

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2023

Public Authority: Department for Culture, Media & Sport

Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for Digital, Culture, Media & Sport (DCMS)¹ seeking information about a decision, previously communicated to him, that the department did not have a role to play in upholding the Cabinet Office Code of Conduct for Board Members of Public Bodies with regards to members of the Channel 4 board. DCMS provided some information falling within the scope of the request with redactions on the basis of section 40 (personal data) of FOIA. It also withheld further information on the basis of section 36(2)(b)(i) (effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 36(2)(b)(i) but that the public interest in disclosing the information outweighs the public interest in maintaining the exemption. The Commissioner has also concluded that DCMS breached sections 17(3) and 17(5) of FOIA as a result of its delayed responses to the request.

¹ As a result of machinery of government changes in February 2023, the Department for Digital, Culture, Media & Sport was replaced by the Department for Science, Innovation and Technology and the Department for Culture, Media & Sport (DCMS). The latter body retained responsibility for the policy area which is the focus of this request and this notice is therefore served on that body and refers to it as the one which handled the request.

3. The Commissioner requires DCMS to take the following steps to ensure compliance with the legislation:
 - Provide the complainant with a copy of the information which it withheld on the basis of section 36(2)(b)(i).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. Following an exchange of correspondence with DCMS' Permanent Secretary, the complainant submitted the following FOI request directly to her on 4 April 2022:

'Under the Freedom of Information Act, could you please provide me with copies of any and all documentation - emails, minutes, notes, memos, messages etc - in any way relating to, discussing, or supporting your decision that you and the DCMS do not have a role to play in upholding the Cabinet Office Code of Conduct for Board Members of Public Bodies with regards members of the Channel 4 Board.'
6. DCMS responded on 5 May 2022 and explained that it was refusing this request on the basis of section 12 (cost limit) of FOIA because it would take a long time to search through all documentation to discover if the above mentioned topic is mentioned. It suggested refining the request to bring it within the cost limit, for example by only seeking information from a specific person or by including a timeframe, ie a 3 month period.
7. The complainant responded on the same day and made it clear that the context of his original request clearly intended it to only seek information considered by the Permanent Secretary.
8. DCMS took this communication to be a clarified request and responded to it on 6 June 2022 by confirming that it held information falling within the scope of the request but considered this to be exempt from disclosure on the basis of section 36 (effective conduct of public affairs) of FOIA. DCMS explained that it needed additional time to consider the balance of the public interest.
9. DCMS provided the complainant with a substantive response on 28 July 2022. It explained that some information was considered to be exempt

from disclosure on the basis of section 36(2)(b)(i) of FOIA and that the public interest favoured maintaining the exemption. It also provided the complainant with other information falling within the scope of his request but explained that redactions had been made on the basis of section 40(2) (personal data) of FOIA and because information was considered to be out of scope of the request.

10. The complainant contacted DCMS on 28 January 2023 and raised concerns that not all of the information falling within the scope of his request appeared to have been disclosed, namely the terms of appointment of the Channel 4 Chair and Board (which had been referred to in a DCMS letter to him of 8 January 2023).
11. DCMS informed the complainant of the outcome of the internal review on 6 March 2023. It explained that further searches had been undertaken to locate information falling within the scope of the request, albeit it did not specifically address his point about the terms of appointment. The internal review concluded that the exemptions contained at sections 36(2)(b)(i) and 40(2) had been applied correctly.

Scope of the case

12. The complainant contacted the Commissioner on 12 March 2023 to complain about DCMS' handling of his request. The complainant raised the following grounds of complaint:
 1. In his view it was clear from the context of his original request of 4 April 2022 that he was only interested in information considered by the Permanent Secretary. Therefore, in his view it was not necessary for DCMS to refuse his request on the basis of section 12 and suggest that he submitted a clarified and narrower request.
 2. In any event, he was unhappy that DCMS' response of 5 May 2022 was not provided within 20 working days.
 3. He was also unhappy with the length of time that DCMS took to consider the balance of the public interest test.
 4. He disputed DCMS' reliance on section 36(2)(b)(i) of FOIA to withhold information falling within the scope of his request.
 5. He also considered that in response to his request DCMS should have provided him with a copy of the MoU between DCMS and Channel 4. In support of this point the complainant explained that the MoU 'describes how Sarah Healey, as Principal Accounting Officer is responsible for

ensuring C4 board members stick to the Managing Public Money Guidelines of HMT. This would seem relevant to whether or not DCMS would investigate the board.²

Reasons for decision

Complaint 4 – section 36

13. DCMS relied on section 36(2)(b)(i) to withhold an advice note provided to the Permanent Secretary regarding its, ie DCMS', role in upholding the Cabinet Office Code of Conduct for Board Members of Public Bodies with regards to members of the Channel 4 Board. Section 36(2)(b)(i) of FOIA states that:

“(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.”

