

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 May 2024

**Public Authority:** Channel 4  
**Address:** 124 Horseferry Road  
London  
SW1P 2TX

#### Decision (including any steps ordered)

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1. The complainant has requested information from Channel 4 ("C4") regarding the use of non-disclosure agreements/confidentiality clauses to prevent the calling out of wrongdoing.
2. The Commissioner's decision is that:
  - C4 was correct in stating that section 36(2)(b)(i) and section 36(2)(b)(ii) of FOIA are engaged and the public interest favours maintaining these exemptions.
  - On the balance of probabilities, C4 does not hold any further information within the scope of the request.
  - C4 was entitled to rely on section 40(2) to withhold personal data.
3. The Commissioner does not require C4 to take any further steps.

#### Request and response

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4. On 19 August 2023, the complainant wrote to C4 and requested information in the following terms:

"A Times article last year revealed that 61 NDAs had been issued to departing staff in the first 5 years of Alex Mahon's tenure as CEO.

C4 and Alex Mahon have both claimed, in various arenas, that Channel 4 never uses NDAs to cover up wrongdoing.

Could you please tell me under the FOIA, how many of the 61 NDAs identified in the Times article were connected to allegations of wrongdoing made by the individuals bound by the clauses?

Can you also provide any correspondence - internal or external - from Alex Mahon regarding the use of NDAs or confidentiality clauses at Channel 4?"

5. C4 responded on 19 September 2023. It stated that some of the requested information was not held and advised that the remaining information was exempt from disclosure under section 36.
6. The complainant sought to clarify their request on 28 September 2023, in the following terms:

"I thought it might be helpful to provide further clarity on what is meant by 'connected to allegations of wrongdoing' in this request.

This request is for how many of the 61 NDAs referenced in the Times article impose any limitations or restrictions on what individuals who made allegations of wrongdoing can say about those allegations of wrongdoing, or the wrongdoing they have alleged. That applies even if they are not prevented from making a whistleblowing disclosure in the public interest.

As per the example from the Times, I would consider that to fall within the rubric of 'connected to', as the individual was prevented by the NDA from commenting on a racial grievance against senior management."

7. Following an internal review C4 wrote to the complainant on 17 October 2023. It stated that it was maintaining its position that some of the requested information was not held, some of the information was exempt under section 36 and advised that providing the remaining information would exceed the cost limit and was therefore exempt under section 12.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 28 October 2023 to complain about the way their request for information had been handled.

9. The complainant also provided the Commissioner with some further clarification of their request

“My request was not for how many of these contracts prevent the individuals from calling out wrongdoing in all circumstances. As per my clarification, it was for how many have clauses that in any way inhibit what individuals can say about a grievance or allegations of wrongdoing.”

10. The Commissioner wrote to C4 explaining this additional clarification from the complainant.
11. C4 wrote to the complainant on 8 February 2024. It advised that there were no confidentiality clauses in any of the 61 settlement agreements which would prevent or inhibit the calling out of wrongdoing.
12. In relation to the second part of the request, which relates to correspondences from Alex Mahon regarding the use of Non-Disclosure Agreements (NDAs) or confidentiality clauses, C4 explained that due to the passage of time external information could now be disclosed, but it continued to withhold internal emails under section 36. C4 redacted parts of the external emails it disclosed to the complainant under section 40(2), stating the information related to personal information.
13. In their complaint to the Commissioner, the complainant explained that they still believed further information was held regarding the use of NDA's/confidentiality clauses to prevent calling out wrongdoing.
14. The complainant also stated they were dissatisfied that C4 had not provided any internal emails from Alex Mahon regarding the use of NDAs and confidentiality clauses.
15. Finally, the complainant stated that the external emails which were provided had been redacted under section 40(2), which the complainant explained they were not satisfied with.
16. The Commissioner considers that the scope of his investigation is to consider whether on the balance of probabilities whether C4 holds any additional information within the scope of the request for both questions.
17. The Commissioner will also consider whether C4 was entitled to rely on section 36 when withholding internal emails, and section 40(2) when making redacting information to the external emails.

## Reasons for decision

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### Section 1 – General right of access to information

18. Section 1(1) of the 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.

19. Section 1(1) requires that a public authority must inform a requestor, in writing, whether it holds information falling within the scope of the request. If it does hold relevant information, it also requires that it communicates the information to the requestor, subject to any exclusions or exemptions applying.

