

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2019

Public Authority: Channel Four Television Corporation
Address: 124 Horseferry Road
London
SW1P 2TX

Decision (including any steps ordered)

1. The complainant has requested communications and minutes relating to the decision by Channel 4 to move parts of its functions outside London. Channel 4 refused to provide the requested information on the basis of section 36(2)(b)(i), (ii) and (c) and later sought to rely on section 43(2) as an alternative.
2. The Commissioner's decision is that Channel 4 has correctly applied section 36(2)(b) and (c) to the information and the balance of the public interest lies in maintaining the exemptions.

Request and response

3. On 24 February 2018, the complainant wrote to Channel 4 and requested information in the following terms:

"1) Please provide all communications between executive directors of Channel 4 and the Department of Digital Culture Media and Sport about moving parts of the channel outside London from 1st January 2017 to 24th February 2018.

2) Please provide the minutes of all meetings held by Channel 4 executives concerning moving parts of the channel outside London from 1st January 2017 to 24th February 2018."

4. Channel 4 responded on 24 April 2018. It stated that the requested information was held but was exempt from disclosure under sections 36(2)(b) and (c) of the FOIA.
5. Following an internal review Channel 4 wrote to the complainant on 23 May 2018. It stated that it upheld its decision.

Scope of the case

6. The complainant contacted the Commissioner on 29 May 2018 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation Channel 4 also sought to apply section 43 to withhold some of the relevant information. The Commissioner considers the scope of her investigation to be to determine if Channel 4 has applied either of the cited exemptions correctly and, if so, to determine where the balance of the public interest lies.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

8. Channel 4 has stated it considers sections 36(2)(b)(i), (ii) and (c) are applicable to the information in the scope of the request.
9. Section 36(2)(b) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, 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 purposes of deliberation.
10. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
11. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.

12. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
13. To determine first whether Channel 4 correctly applied the exemption, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - ascertain who was the qualified person or persons
 - establish that an opinion was given by the qualified person
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
14. Channel 4 has told the Commissioner that the qualified person in this case was the Director of Commercial Affairs. The qualified person had access to arguments supporting disclosure and withholding the information and an overview of the withheld information.
15. The qualified person concluded that, in his opinion, both sections 36(2)(b) and (c) were applicable and engaged for the following reasons; that disclosure would
 - inhibit the free and frank provision of advice or
 - the free and frank exchange of views for the purposes of deliberation or
 - otherwise prejudice the effective conduct of public affairs.
16. The Commissioner is satisfied that the opinion was that of the appropriate qualified person for Channel 4, provided at the appropriate time. She has gone on to consider whether that opinion is reasonable. It is important to note that this 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, she must find that the exemption is engaged.

17. With regard to both section 36(2)(b) and 36(2)(c), the qualified person's opinion in this case seems to be that prejudice *would* occur if the withheld information was to be disclosed, rather than would be likely to occur. 'Would' imposes a stronger evidential burden than the lower threshold of 'would be likely'.
18. With regard to section 36(2)(b), the Commissioner considers that the exemption concerns processes that may be inhibited at the time of the request and in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure could inhibit the process of providing free and frank advice for the purposes of deliberation, in relation to decision making.
19. Section 36(2)(c), on the other hand, refers to the prejudice that would otherwise apply. The Commissioner considers that if section 36(2)(c) is used in conjunction with section 36(2)(b), as in this case, the prejudice envisaged must be different to that covered by section 36(2)(b).
20. In order for the qualified person's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
21. Channel 4 provided the qualified person with the substantive withheld information which included reports, briefing notes, minutes and correspondence exchanges. The qualified person was fully aware of the nature and context of the request as part of the executive management team at Channel 4. The qualified person was also presented with detailed arguments to support both disclosure and withholding the information in order to reach an opinion.
22. In relation to section 36(2)(b)(i), Channel 4 argued that disclosure would inhibit the process of providing internal advice as both Channel 4 staff and its external professional advisors would not be comfortable expressing themselves openly, honestly and completely when providing advice as part of the process of deliberation. Channel 4 also considered disclosing the requested information would inhibit Channel 4 staff and external professional advisors from exploring more extreme options regarding potential locations.
23. Overall, the main arguments presented to the qualified person related to the potential 'chilling effect' on future advice offered at Channel 4 and a loss of candour that may follow from disclosure. Channel 4 considered