14. In determining whether section 36(2)(b)(i) is engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

15. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance

² The Commissioner notes that the MoU was later provided to the complainant in response to a further request he submitted to DCMS.

with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

16. With regard to the process of seeking this opinion, DCMS sought the opinion of the Minister of State for the department on 13 July 2022 with regard to whether section 36(2)(b)(i) of FOIA was engaged. Qualified persons are described in section 36(5) of FOIA with section 36(5)(a) stating that 'qualified person' means 'in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown'. The Commissioner is therefore satisfied that the Minister of State was an appropriate qualified person.
17. The qualified person was provided with a rationale as to why the exemption could apply and copies of the withheld information. The qualified person provided their opinion that the exemption was engaged on 20 July 2022.
18. With regard to the substance of the opinion, the qualified person argued that disclosure of the advice note would be likely to impact on the 'safe space' that officials need to provide candid advice to Ministers and senior officials. As a result disclosure would be likely to dissuade officials from providing thorough, free and frank advice to Ministers and senior officials for fear of their advice being released. This is particularly true in this case due to the sensitivity of the complaint.
19. The Commissioner does not accept that officials would be put off providing advice and views in full to senior officials or Ministers if the information was disclosed. However, he accepts that it is not unreasonable to conclude that there is a potential risk that the routine disclosure of such advice could result in it being less descriptive and couched in a more cautious manner. The Commissioner has therefore concluded that the opinion of the qualified person was a reasonable one and that section 36(2)(b)(i) is engaged.

Public interest test

20. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

21. The complainant explained to the Commissioner that his intention in seeking the information was to assist him with determining, at the time of the request, whether to take potential further legal action in relation to the matter in question. (He was dissatisfied with how Channel 4 had handled a complaint he raised with it regarding an initial concern he raised via its Speak Up whistleblowing facility). Furthermore, in his submissions to the Commissioner the complainant set out why he had concerns as to whether DCMS' responses to him regarding the oversight of Channel 4 could have been intended to be misleading. As result of this, he argued that there was a public interest in disclosure of the information to provide further insight into DCMS' handling of his questions to it on this issue.
22. For its part, DCMS acknowledged that greater transparency makes the government more accountable to the electorate and increases trust.

Public interest arguments in favour of maintaining the exemption

23. However, DCMS argued that there was a clear public interest in ensuring a 'safe space' so that officials feel comfortable sharing candid advice to Ministers and senior officials (in this case the Permanent Secretary) to brief them for responses. DCMS argued that release of the requested information would impact on this 'safe space' and so dissuade officials from providing thorough, free and frank advice to Ministers and senior officials.

Balance of the public interest arguments

24. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
25. In relation to DCMS' public interest arguments to withhold the information, and in particular the language it used in support of these

arguments, the Commissioner considers it important to explain his interpretation of the term 'safe space'. In the Commissioner's view safe space refers to the need to develop ideas, debate live issues and reach decisions away from external interference and distraction. The need for a safe space is strongest when the issue is still live. Once decision has been made the argument will carry little weight.

26. However, in Commissioner's view having considered DCMS' arguments, although they refer to the concept of a safe space they actually focus instead on what is commonly understood to be the risk of a 'chilling effect'. Chilling effect arguments are different to safe space arguments and focus and relate instead to the view that disclosure of internal discussions inhibits free and frank discussions, and that the loss of frankness and candour damages the quality of advice, leading to poorer decision-making.
27. With regards to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when giving advice. They should not be easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make more convincing arguments about a generalised chilling effect on all future discussions.
28. The Commissioner notes that neither in its responses to the request, nor in its responses to him, did DCMS make any reference to the matter in question being live and ongoing. As the wording of the complainant's original request suggests, the withheld information relates to a decision, already taken, by the Permanent Secretary to inform him, ie the complainant, that DCMS did not have a role in upholding the Cabinet Office Code of Conduct for Board Members of Public Bodies with regards to members of the Channel 4 Board. The covering email from the Permanent Secretary to the complainant makes it clear that this was DCMS' final position on the matter. Whilst the Commissioner understands that the complainant was involved in further discussions with DCMS after the request regarding this decision, he does not consider the matter to be one that was live at the point of the request, particularly in the absence of any such submissions from DCMS.
29. Furthermore, the Commissioner considers the arguments advanced by DCMS to support the view that the disclosure of the information would

be likely to result in a chilling effect are rather generic. Although DCMS noted that the complaint in question, ie regarding the conduct of the Channel 4 board member, was a sensitive one, it did not explain why the disclosure of the particular information that had been withheld would be likely to impact on the candour of further written submissions. Rather, in the Commissioner's view, DCMS' position effectively adopts, or certainly implies, the position that any such advice to the Permanent Secretary should be withheld given the risk of some unquantified chilling effect in the future. The Commissioner considers this to be too generic a position to adopt.

