

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 December 2023

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

Decision (including any steps ordered)

1. The complainant requested information related to the Coronation Celebration Playlist published on the Department for Culture, Media and Sport' (DCMS) Spotify account. The requested information included the relevant internal correspondence and names of the songs and artists removed from the draft versions. DCMS withheld the information in its entirety relying on section 36(2)(c) of FOIA (effective conduct of public affairs).
2. The Commissioner has found that section 36(2)(c) is not engaged. In addition, DCMS breached section 17(1) of FOIA as it failed to issue its refusal notice within the statutory 20 working days.
3. The Commissioner requires DCMS to take the following steps to ensure compliance with the legislation.

- Provide the complainant with the information within the scope of the request, with the exception of the names of all officials named in the information.¹
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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 6 February 2023 the complainant made the following request for information under the FOIA:

‘Please provide me:

1. Internal correspondence relating to the Coronation Celebration Playlist posted on the DCMS Spotify account.
 2. The names of songs and artists removed from the draft versions of it.’
6. DCMS responded on 11 May 2023 and confirmed that it held the information within the scope of the request but refused to provide it citing section 36(2)(c) as the basis for doing so.
7. The complainant requested an internal review on 16 May 2023.
8. DCMS provided an internal review response on 21 June 2023 in which it maintained its original position in relation to point 1 of the request but it revised its position in relation to point 2 of the request, confirming that, following a discussion with the relevant policy team, it appeared that there were no draft versions and therefore the response to point 2 of the request should be that the information was not held.
9. DCMS added that two songs had been removed since the release of the

¹ The Commissioner expects the public authority to take appropriate precautions to protect any personal data when disclosing information in a spreadsheet or similar format; [Information Commissioner's Office - Advisory note to public authorities | ICO](#)

playlist. These were 'Dance Wiv Me' (Calvin Harris and Dizzee Rascal) and 'I'm Gonna Be (500 Miles)' (The Proclaimers).

Scope of the case

10. The complainant contacted the Commissioner on 25 June 2023, expressing his dissatisfaction with the DCMS response. He challenged the exemption relied on and the reasons given by the DCMS for withholding the information within the scope of his request.
11. The Commissioner has considered whether DCMS was correct to rely on section 36(2)(c) as a basis for refusing to provide the information it held within the scope of the request in relation to Part 1.
12. The Commissioner notes that as part of its submission to him, DCMS provided a draft playlist, containing information within the scope of the request related to Part 2 thus rectifying its initial response, and the subsequent internal review to the complainant informing him that the information relating to this point was not held.

Reasons for decision

Section 36 - prejudice to effective conduct of public affairs

13. Section 36(2) of FOIA states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this 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."

14. Section 36 differs from all other prejudice exemptions, as for it to be engaged a qualified person (QP) must give their reasonable opinion about likelihood of prejudice or inhibition.

15. When determining whether the QP's 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.
16. It is not necessary for the Commissioner to agree with the opinion of the QP for the exemption to apply. Furthermore, the opinion does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
17. DCMS provided the Commissioner with evidence that it sought the opinion of the QP, Lord Parkinson, the Minister for Arts and Heritage and DCMS Lords Minister, on 29 March 2023. DCMS provided the QP with a copy of the withheld information related to Parts 1 and 2 of the original request. It also provided the QP with supporting arguments for maintaining the exemption as well as reference to the general and inherent public interest in governmental transparency, in support of disclosure.
18. The QP gave their opinion on 6 April 2023 by agreeing with DCMS recommendation that the exemption should be applied and the information related to Parts 1 and 2, withheld.
19. DCMS' submissions to the QP to apply section 36(2)(c) argued that the disclosure would be likely to prejudice the effective conduct of public affairs. In support of this, DCMS said that it is in the public interest to protect the 'safe space' where officials can engage in candid discussions and that the disclosure would prevent staff from sharing ideas in a similar way in future.
20. The Commissioner has considered whether the opinion of the QP is a reasonable one.
21. In order to be engaged, section 36(2)(c) must demonstrate an 'otherwise' prejudice. This means that the prejudice must be different to those prejudices covered by section 36(2)(b).²

² See the Commissioner's section 36 guidance <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/#other>

22. The QP has failed to demonstrate that 'otherwise' prejudice and so the Commissioner considers that section 36(2)(c) is not engaged because the opinion is not a reasonable one. This is because the substance of the recommendations provided to the QP, although explicitly referencing section 36(2)(c), relate to section 36(2)(b)(ii).
23. As a result of this finding the Commissioner requires DCMS to disclose the information it has withheld on the basis of section 36(2)(c) of FOIA. However, in doing so it can redact the names and contact details of junior officials. The Commissioner accepts, as he has done in previous cases, that such information is exempt from disclosure on the basis of the section 40(2) (personal data) exemption of FOIA.

Procedural matters

24. Section 10(1) of FOIA provides that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
 25. Section 17(1) of FOIA provides that a public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—
 - (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
 26. In this case, the complainant made his request for information on 6 February 2023, but DCMS did not provide its initial response until 11 May 2023.
 27. Therefore, the Commissioner finds that DCMS breached section 17(1) of FOIA.
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Other matters

Insufficient initial searches following request for information

28. As commented on in point 12 of the 'Scope of the case' section, DCMS issued a refusal notice to the complainant, stating that the information in relation to Part 2 of his request was not held. DCMS then provided this information in response to the Commissioner's investigation, effectively rectifying the error.
29. However, the Commissioner wishes to remind DCMS that, when processing FOIA requests it is fundamental for public authorities to consider them in sufficient detail to be able to determine whether the requested information falling within the scope of that particular request is actually held, before responding to the requester.

Application of section 36(2)

30. As commented on in paragraph 22 of this decision notice, DCMS relied on section 36(2)(c) to withhold information but the Commissioner has found that its submissions to the QP were in fact pertinent to section 36(2)(b)(ii).
31. The Commissioner wishes to clarify that even if QP had applied subsection 36(2)(b)(ii) in this case, and he accepted this to be a reasonable opinion, the Commissioner would have still found that the public interest favours disclosure of the withheld information. Whilst the Commissioner accepts that safe space arguments do attract weight when balancing the public interest, this is primarily when the decision making process is still live. This is not the case in this scenario as the playlist had been released at the point the request was submitted. The Commissioner also considers the content of the information to be relatively innocuous and as result the risk on any future free and frank exchanges to be limited. Balanced against the public interest in DCMS being transparent about decisions it has taken, the Commissioner would have found the public interest favoured disclosing the information.

Right of appeal

32. 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

33. 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.
34. 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
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