this would damage the quality of advice delivered by its staff and that this issue (the relocation) was particularly sensitive given the impact it may have on staff. Channel 4 advised the qualified person that those involved in delivering advice on this subject needed to do so freely, without inhibition, and be comfortable doing so. It was also pointed out that the '4 All the UK' process (the consultation on relocation) had only just got underway and the decision-making process was still ongoing.

24. For section 36(2)(b)(ii) Channel 4 were clear that this was most relevant to the information which concerned communications between senior members of Channel 4 staff, internal and external professional advisors and members of the Channel 4 Board regarding views on a proposed partial or full relocation and how to present these to Government. Included in this information was also responses showing the views of Government and details of the exchange of views with Channel 4.
25. It was put to the qualified person that this particular information was used to allow Channel 4 to make an informed decision about how best to provide input to Government about issues that affect it and the wider media landscape as a whole. Channel 4 considers that disclosing this information would inhibit Channel 4 staff, Board members and professional advisors from debating ongoing issues about alternative location options or indeed any other relevant policy issues, freely and frankly for the purpose of deliberation. Similarly, disclosure would inhibit Channel 4 from freely and frankly discussing future policy options with Government if it was believed that these communications could be disclosed. This would impact on Government's ability to consult relevant stakeholders in a free and frank manner, impacting on its ability to make informed decisions on future policy making.
26. Overall, Channel 4's submissions to the qualified person on the application of section 36(2)(b)(ii) to communications at a senior level and with Government again related to the chilling effect on decision making at Channel 4.
27. With regard to section 36(2)(c) Channel 4 argues that there is a need for a safe space, away from public or media involvement, in which it can develop ideas and make decisions relating to significant policies affecting the future of the organisation. Channel 4 identified the information this was most relevant to as being the information relating to internal meetings, discussions with specialist third party advisors and discussions with town, cities and regions in the process of submitting bids to become the National Head Quarters or regional creative hubs. As the issue was still live Channel 4 considers this to be of particular relevance.
28. The Commissioner has considered the qualified person's opinion, which has been supported by Channel 4's reasoning. The Commissioner is

prepared to accept that the opinion is reasonable, that the prejudice envisioned under sections 36(2)(b) and 36(2)(c) are different and that both section 36(2)(b) and section 36(2)(c) are therefore engaged. The Commissioner has gone on to consider the public interest arguments associated with these exemptions.

Public interest arguments in favour of disclosing the information

29. Channel 4 recognises that it is as a publicly-owned and commercially-funded UK public service broadcaster, with a public service remit that requires it to innovate, challenge and inspire, to stimulate debate and provide new opportunities for brilliant creative talent. Whilst Channel 4 does not receive any public funding such as the licence fee, Channel 4 acknowledges that there is a public interest in promoting transparency, accountability and public understanding in its decision making process.
30. The complainant argues there is a very strong public interest in openness about the reasons for the decision not to completely relocate Channel 4 outside of London. Communities outside of London will now not receive hundreds of highly skilled and well paid job roles and as such, those communities have a very strong public interest in understanding exactly what factors were taken into account in this decision. The complainant considers this clearly seems to outweigh concerns about the provision of free and frank advice, should this advice be released after the fact. Moreover, this information could simply be anonymised and released.