30. Moreover, having considered the content of the specific information that has been withheld, the Commissioner is not persuaded that it contains any particular details of DCMS' consideration of this issue beyond the matters discussed in the email chain already disclosed to the complainant.
31. Taking the above into account, the Commissioner is not persuaded that the public interest arguments in favour of maintaining the exemption attract any particular or significant weight.
32. Turning to the public interest arguments in favour of disclosure, the Commissioner recognises that the complainant has a particular interest in the issue in question as a result of his concerns about Channel 4's handling of his initial concerns and the subsequent handling by a board member of his complaint. The Commissioner would take the view that whilst such interests are obviously ones of importance to the complainant, this does not mean that they are necessarily ones of any great importance to the wider public. Nevertheless, the Commissioner accepts that there is a wider public interest in allowing the public to understand how decisions have been reached by government departments. Furthermore, in the circumstances of this case, the Commissioner accepts that taking into account the focus at the time of the request in the media regarding the status and future of Channel 4, this arguably adds some weight to the public interest in disclosure. Disclosure of the withheld information could therefore address the complainant's particular interests as well contributing to this broader public interest in transparency and accountability.
33. In conclusion, and particularly because of the limited weight that the Commissioner has concluded should be attributed to the public interest arguments in favour of maintaining the exemption, he has found that the public interest in disclosing the information outweighs the public interest in maintaining the exemption.

Procedural matters

Complaint 1

34. The complainant argued that it was clear from the context of his original request of 4 April 2022 that he was clearly seeking information about a specific decision by the Permanent Secretary and the documents generated by, or consulted as part of, that decision.
35. DCMS, in its submissions to the Commissioner, explained that it remained of the view that it was not clear from the wording of this request that the complainant was only interested in information considered by the Permanent Secretary.
36. The Commissioner respects DCMS' position that it considered the request to be ambiguous. However, he does have considerable sympathy with complainant's point. The covering email of 21 March 2022 from the Permanent Secretary stated:

'As highlighted in my previous email, I have consulted with my officials and officials in the Cabinet Office and have determined that DCMS does not have a role in responding to this complaint. While I appreciate this is disappointing to you, it is our final position.'
37. In light of this context, in the Commissioner's view the wording of the request of 4 April 2022 could be objectively interpreted as only seeking information in respect of the Permanent Secretary's decision. Nevertheless, the Commissioner is satisfied that in refusing the request on the basis of section 12 of FOIA and offering advice and assistance, DCMS did not breach any aspect of the legislation.

Complaint 2

38. Under section 1(1) of FOIA, anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
39. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
40. If a public authority issues a refusal notice citing section 12 to refuse a request, under section 17(5) it must do so within the time for compliance set out in section 10(1).

41. The complainant submitted his original request on 4 April 2022 and DCMS responded on 5 May 2022, refusing the request on the basis of section 12. This means that DCMS took 21 working days to refuse the request which constitutes a breach of section 17(5).

Complaint 3

42. Section 17(3) of FOIA states that where a public authority is relying on a qualified exemption, it can have a "reasonable" extension of time to consider the public interest in maintaining the exemption or disclosing the information. FOIA does not define how long a reasonable time is.
43. The section 45 Code of Practice on request handling states that "it is best practice for an extension to be for no more than a further 20 working days".³ This means that the total time spent responding to a request should not exceed 40 working days unless there are exceptional circumstances.
44. In this case DCMS took 58 working days to consider the balance of public interest test which the Commissioner considers to be an unreasonable amount of time and therefore represents a breach of section 17(3) of FOIA.

Complaint 5

45. In submissions to the Commissioner, DCMS explained that it remained of the view that the MoU the complainant referred to did not fall into the scope of the 5 May 2022 request. In support of this position DCMS explained that this request related to documents that were consulted in reaching the decision that DCMS did not have a role in upholding the Cabinet Office's Code of Conduct for Board Members of Public Bodies. DCMS officials' view, subsequently confirmed with relevant colleagues at the Cabinet Office, was that Ofcom as the appointing authority were the relevant body for escalating a complaint to, rather than DCMS. Neither DCMS officials nor the Permanent Secretary needed to consult Channel 4 Board members' terms of appointments to determine this.
46. On the basis of this explanation the Commissioner is satisfied that the MoU does not fall within the scope of the request of 5 May 2022.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

47. 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

48. 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.
49. 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

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