20. In scenarios where there is some dispute between the amount of information held which a public authority says it holds, and the amount of information that a complainant believes is held, the Commissioner, following the lead of a number of First-tier Tribunal (Information Rights) decisions, applies the civil standard of the balance of probabilities.

21. In other words, in order to determine such complaints, the Commissioner must decide whether, on the balance of probabilities, a public authority holds any - or additional - information which falls within the scope of the request (or was held at the time of the request). For clarity, the Commissioner is not expected to prove categorically whether the information/further information is held. Public interest test

#### Question 1

22. The first question of the request relates to whether any of the 61 settlement agreements which were identified in the Times article, had any confidentiality clauses or NDA which prevented or inhibited what individuals could say about a grievance or allegations of wrongdoing.

23. The complainant advised that C4 has confirmed that settlement agreements can include confidentiality clauses, which "cover the quantum of any payments and/or in situations where it believes it is necessary and reasonable for it to discharge our duty of care owed to all employees or others specially connected to the matters leading to the existence of a settlement." The complainant stated that "this would

strongly imply that there would be a number of those agreements that do inhibit in some way what individuals can say about grievance or allegations of wrongdoing”.

24. The complainant referred the Commissioner to two articles which contained accusations of wrongdoing, but the Commissioner did not see any evidence which showed that C4 used confidentiality clauses or NDAs to prevent/inhibit the allegations being brought forward.
25. C4 has maintained its position throughout the request that none of the 61 settlement agreements have confidentiality clauses or NDAs which prevent or inhibit the calling out of wrongdoing.
26. C4 advised that settlement agreements can contain a range of provisions, one example could be commercial confidentiality provision. A commercial confidentiality provision would be justifiably included in a settlement agreement regardless of the specific matters leading to the existence of a settlement.
27. C4 explained that although settlement agreements may contain certain provisions, its position is very clear that any confidentiality clauses (or any other provisions) within a settlement agreement, have not and must not be used to prevent or inhibit the calling out of wrongdoing.
28. C4 informed the Commissioner that in response to the request, each of the 61 settlement agreements referred to were checked for the requested information. C4 advised that having read and checked each agreement it was able to confirm that no information within the scope of the request was held.

## Question 2

29. The second part of the request related to any correspondence from Alex Mahon regarding the use of NDAs or confidentiality clauses at C4.
30. The complainant advised the Commissioner that they were not satisfied with the extracts and limited information disclosed for the second part of the complainant's request.
31. The complainant added that other than a small exchange, no internal email correspondence has been released by C4. The Commissioner notes that C4 has relied on section 36 for internal correspondences, and he will refer to the application of section 36 later in his decision.
32. The Commissioner will now determine whether C4 has conducted adequate searches for the external emails and determine, on the balance of probabilities, whether C4 holds any additional information within the scope of the request.

33. C4 explained that its information security team conducted a search of Alex Mahon's email account, and a further search was conducted for any hard copy correspondences which may fall into the scope of the request.
34. C4's information security team used a keyword search to locate any information within the scope of the request. The keywords used were "non disclosure agreement", "non-disclosure agreement", "NDA" and "confidentiality clause".
35. C4 explained that the CEO email accounts (in this case Alex Mahon) are to be retained permanently and there was no record of any information within the scope of the request being destroyed or deleted.
36. C4 confirmed that no hard copy documents had been located during its searches. It therefore concluded that apart from the internal emails withheld under section 36, no further information within the scope of the request was held.

### **The Commissioner's Decision**

37. Having reviewed C4's position in relation to question 2, the Commissioner is satisfied that C4 has conducted reasonable searches to determine that no information was held. By reading each of the 61 settlement agreements, if any information within the scope of the request was held, this would have been located within the settlement agreements.
38. The Commissioner is also satisfied that if any of the request information within the scope of question 1 was held by C4, this information would be held within the settlement agreements in question. The Commissioner finds it unlikely that any information regarding the use of NDAs and confidentiality clauses that would prevent the calling out of wrongdoing, would be held anywhere other than the settlement agreements in question. By reviewing each settlement agreements C4 ensured that no information within the scope of question 1 was held.
39. Based on the above, the Commissioner is satisfied that, on the balance of probabilities, C4 does not hold any information in relation to question 1.
40. In relation to question 2, the Commissioner is satisfied that C4 has conducted adequate searches for the requested information. If any additional information was held by C4, the key terms used by C4, and the direct search conducted in Alex Mahon's email account would have located this information.
41. The Commissioner notes that C4 keeps a permanent record of CEO email accounts (in this case Alex Mahon) and C4 confirmed that it had

no record of any information within the scope of question 2 being deleted. This reiterates C4 position that if any additional information within the scope of question 2 was held, these searches would have located this information.

