

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 June 2024

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

Decision (including any steps ordered)

1. The complainant has requested TNA to disclose a paper circulated at an Executive Team meeting in April 2023 which concerns both Reclosure and Risk and Reclosure and Enquiries. TNA disclosed some information but withheld the remainder citing sections 36(2)(b) and (c) of FOIA, which concern prejudice to the effective conduct of public affairs.
2. The Commissioner's decision is that TNA is entitled to rely on sections 36(2)(b) and (c) of FOIA. He has however recorded a breach of section 17(1) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 14 July 2023, the complainant wrote to TNA and requested information in the following terms:

"a copy of a paper circulated at the Executive Team Meeting held on 6th April 2023 and details of the proposals made at that meeting in relation to it. The paper circulated and the proposals relating to it were minuted under items 4 and 5 (Reclosure and Risk and Reclosure and Enquiries). The minutes for this meeting can be found at: <https://cdn.nationalarchives.gov.uk/documents/executive-team-minutes-2023-04.pdf>."

5. TNA wrote to the complainant on 15 August 2023, advising them that it required additional time to consider the public interest test.
6. TNA responded on 12 September 2023. It disclosed some information but withheld the remainder citing sections 36(2)(b) and (c) and section 40(2) of FOIA (personal data).
7. The complainant requested an internal review on 14 September 2023.
8. TNA carried out an internal review and notified the complainant of its findings on 8 November 2023. It upheld the application of the exemptions cited.

Scope of the case

9. The complainant contacted the Commissioner on 2 January 2024 to complain about the way their request for information had been handled.
10. The complainant confirmed at the internal review stage that they were content to accept the redactions made under section 40 of FOIA. The Commissioner's investigation has therefore focussed on TNA's application of section 36(2)(b) and (c) of FOIA.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

11. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
 - (b) would, or would be likely to, prejudice-
 - (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.
12. TNA confirmed that it obtained the opinion of the qualified person – its Chief Executive and Keeper - on 13 August 2023. On receipt of the complainant's request for an internal review it also checked with the qualified person that they still considered the exemptions are engaged.

It is the qualified person's opinion that disclosure would be likely to prejudice the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation and therefore section 36(2)(b)(i) and (ii) is engaged. It is also their opinion that disclosure would be likely to otherwise prejudice the effective conduct of public affairs and therefore section 36(2)(c) applied.

13. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also 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.
14. TNA provided a detailed explanation of the withheld information and why it is considered that section 36(2)(b) and (c) are engaged. As these submissions discuss the contents of the withheld information it is not possible to share that detail in this notice.
15. However, it confirmed that it is the qualified person's opinion that disclosure would be likely to inhibit the ability of staff to express themselves openly and honestly, and to explore options when providing advice or giving their views to The National Archives' Executive Team as part of the process of deliberation for this live issue. It stated that the qualified person's view is that this exemption protects the process of consultation, as disclosure of discussions and the provision of advice concerning this live issue would be likely to inhibit free and frank discussions in the future, and therefore may damage the quality of future advice and deliberation and lead to poorer decision making. For these reasons, the qualified person decided that section 36(2)(b)(i) and (ii) applies.
16. In respect of section 36(2)(c), the qualified person's opinion is that disclosure would be likely to prejudice the 'safe space' required by TNA to develop ideas and reach decisions on this live issue, away from external interference, thereby having an adverse effect on TNA's ability to meet its objectives and offer an effective public service. It also said that the qualified person decided that disclosure would be likely to prejudice TNA's ability to meet its wider objectives or purpose, in particularly engaging with other government departments on the arrangements to transfer records of a particularly sensitive nature. It said that disclosure would be likely to be premature and disruptive.
17. The Commissioner has reviewed the withheld information and considered TNA's detailed submissions surrounding the specific contents

of the withheld information. He is satisfied that it is a reasonable opinion to hold that disclosure would be likely to prejudice TNA's ability to carry out free and frank discussions around the specific contents and openly, freely and candidly consider the options that are available to it and provide advice of a similar vein to its senior leadership. This would in turn be likely to prejudice the quality of decision making and dilute the quality and frankness of ongoing discussions and deliberations around the issues discussed in the withheld information. He is therefore satisfied that section 36(2)(b)(i) and (ii) is engaged.