Public interest arguments in favour of maintaining the exemption

31. At the time of the request, Channel 4 staff did not have details of specific plans for implementing the new location or any details about the relocation or how this would impact staff. Disclosing the withheld information which included early stage discussions and plans as to how the changes may affect staff and part of the business would have had a destabilising impact on staff which in turn would have impact on Channel 4's ability to carry out its functions. This would not have been in the public interest.
32. It is recognised there is considerable media interest in this matter, and the erosion of the safe space to make decisions away from this scrutiny could potentially disrupt the on-going employee process and day to day work, causing huge distraction at a sensitive time. If all correspondence and minutes on this matter were to be made public then this would prevent or hinder the free and frank exchange of views or provision of advice regarding this matter. Channel 4 argued it needed to maintain a space so it could consider the best course of action for the next phase of

this process. Disclosure at the time would have prejudiced the on-going process and implementation of the decision.

33. Channel 4 argues there is a powerful public interest in ensuring that it is able to properly and passionately protect its interests as a public service broadcaster and strong supporter of independent journalism, particularly given its statutory obligations to the public. This is particularly true in the context of negotiations with the government regarding significant matters such as Channel 4's location, which could impact upon its ability to continue to deliver on its remit.
34. It is also stated that there is a strong public interest in not disclosing information that could, at the time of the request, have been damaging to the key issues at stake given the impact '4 All the UK' would have on the Nations and Regions content spend, growth in the production and creative sector right across the UK, as well as representing people from different backgrounds and parts of the UK on and off-screen. Channel 4 considered there was a compelling public interest in ensuring that the process and its implementation are conducted effectively and that the right conclusion is reached and delivered, with minimum adverse impact.

Balance of the public interest arguments

35. The opinion of the qualified person is limited to the degree of likelihood that inhibition or prejudice would occur. In assessing the public interest arguments therefore, particularly those relating to withholding the information, the Commissioner considers the relevance of factors such as the severity, extent and frequency with which providing advice and the free and frank exchange of views, and the conduct of public affairs, might be inhibited if the information was to be disclosed.
36. From its submissions Channel 4 appears to be saying that disclosing the requested information would diminish the likelihood of free and frank exchanges between external advisors, executive team, staff and Government and that this would impact on the ability of Channel 4 to reach an informed decision about the relocation. This in turn would be detrimental to how effectively Channel 4 can fulfil its public functions.
37. The complainant had argued against this by stating the substantive decision whether to leave London had already been made, and it was only the further decision making on the shape of the devolution of the some parts of Channel 4 to the regions that had not been finalised. The complainant considered that much of the withheld information would cover the question of whether to move but as this decision had been made the argument about chilling effect and safe space would not apply.

38. The Commissioner considers that the timing of a request and the continuing relevance of the information will have some bearing on whether it can be accepted there is a potential chilling effect on future engagement. In considering this the Commissioner has taken note of the complainant's arguments that it had already been decided Channel 4 would, to some extent, be relocating.
39. The Commissioner notes that following a Department for Culture Media and Sport (DCMS) consultation, Channel 4 launched "4 All the UK"¹ in March 2018. This was a strategy relating to the restructuring and relocation of Channel 4 but it was not until October 2018 that Channel 4 officially announced that its new Head Quarters would be in Leeds with two creative hubs in Bristol and Glasgow. It is clear to the Commissioner that at the time the request was made there were still significant decisions to be made on the relocation and restructuring of Channel 4. Whilst the complainant is correct that the main decision that relocation would happen had been taken this is an over simplification of the situation as significant decisions had yet to be taken regarding the future of Channel 4.
40. That being said, the complainant was of the view that the information he requested would largely relate to the decision already taken – the decision to relocate and not on the decision about where this should be. However, having viewed the withheld information the Commissioner notes that discussions about the 'where' as well as the 'whether' had been ongoing from an early stage. The launch of the "4 All the UK" strategy was the first official declaration by Channel 4 that the decision 'whether' to move had been made but at this stage Channel 4 had not made the 'where' decision. The Commissioner can understand therefore why it would be reasonable to assume that the withheld information would only cover the decision taken but this is not the case and discussions on 'where' were taking place alongside the decision about 'whether'.
41. The Commissioner therefore considers that this demonstrates that the requested information was relevant as the discussions were still ongoing and no decision had been reached about where and how to relocate at the time of the request. However, this does not mean that it has to be accepted there would be a chilling effect i.e. an unwillingness by various parties to engage with discussions, or an impact on Channel 4's ability

¹ <https://www.channel4.com/corporate/about-4/4-all-uk>

to conduct its public journalism functions if the information were to be disclosed.