42. The Commissioner would also like to mention that C4 provided him with a full copy of the external emails, which had been sent to the complainant in extracts. Having reviewed these correspondences the Commissioner is satisfied that the only information within these emails that has not been provided to the complainant, is information outside the scope of the request.
43. Based on the above, the Commissioner is satisfied that, on the balance of probabilities, no additional information within the scope of the request for question 2 is held by C4.

### **Section 36 – prejudice to the effective conduct of public affairs**

44. Section 36(2) of FOIA 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-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation,”

45. Section 36 differs from all other prejudice-based exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person (‘QP’) for that public authority. The QP’s opinion must also be a ‘reasonable’ opinion.
46. It’s not necessary for the Commissioner to agree with the opinion of the QP and it doesn’t need to be the only reasonable opinion, or the most reasonable opinion, that could be held. The Commissioner only needs to satisfy himself that it’s an opinion that a reasonable person could hold.

### **Who is the qualified person and how was their opinion sought?**

47. C4 confirmed that the QP was the Director of Commercial Affairs Martin Baker. The QP’s opinion was sought on 19 September 2023. In order for the QP to form a reasonable opinion on the case they were provided with a copy of the withheld information, a draft opinion document



setting out arguments supporting the application of the exemption and contrary arguments.

48. The QP's opinion was approved on 19 September 2023, but wasn't signed by the QP until 21 September 2023.

### **Is the qualified person's opinion reasonable?**

49. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the QP's opinion was a reasonable one. In determining whether the 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. The QP's opinion does not have to be the most or only reasonable opinion that could be held; it only has to be a reasonable opinion.
50. The QP advised that it is important that there is a safe space away from public scrutiny which allows for there to be free and frank exchange of views and advice in relation to such matters.
51. The QP has provided an opinion that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation and inhibit the free and frank provision of advice.
52. The withheld information in this case are internal emails compromises of advice and views between Alex Mahon and other members of staff at C4 regarding the use of NDA's and confidentiality clauses.
53. The QP stated that it is important that C4 staff have a safe space to deliberate and make decisions about how to deal with any concerns relating to the use of confidentiality clauses and NDA's. C4 stated that if the requested information was disclosed staff may not feel able to express their views fully, especially when considering how to respond to any concern about confidentiality clauses or NDA's.
54. The QP concluded that if the requested information was disclosed, it would likely have a chilling effect on any future offering of advice and views by C4 staff. The QP added that it may also have an effect on the future deliberation by C4 staff, as they may not feel they have a safe space away from public scrutiny to express their views.
55. Having reviewed the QP opinion, the Commissioner is satisfied that the QP opinion is reasonable in stating that if the requested information was disclosed, it could inhibit the free and frank exchange of views for the purposes of deliberation and the free and frank provision of advice.



56. The Commissioner also considers that the QP opinion that disclosing the withheld information may prevent staff from having a safe place to exchange free views, frank views and advice away from public scrutiny is a reasonable opinion.
57. The Commissioner's conclusion is that the exemptions provided by sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged. The Commissioner will now go on to consider whether the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.

## **The public interest test**

### **Arguments in favour of disclosure**

58. The complainant and C4 both agreed that the information within the scope of the request is of interest to members of the public. There is a clear interest regarding the use of NDAs and confidentiality clauses in settlement agreements, especially when there is a concern that such agreements or clauses could prevent the calling out of wrongdoing.
59. The complainant does not agree that the matter is still a "live" issue and argues that the requested information should now be provided.
60. The Commissioner acknowledges that there is a public interest in any internal discussions regarding the alleged use of NDAs or confidentiality clauses at C4, especially those discussions which come from the CEO, Alex Mahon directly.

