

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 November 2017

Public Authority: The National Archives
Address: Kew
Richmond
Surrey
TW9 4DU

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the National Archives (TNA) for a copy of a file relating to the Coronation of HM Queen Elizabeth II in 1953. TNA refused the request under the exemption in section 27(1) (International Relations).
2. The Commissioner's decision is that the requested information is exempt from disclosure under section 27(1) and the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner also found that TNA breached section 17(3) in its handling of the complainant's request and 3 other requests but she requires no steps to be taken.

Request and response

3. On 29 September 2016 the complainant made a freedom of information request to TNA which asked for the following 4 files relating to the Coronation of Queen Elizabeth II.

T 219/316/1 – Closed extracts: 7 pages
DO 35/5020/1 – Closed extracts: 12 pages
FO 372/7162/1 – Closed extract TR 72/47
FO 372/7165/1 – Closed extract TR 72/134

4. TNA initially responded to the request on 10 November 2016 when it informed the complainant that the T 219/316/1, FO 372/7162/1, FO 372/7165/1 files were considered to be exempt from disclosure under

sections 27, 31 and 38 and that it needed further time to consider the public interest test. For the extract, DO 35/5020/1 TNA said that it was still waiting to make a final decision on whether or not this information was exempt. TNA treated the request as four separate requests for information.

5. On 8 December 2016 TNA contacted the complainant again to say that it was still considering the public interest and to confirm that in respect of DO 35/5020/1 the qualified exemption it was considering was section 37(1)(ac). The complainant was unhappy with the delay and asked TNA to carry out an internal review. It presented its findings on 25 January 2017 which upheld its handling of the request with the exception that it acknowledged that it should have confirmed which exemption was being applied to DO 35/5020/1 within 30 working days.
6. On 12 January 2017 TNA issued its response to the request which asked for the closed extract from file FO 372/7165/1. It explained that the information was being withheld under the exemption in section 27 (international relations). This is the only request which is in dispute although the Commissioner understands that final responses were also issued to the three remaining requests on 12 January, 10 February and 14 March 2017.
7. At the complainant's request TNA carried out a further internal review in respect of file FO372/7165/1. The review upheld the decision to refuse to disclose the withheld information (which concerns invitations to foreign representatives to the Coronation of Queen Elizabeth II) under the exemptions in sections 27(1)(a), (b) and (c) and concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.

Scope of the case

8. On 24 April 2017 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner understands that the complainant is only challenging TNA's decision to refuse to disclose the closed extract from the FO372/7165/1 file. Therefore the Commissioner considers the scope of her investigation to be to consider whether this information was correctly withheld under the section 27 exemption.
10. The complainant also said that he was unhappy with the delay in carrying out the public interest test and providing a final response to

each of his four requests. Therefore, the Commissioner has also considered whether TNA breached FOIA in the time it took to respond to the requests.

Reasons for decision

Section 27 – International Relations

11. TNA refused to disclose the closed extract from the FO372/7165/1 file by relying on the exemptions in section 27(1)(a), (c) and (d) which provides that

(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) relations between the United Kingdom and any other State,

(c) the interests of the United Kingdom abroad

(d) the promotion or protection by the United Kingdom of its interests abroad.

12. In this case TNA, in conjunction with the transferring department the Foreign and Commonwealth Office, is relying on the lower threshold, 'would be likely' to occur. However this still means that TNA needs to satisfy the Commissioner that the chance of international relations being prejudiced is more than a hypothetical possibility; there must be a real and significant risk.

13. The withheld information comprises a single sentence that was redacted from a document within the main file which relates to arrangements for the Coronation of HM Queen Elizabeth II in 1953. The document itself is a memo from the Permanent Under Secretary of State at the Colonial Office which discussed the attendance at the coronation of the rulers of what were then the British Protected states in the Persian Gulf.

14. Each of the sub-sections within section 27 provide a separate exemption from disclosure although in this case the arguments for engaging the exemptions are essentially the same. However for section 27(1)(c) and section 27(1)(d) TNA does not specify which of the UK's interests would be prejudiced or how this would occur. Therefore the Commissioner considers that section 27(1)(a) is the more appropriate exemption to consider in the particular circumstances of this case.

