

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2024

Public Authority: House of Commons
Address: London
SW1A 0AA

Decision (including any steps ordered)

1. The complainant has requested information about the Culture, Media and Sport Committee's decision to write to broadcasters and social media platforms in the wake of allegations about Russell Brand. The House of Commons (HoC) would neither confirm nor deny that it held information falling within scope of the request, citing section 34(2) (Parliamentary privilege) of FOIA. It issued a certificate under section 34(3) confirming that the exemption applied.
2. The Commissioner's decision is that section 34(2) of FOIA was correctly applied.
3. The Commissioner does not require further steps as a result of this decision.

Request and response

4. On 25 September 2023, the complainant wrote to the Culture, Media and Sport Committee (a select committee of the HoC) and requested information in the following terms:

"I am sending this request under the Freedom of Information Act to ask for the following information:

All materials relating to your decision to write letters to various organisations, in the wake of the allegations against Russell Brand

that were reported in the media from 16/09/23 on. These should include all minutes and all records of any nature. Plus records of any discussion regarding these letters after they were sent.

The letters of yours to which I am referring are listed here:

<https://committees.parliament.uk/committee/378/culture-media-and-sport-committee/news/197649/cms-committee-publishes-response-from-rumble-on-monetisation-of-content/>

<https://committees.parliament.uk/committee/378/culture-media-and-sport-committee/news/197530/culture-media-and-sport-committee-chair-writes-to-broadcasters-and-tiktok-over-russell-brand-allegations-and-investigations/>

...

Please prioritise the following:

- Materials relating to your letters to Rumble on 20/09/23 and TikTok and 19/09/23.
 - Whether you sought legal or other advice as to whether these letters could prejudice any potential criminal investigations and prosecutions.
 - Confirmation that the other members of the committee were in agreement that these letters should be sent, especially the letters to Rumble and TikTok.”
5. The HoC responded on 5 October 2023. It would neither confirm nor deny (‘NCND’) whether it held any information falling in scope of the request, citing section 34(2) of FOIA. It said:
- “Any information that may be held by the CMS [Culture, Media and Sport] Committee within the scope of your request forms part of the proceedings of the House of Commons, and is subject to parliamentary privilege. The privileges of Parliament include the exclusive right (cognisance) of each House over whether and when information relating to proceedings should be disclosed. Therefore, in order to prevent an infringement of parliamentary privilege, any information which may or may not be held in relation to your request is exempt under section 34(2) FOIA, and the duty to confirm or deny whether the House of Commons holds such information does not apply to your request. This is an absolute exemption and the public interest test does not apply.”
6. In addition, it would neither confirm nor deny whether any information was held which may be subject to legal professional privilege, citing section 42(2) FOIA.

7. The complainant requested an internal review of the decision to apply section 42(2) of FOIA, on 7 October 2023. He felt it should be possible for the HoC to confirm or deny whether it held information to which that exemption had been applied.
8. The HoC provided the outcome of the internal review on 6 November 2023. It clarified that section 34(2) had been applied to all parts of the request, and confirmed that both section 34(2) and section 42(2) of FOIA had been applied correctly. By way of advice and assistance, it linked the complainant to the online publications of the Culture, Media and Sport Committee.

Scope of the case

9. The complainant contacted the Commissioner on 9 November 2023 to complain about the way his request for information had been handled. In his complaint to the ICO, he set out his understanding of the HoC's position:

"In their first refusal (5th Oct) they issued an NCND, citing section 42(2). However, in their response (6th Nov) to my internal review request, they cite that the legal advice is also subject to section 34.

However, setting aside the legal advice and focusing only on whether this was sought, I would suggest that only 42(2) would apply. This, they had already suggested in their original refusal (5th Oct) is subject to the public interest test, and therefore something I can challenge.

I suggest that issuing an NCND in this case is excessive as I cannot see how, for example, it could prejudice any legal proceedings...Therefore, can you ask of them the answer to the question of whether legal advice was sought."

10. Although the complainant asked the Commissioner to restrict his consideration to the application of section 42(2) of FOIA to the question of whether legal advice was sought, the HoC clarified in the internal review that section 34(2) had been applied to the request as a whole (ie including to whether or not information was held on whether legal advice was sought).
11. The Commissioner has, therefore, firstly considered the application of section 34(2), as it is class based and not subject to a public interest balancing test. If that exemption is engaged, then the HoC was entitled

to issue an NCND response. The question of whether or not section 42(2) was also correctly engaged would become irrelevant.