### **Arguments in favour of maintain the exemption**

61. C4 explained that the requested information contains the candid provision of advice, exchange of views and opinions. Disclosure of this correspondence under FOIA would likely inhibit individuals from having free and frank discussion and from raising the subject matter with C4's CEO in future, especially if it was felt that this sort of sensitive correspondence could become subject to routine disclosure.
62. C4 advised that if its staff members were to stop discussing and raising such subject matters, it could prevent suitable debate regarding how confidentiality clauses apply to allegations/incidents being brought to the attention of senior management and how such matters are dealt with.
63. C4 informed the Commissioner that it was overwhelmingly in the public interest that C4's senior managers can discuss how confidentiality clauses apply to allegations of wrongdoing in the most effective and appropriate way. This is vital to safeguard individuals working in the

industry and ensure that any poor behaviour is identified and remedied to ensure it is not perpetuated.

### **The balance of the public interest test**

64. In balancing the public interest test, the Commissioner accepts that a public authority should be afforded private space for its staff to consider and debate issues, and in which advice can be sought and given, whilst protecting the integrity of the deliberation process.
65. The Commissioner also notes that the C4's arguments against disclosure are based on the concept of a 'chilling effect', and that these arguments are likely to be strongest when the issue in question is still 'live'. The Commissioner considers that it is likely that NDAs and confidentiality clauses are currently and will likely remain a 'live' issue for C4 in the future.
66. However, the fact that prejudice has been identified and accepted is not conclusive evidence that the requested information should be withheld. It is important to be clear that the exemptions contained in section 36 focus on the processes that may be inhibited, rather than what is in the withheld information. The issue is whether disclosure would inhibit the process of exchanging views and providing advice. If the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could that inhibition.
67. Having reviewed the withheld information, the Commissioner is satisfied that the public interest in the requested information is minimised by information already available to the public. The withheld information does not add anything further than what has already been disclosed by C4.
68. The Commissioner is satisfied that disclosing the requested information would show that C4 is acting in an open and transparent manner which is in the public interest. However, the risk of staff members not having free and frank discussions or not feeling able to provide advice freely regarding NDAs and confidentiality agreements would not be in the public interest.
69. Consequently, the Commissioner's decision is that the public interest in maintaining the exemptions under section 36(2)(b)(i) and section 36(2)(b)(ii) outweighs the public interest in disclosing the requested information.
70. The Commissioner will now go on to consider whether C4 was entitled to rely on section 40(2) when redacting information disclosed to the complainant.

## **Section 40(2) – Third party personal data**

71. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
72. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
73. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.
74. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

75. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".
76. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
77. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
78. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
79. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does relate to specific individuals. This is because the withheld information is the names of junior staff members (data subjects) contained in email correspondences. The names of junior members of staff at C4 is quite obviously information which both relates to and identifies those concerned. The Commissioner uses the term data subject(s) as a way

to describe individuals which information is related to, in the circumstances of this case, the names of members of junior staff at C4.

80. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
81. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
82. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

83. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

84. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
85. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

86. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>1</sup>.

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<sup>1</sup> Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article

87. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
88. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

89. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
90. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
91. The Commissioner recognises that the complainant has a legitimate interest in correspondences that the CEO of C4 sends regarding the use of NDAs and providing all the withheld information would show the complainant that C4 is acting in an open and transparent manner.
92. The Commissioner is satisfied that there is a legitimate interest in the requested information and will go on to consider whether disclosure is necessary.

### **Is disclosure necessary?**

93. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make
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5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

94. The Commissioner notes that while disclosing the withheld information may show that C4 is operating in an open and transparent manner, he is satisfied the redacted information provides little value to the request.
95. The Commissioner also notes that as the redacted information is only the names of junior member of staff. Unlike senior members of staff, positions which junior members of staff have usually do not carry a greater level of accountability and therefore the data subjects will have no expectation that their names will be disclosed in response to a FOIA request.
96. The complainant specifically asks for correspondences from Alex Mahon regarding the use of NDAs and confidentiality clauses. C4 has provided a copy of the emails which it has not sought to rely on section 36 for, in order to demonstrate that it is operating in an open and transparent manner. The redacted information does not provide any more details regarding Alex Mahon's opinions/decisions regarding the use of NDAs or confidentiality agreements and for this reason the Commissioner is satisfied that disclosing the names of junior members of staff is not necessary to meet the legitimate interests of this case.
97. As the Commissioner is satisfied that disclosure is not necessary, there is no lawful basis for disclosure and C4 was therefore entitled to rely on section 40(2) of FOIA to withhold the information.

## **Right of appeal**

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98. 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)

99. 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.

100. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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