15. TNA's reasons for applying the exemption is essentially twofold. The first reason is that disclosure would be likely to inhibit frank discussion by

Foreign Office Officials which are needed to promote UK interests. It explained that Foreign Office employees require an open environment where contentious, confidential and delicate matters can be discussed, in order to promote UK interests. It said that within this environment there needs to be a level of certainty that ideas, comments, suggestions or remarks will not be made public. It suggested that if there is fear that frank, candid remarks could potentially be released in the future then there is the possibility that officials would be less likely to make them. Therefore it argued that the loss of this safe environment would be likely to impede frank exchanges which in turn could prejudice relations with another state (a), the United Kingdom's interest abroad (c) or the promotion/protection of the United Kingdom's interests abroad (d).

16. The Commissioner has not taken this argument into account. To engage an exemption a public authority must show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect. Arguments about prejudice to any other interests will not engage the exemption. In the Commissioner's opinion TNA's argument would more properly be considered under the section 36(2)(b)(i) and (ii) exemptions which specifically provide for an exemption where disclosure would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views. In any event, TNA has not specified what State the UK's relations would be prejudiced with; neither has it specified which of the UK's interests would be prejudiced.
17. For the second argument the Commissioner is limited in what she can say about the nature of the withheld information or the reasons why disclosure would give rise to prejudice and has discussed this in more detail in a confidential annex to be supplied to TNA only. However, the Commissioner would say that she accepts that disclosure of the information would be likely to prejudice the UK's relations with the Gulf states and that the exemption is engaged on this basis. The Commissioner is also satisfied that the prejudice is not diminished by the passage of time. The information would still be likely to damage relations if it was disclosed today.
18. In reaching her decision the Commissioner has been guided by the findings of the First Tier Tribunal in *Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence* where it discussed the nature of the prejudice covered by section 27(1)(a).

"...prejudice can be real and of substance if it makes relations more difficult or calls for particular diplomatic response to contain or limit damage which would not otherwise have been necessary. We do not consider that prejudice necessarily requires demonstration of actual harm to the relevant interests in terms of quantifiable loss or damage.

For example, in our view there would or could be prejudice to the interests of the UK abroad or the promotion of those interests if the consequence of disclosure was to expose those interests to the risk of an adverse reaction from the KSA or to make them vulnerable to such a reaction, notwithstanding that the precise reaction of the KSA would not be predictable either as a matter of probability or certainty".¹

19. The Commissioner is satisfied that the Tribunal's findings would apply in this case and she is satisfied that the information is exempt under section 27(1)(a). The Commissioner has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest test

Public interest arguments in favour of disclosure

20. TNA said that in balancing the public interest it had taken into account the following factors in favour of disclosure:
- *Obligations under Freedom of Information and Public Records legislation are taken very seriously, and adhered to strongly to the principle that there is a public interest in showing a true and open account of the historical record.*
 - *This makes for greater accountability, increases public confidence in government decision-making and helps to encourage greater public engagement with political life. There is a general public interest in being able to evaluate the foreign and defence policy of the government.*

Public interest arguments in favour of maintaining the exemption

21. TNA said that the following arguments favoured maintaining the exemption and withholding the information:
- *An important consideration under Section 27 is the need for candid and open reporting concerning relations with foreign governments, and also communications between governments.*

¹ Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence [EA/2006/0040], para. 81.

- *Officials and ministers from the UK, as well as other governments, need to be able to comment in an accurate and open way. If this candid and open comment is not protected, the UK's ability to influence foreign governments, and thereby to protect and promote UK interests, will be hampered.*
- *The release of the information in this file would harm UK relations with the Gulf States. This would be of detriment to the operation of government and not be in the UK's interest. In addition, official judgements about how open officials should be in communicating with us in future could also be affected if it is felt that the information may be released into the public domain at a later date.*
- *As it can therefore be seen the arguments for and against release of this information constitutes balancing the need for governmental accountability and an open historical record surrounding international relations against safeguarding i) the ability of UK government officials to discuss in an open and frank way and ii) the need to limit harm caused to relations with Gulf States.*

Balance of the public interest arguments

22. The Commissioner has considered the public interest arguments and reviewed the withheld information. She would also stress that only a very small amount of information has actually been withheld. Less than a single sentence has been redacted from the main file which is publicly available from TNA. The main file provides extensive historical information on the invitation of foreign representatives to the Coronation and in the Commissioner's view the public interest in the disclosure of the withheld information is very limited indeed. The withheld information would add very little to the public record, is of limited use and in the Commissioner's view the case for disclosure amounts to little more than historical curiosity.
23. On the other hand the Commissioner considers that there is strong public interest in not harming the UK's relations with another State. The Commissioner has found that there is a real and significant risk of harming the UK's relations with the Gulf states and that this is undiminished by the passage of time, In the Commissioner's view this is the main reason for maintaining the exemption and in the absence of any compelling arguments in favour of disclosure has decided that the public interest favours maintaining the exemption.