18. Equally, the Commissioner considers it is a reasonable opinion to hold that disclosure would otherwise prejudice the effective conduct of public affairs. It is a reasonable opinion to hold that disclosure would be likely to inhibit the provision of access to public records and the operation of the Reclosure process, thereby having a disruptive effect on the disclosure of records in the future and the overall effective conduct of TNA's public affairs. For these reasons, he is also satisfied that section 36(2)(c) is engaged.

Public interest test

19. TNA recognises the public interest arguments in favour of disclosure and in showing a true and open account of government decision making. It accepts that this allows for greater accountability and increases public confidence in the integrity of the decisions made. It also said that there is a general public interest in being able to evaluate government policy.
20. TNA acknowledges that given its obligations under the Public Records Act 1958 and the importance of access to public records, there is a significant public interest in the openness and transparency around the process of removing records from public access, and the transfer process. It said that it appreciated, therefore, that there is an expectation of transparency around how it and government operates the process to reclose or transfer records.
21. Additionally, it said that disclosure would provide further understanding of the accountability of the government departments and TNA in relation to meeting its obligations under FOIA.
22. However, TNA concluded that the public interest in this case rests in maintaining the exemptions. It considers disclosure would be likely to prejudice the effective function of the process for the transfer of public records and the operation of the Reclosure process. It said that it is important that officials are able to exchange views freely and frankly and to fully discuss any issues that effect that process. It argued that the ability of staff to freely discuss issues, explore options, and make recommendations and propose solutions would therefore be impaired

due to the chilling effect caused by disclosure, in the expectation that information created in the course of discussion would be disclosed.

23. TNA stated that premature disclosure of evaluations of current process and discussion regarding changes to TNA's processes, whilst this is still a live issue, would be likely to undermine the principle of having a 'safe space' in which to develop ideas and make decisions. This need for safe space is strongest when issues are still live and policy is in a formulative stage.
24. It felt that disclosure may act as an inhibitor to necessary discussions, which would not be in the public interest and would be likely to prejudice TNA's ability to carry out its statutory obligations. Again, TNA stated that such consequences are not in the public interest.
25. The Commissioner recognises the public interest in openness, transparency and accountability and in members of the public having access to information which enables them to understand more clearly government decision making. It promotes public debate and enhances public trust in government.
26. The Commissioner acknowledges the significant public interest in access to public records and in how TNA operates this process. Disclosure would provide more transparency around the process of removing records from public access and the transfer process. It would allow the public to see how this is approached and why particular decisions are made. There is a public interest in ensuring that this is being carried out effectively and in accordance with relevant guidance, procedures, policies and legislation.
27. However, on this occasion he considers the public interest rests in maintaining the exemptions. This is because TNA has confirmed how the contents of the withheld information and the issues discussed are still very much live and ongoing and it is accepted that it requires the 'safe space' to openly, candidly and freely exchange views and advice and deliberate on the options available and issues before it. At a stage when matters are still live and very much under consideration, the Commissioner accepts that the extent of prejudice will be more severe and significant.
28. He considers it is in the public interest to allow TNA the 'safe space' to continue those candid discussions, explore its options and make the necessary recommendations and solutions that are required. Disclosure at this stage would be likely to hinder TNA's ability to do that and prejudice its ability to carry out its statutory functions and such consequences are not in the public interest.

29. Although he recognises the importance of openness and transparency around the reclosure process and the transfer of public records, and in members of the public understanding the decisions reached in relation to specific records of interest to them, it is not in the public interest to prejudice TNA's ability to carry out those processes and functions.
30. In terms of the chilling effect on future discussions and deliberations, again the Commissioner can see how premature disclosure, at a time when TNA are still actively exchanging views, advice and in a process of deliberation, could affect the quality and candidness of those exchanges. However, he does not accept that disclosure would be likely to have a chilling effect on all future discussions. As time passes, the sensitivity of information and the likely impact of disclosure diminishes. This also happens once those ongoing processes and discussions have come to an end and decision making has been finalised on the issue or concerns at hand.
31. Overall, the Commissioner considers the public interest in disclosure is outweighed by the public interest in maintaining the exemptions.

Procedural matters

32. TNA claimed a reasonable extension beyond the statutory 20 working days deadline, as it needed more time to consider the public interest test. It responded within 40 working days, which is considered a reasonable amount of time for a case with a qualified exemption. However, it failed to inform the complainant of its intention to cite a qualified exemption within the initial 20 working days following the receipt of the request. This was issued on 21st working day. For this, the Commissioner has recorded a breach of section 17(1) of FOIA.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Coward
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