Reasons for decision

Neither confirm nor deny

12. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds information of the description specified in the request.
13. However, section 2(1)(b) of FOIA provides that section 1(1)(a) does not apply where an exemption contains an exclusion from this duty.
14. In this case, the HoC would neither confirm nor deny whether it holds the requested information, citing the NCND exclusion at section 34(2) of FOIA.
15. For the avoidance of doubt, nothing in this decision notice should be taken to mean that the HoC does, or does not, hold the information to which section 34(2) had been applied.

Section 34 – Parliamentary privilege

16. Section 34 of FOIA states:

“(1) Information is exempt information if exemption from section 1(1)(b) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.

(2) The duty to confirm or deny does not apply if, or to the extent that, exemption from section 1(1)(a) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament.”

17. Section 34 is a class based exemption, meaning that if the requested information falls within the description of the exemption, then it is exempt. It is not subject to a public interest test.

18. The Commissioner has issued guidance on section 34¹. The guidance explains that, whilst there is no definitive guide as to what constitutes parliamentary privilege, it will include:
- “...the right of each House to manage its own affairs and to exercise sole jurisdiction over its own proceedings. This right is known as “exclusive cognizance”, which means “exclusive jurisdiction”. For the purposes of the FOIA, the key point is that, as part of its privilege, the relevant House has the right to control publication of its proceedings.”
19. The guidance explains that ‘proceedings’ will include proceedings within committees formally appointed by the House (and their subcommittees), including oral and written evidence and deliberations. It confirms that:
- “As each House has the right to control its own affairs, including the right to control publication of its proceedings, any unpublished information relating to proceedings in Parliament may be covered by the exemption.”
20. Section 34(3) of FOIA provides that a certificate signed by the appropriate authority, certifying that exemption from the duty under section 1(1)(a) is required for the purpose of avoiding an infringement of the privileges of either House of Parliament, shall be conclusive evidence of that fact. In relation to the HoC, the Speaker of that House is the appropriate authority.
21. During the Commissioner’s investigation of the complaint, on 5 March 2024, pursuant to section 34(3), the Speaker of the House of Commons issued a certificate which said as follows:
- “This Certificate relates to a request to the House of Commons for the release of a copy of all materials relating to the decision of the Digital, Culture Media and Sport committee² to write the letters specified in the request, including minutes and all records of any nature and records of any discussion, following the reporting of allegations against Mr Russell Brand in September 2023. The request also includes whether legal or other advice was sought by the Committee

¹ https://ico.org.uk/media/for-organisations/documents/1161/section_34_parliamentary_privilege.pdf

² The former name of the Culture, Media and Sport Committee. The Committee changed its name following the Government’s decision on 7 February 2023 to transfer responsibility for digital policy to the Department for Science, Innovation and Technology

and whether the members of the Committee were in agreement that the letters should be sent.

In relation to the above information, I hereby certify that an exemption from section 1(1)(a) and section 1(1)(b) of the Freedom of Information Act 2000 is required for the purpose of avoiding an infringement of the privileges of the House of Commons.”

22. The certificate is clear that information relating to the decision of the Culture, Media and Sport Committee to write the letters specified in the request, including:

- minutes and all records of any nature;
- records of any discussion;
- whether legal or other advice was sought by the Committee; and
- whether the members of the Committee were in agreement that the letters should be sent,

is exempt from the section 1(1)(a) duty to confirm or deny whether information is held.

23. The Commissioner is satisfied that the requested information is information of this description.

24. As noted above, the Speaker’s certificate is conclusive evidence (irrespective of the complainant’s submissions) that the exemption applies, and nothing in FOIA requires, or permits, the Commissioner to look beyond the certificate. Accordingly, the Commissioner finds that the NCND exemption afforded by section 34(2) of FOIA applies.

25. As that exemption applies to the request in its entirety, it is not necessary to consider the application of section 42(2) to the same information.

Right of appeal

26. 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

27. 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.
28. 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

Samantha Bracegirdle
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Wycliffe House
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SK9 5AF