42. As discussed in the Commissioner's published guidance on section 36, chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.
43. That being said; the information in the exchanges between the various parties is reasonably detailed and therefore there is a more substantial argument for saying there would be a chilling effect on future exchanges if it were to be disclosed. Contributors may be more guarded in their views if they think they might be disclosed. Whilst they will still need to engage with Channel 4 at various levels it is not unreasonable to assume they may be less frank in their opinions. Perhaps more compelling is the argument that disclosure may lead to a chilling effect on future exchanges in that it may make external parties less willing to engage with Channel 4 for fear that their advice and opinions will be disclosed.
44. Given that it is accepted the issue was still live the Commissioner would accept there would be a chilling effect if the information were disclosed. It is accepted that the potential for a chilling effect to occur is not in the public interest as it may impact on the quality of future decisions.
45. In terms of sections 36(2)(b)(i) and (ii) the Commissioner accepts there is an argument that disclosing the exchanges and communications would have a chilling effect and cause a degree of inhibition to the free and frank provision of advice and exchange of views for the purpose of deliberation. It is reasonable to state that those corresponding may be more guarded in their comments if they believe they will be made publicly available.
46. The Commissioner acknowledges that this argument is weakened somewhat by the fact it is likely that staff, senior management and Government will still want to and need to engage with Channel 4 to collaborate on policy issues and strategy and input into the future structure of the organisation. Despite this there is still a case for stating that the chilling effect would occur as the ways in which these parties interact may change and impact on how effectively Channel 4 can make decisions. This would not be in the public interest.

47. With regard to the safe space arguments advance in relation to section 36(2)(c) which has been applied to information held regarding internal meetings and discussions with towns and cities bidding to be the Head Quarter or creative hubs; the Commissioner accepts that a safe space is needed by organisations making large-scale, far-reaching decisions in order to be able to debate and discuss options. Disclosing information which may cause the erosion of this safe space would not be in the public interest as it may impact on the ability of Channel 4 to make a decision based on the best possible advice that has not been influence by outside influence or pressure. The Commissioner accepts that disclosing details of the internal discussions and the discussions with towns and cities submitting bids would have this impact on Channel 4 as it would likely invite outside scrutiny from the media and local communities who would want to offer views on the proposals being made and put to Channel 4. Whilst there is always a time and place for transparency and opening up for public debate the Commissioner considers at the time of the request there was a greater risk that this would erode the safe space needed for Channel 4 to continue its discussions and make an informed decision.
48. The Commissioner does recognises the public interest in transparency and accountability and disclosing information which would show how Channel 4 makes decisions and, more specifically to this information, the impact the relocation decision would have on staff as well as the areas chosen and rejected as regional hubs or Head Quarters. The need for transparency to allow for proper debate does therefore carry weight here but the Commissioner considers the timing of the request, at such a crucial stage of the process, adds much greater weight to the chilling effect arguments in relation to section 36(2)(b)(ii) and (ii) and the safe space arguments in relation to section 36(2)(c).
49. Therefore, the Commissioner has concluded the section 36(2)(b)(i) and (ii) exemptions are engaged in relation to the majority of the information and the section 36(2)(c) exemption is engaged in relation to the exchanges with towns and cities bidding and the small number of exchanges between DCMS and Channel 4 and the public interest favours maintaining the exemptions.
50. The Commissioner has therefore not gone on to consider the section 43 exemption.

Right of appeal

51. 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

52. 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.
53. 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

Jill Hulley
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