person and the factors they considered.

If there is not even a record taken at the time of the discussion, then **as a minimum** we would accept a signed statement from the qualified person recording their opinion."

23. The Commissioner is prepared to accept DCMS's assertion in this case that the QP provided an opinion, albeit that he has not been provided with any record of that opinion. The Commissioner observes that DCMS was able to confirm the date that the opinion was provided, but made or kept no record or other evidence of that opinion. The Commissioner has seen no evidence that would lead him to reject DCMS's assertion, therefore he has accepted DCMS's assertion on the balance of probabilities. However he expects DCMS to ensure that appropriate records are retained in future cases. The Commissioner considers that central government departments ought to model best practice in terms of compliance with the requirements of FOIA.

24. The Commissioner has gone on to consider the reasonableness of the QP's opinion. He is mindful that the test of reasonableness is not intended to be a high bar, and if the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.

25. The Commissioner observes that the submission provided to the QP refers to the public interest test, rather than the prejudice test. This is incorrect. The QP's opinion is required in order to decide whether an exemption at section 36 is engaged, rather than where the balance of the public interest lies.

26. In order to engage a prejudice based exemption such as section 36, there must be the likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met:

- first, 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.
27. In this case the submission provided to the QP advised that disclosure of the requested information would be likely to impact on "safe space" and would be likely to dissuade officials from providing thorough, free and frank advice to ministers. It also advised that disclosure would have a "chilling effect" on future meetings.
28. Having reviewed the withheld information the Commissioner accepts that it was reasonable for the qualified person to conclude that section 36(2)(b)(i) and section 36(2)(b)(ii) applied to it. He is prepared to accept that the Secretary of State would be likely to have the required understanding to form a reasonable opinion. He also accepts that the QP was provided with the requested information, the relevant provisions of section 36 and high level arguments relating to prejudice.
29. Accordingly the Commissioner accepts that the QP's opinion is one that a reasonable person could hold. He is further satisfied that the lower level of prejudice, ie, would be likely to prejudice, applies. The Commissioner finds that the exemptions at section 36(2)(b)(i) and section 36(2)(b)(ii) are engaged on the basis of the QP's opinion.
30. Section 36(2)(b)(i) and section 36(2)(b)(ii) provide qualified exemptions. The fact that prejudice has been identified and accepted is not in itself conclusive evidence that information should be withheld. Rather, the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure.

Public interest in favour of disclosing the withheld information

31. DCMS did not provide the Commissioner with public interest arguments in addition to those set out in the submission to the QP. Therefore the Commissioner has made his decision on the basis of this limited information.

32. DCMS acknowledged the general public interest in government transparency. It recognised that transparency makes government more accountable to the electorate and increases trust.
33. DCMS also identified "heightened interest" in the requested information owing to the media attention surrounding Lord Brownlow and the proposed Great Exhibition 2.0.
34. The complainant also made public interest arguments in favour of disclosure. He referred the Commissioner to the Electoral Commission's investigation in 2021 which examined donations from Lord Brownlow to the then Prime Minister, Boris Johnson. As part of that investigation Lord Brownlow had disclosed texts between him and the Prime Minister.
35. The texts were subsequently published by the Independent Adviser on Ministers' Interests.⁴ One text from the Prime Minister to Lord Brownlow read as follows:

"Ps am on the great exhibition plan Will revert."

36. The complainant argued that this indicated an "elevated risk of misconduct in this case, even verging on corruption in the worst-case scenario". He maintained that there was an overwhelming public interest in transparency, which would either reassure that public that everything was above board, or allow the government to be held accountable for any malpractice.

Public interest in favour of maintaining the exemption

37. As set out at paragraph 27 above, DCMS set out that there was a public interest in preserving a "safe space" around briefing documents so that officials feel comfortable sharing candid advice to ministers to brief them for meetings. It added that officials needed to alert the minister to all issues relevant to the discussion, and that failure to do so may leave ministers unprepared.
38. DCMS also set out that disclosure would have a "chilling effect" on future meetings, and that attendees may be reluctant to contribute to meetings, or may withhold sensitive but important information.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1044951/lord-geidt-to-prime-minister-17-december-2021.pdf

Balance of the public interest

39. Section 36(2)(b)(i) and section 36(2)(b)(ii) provide qualified exemptions. The fact that prejudice has been identified and accepted is not in itself conclusive evidence that information should be withheld. Rather, the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure.
40. The Commissioner accepts that there is a legitimate, and considerable, public interest in disclosure of the withheld information, in the wider context of Lord Brownlow's relationship with the then Prime Minister.
41. The Commissioner has commented above concerning the poor quality of the submission provided by DCMS, and in particular the lack of reference to the content of the requested information itself. This lack of detail makes it more difficult for the Commissioner to be persuaded by DCMS's arguments.
42. As with any case, the Commissioner can only make his decision on the basis of the information provided to him. It is therefore essential that a public authority provide detailed and specific arguments in support of any decision to refuse a request, otherwise the Commissioner is more likely to order the disclosure of information. This includes details of the public interest test in respect of any exemptions claimed.
43. The Commissioner finds that DCMS's public interest arguments are too general to carry significant weight in the balancing process. Consequently the Commissioner cannot be satisfied that in this particular case the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

Right of appeal

44. 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

45. 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.
46. 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

Sarah O’Cathain
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