Section 17 – Refusal of a request

24. Section 10(1) of FOIA provides that a public authority must respond to a request for information promptly and in event within 20 working days. In the case of TNA, where a request relates to a transferred public record, in accordance with section 10(4) of FOIA and The Freedom of Information (Time for Compliance with Request) Regulations 2004 it has a further 10 working days to respond.
25. In addition, under section 10(3)(b), where a qualified exemption applies to the request a public authority need not comply with the duty to disclose information until such time as is reasonable in the circumstances.
26. However a public authority must still issue the applicant with a refusal notice in accordance with section 17(1) of FOIA, stating which exemptions apply to the request and containing an estimate of when it expects to have reached a decision on the public interest test.
27. Where a public authority is relying on a qualified exemption to refuse the request, it must also, within such time as is reasonable in the circumstances, provide the applicant with a notice stating the reasons for claiming that the public interest in maintaining the exemption outweighs the public interest in disclosure.
28. In this case the complainant made his freedom of information request for the 4 different files on 29 September 2016. TNA provided its final responses, after considering the public interest test, on 12 January (FO 372/7165/1 and FO 372/7162/1), 10 February (DO 35/5020/1) and 14 March (T 219/316/1).
29. In setting out the reasons for the delay in carrying out the public interest test, TNA explained that decisions relating to transferred public records that require the application of a public interest test are determined by the transferring authority and the records authority (TNA). It explained that the files requested by the complainant required consultation with several departments who had a vested interest in the information. Furthermore the public interest test process for transferred records held at TNA requires independent evaluation, via the Advisory Council on National Records and Archives as defined by section 66 of FOIA.
30. TNA said that since section 66 requires it to consult two additional external organisations it is not always possible to meet its maximum timeframe of 70 working days. It explained that it is not within its remit to impose strict deadlines on the external organisations and that all it

could do was to try and influence and advise on the statutory deadlines which it is subject to.

31. TNA explained that there were also mitigating factors including what it described as "severe pressure on resources within the FOI Team" which affected its handling of all four requests. In addition for the request for the DO 35/5020/1 file, TNA said that its response was delayed further due to the application of a qualified exemption being queried by the Advisory Council on National Records and Archives. The request that led to the greatest delay was for file T 219/316/1 and TNA explained that this was due in part to complications over its consultations with the transferring departments.

32. The Commissioner's guidance on Time limits for compliance under the Freedom of Information Act states that:

*"...our view is that an authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days. An extension beyond this should be exceptional."*¹

33. The Commissioner's view is that depending on the circumstances of a particular case TNA would be entitled to take up to an additional 40 working days to carry out a public interest test, and therefore 70 working days in total, allowing for the extra 10 working days provided by The Freedom of Information (Time for Compliance with Request) Regulations 2000. Whilst the Commissioner's guidance referred to above suggests that an additional 20 working days will be the maximum allowed in most cases, it clearly highlights the potential to go beyond this depending on the circumstances of the case. The Commissioner would take the view that in exceptional cases a maximum of an additional 40 working days would be appropriate. This does not necessarily mean that TNA can take up to 70 working days for all cases that require a public interest test. The Commissioner will look at complaints on a case by case basis and each case would need to be decided on its own merits.

34. In this case TNA took between approximately 3 ½ months and 5 ½ months to inform the complainant of its decision on the public interest test on the four different requests. The Commissioner has some sympathy with TNA's position and accepts that to some extent it is reliant on other parties to be able to respond to requests involving transferred public records in a timely manner. Nevertheless the Commissioner's view is that that the time taken to respond to the requests significantly exceeded her guidelines and was unreasonable.

Therefore the Commissioner finds that TNA breached section 17(3) in its handling of each of the four requests.

Right of appeal

35. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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

**Paul Warbrick
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