

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 November 2024

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

Decision (including any steps ordered)

1. The complainant has requested TNA to disclose information relating to the reclosure of case files MEPO 3/1875 and MEPO 3/870. TNA disclosed some information but withheld the remainder citing sections 36(2)(b) and (c) and 40 of FOIA.
2. No complaint was raised in relation to the application of section 40 of FOIA.
3. The Commissioner's decision is that while section 36(2)(b) is engaged the public interest in maintaining the exemption is outweighed by the public interest in favour of disclosure. He has also found TNA to be in breach of section 10 of FOIA.
4. The Commissioner requires TNA to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information to which it has applied the exemptions under section 36(2)(b).
5. TNA must take these steps within 30 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

6. On 15 June 2023, the complainant wrote to TNA and requested information in the following terms:

“CAS-128816:

I would like to request copies of all correspondence relating to the reclosure of file MEPO 3/1875. This includes (but is not limited to) the initial request for a review, any reports made to or by either the Metropolitan Police and/or TNA staff and/or the Reclosure Panel. I would also like to see any material relating to the reclosure of this file circulated to or produced by members or officers of the Advisory Council on National Records and Archives. In addition, I would like to know the specific dates on which the request for reclosure was received; the specific date on which the file was withdrawn from public access; the specific date on which reclosure was confirmed; and the date on which this file's closed status (and proposed date was confirmed; and the date on which this file's closed status (and proposed date for reopening) was published on Discovery.

CAS-128748: I would like to request copies of all correspondence relating to the reclosure of file MEPO 3/870. This includes (but is not limited to) the initial request for a review, any reports made to or by either the Metropolitan Police and/or TNA staff and/or the Reclosure Panel. I would also like to see any material relating to the reclosure of this file circulated to or produced by members or officers of the Advisory Council on National Records and Archives. In addition, I would like to know the specific dates on which the request for reclosure was received; the specific date on which the file was withdrawn from public access; and the specific date on which reclosure was confirmed. I would also like to know why Discovery has not been updated with full details of the grounds for reclosure and the projected date for re-opening.”

7. TNA responded on 13 September 2023. It disclosed some information but withheld the remainder citing sections 36(2)(b) and (c) and 40 of FOIA.
8. The complainant requested an internal review on 14 September 2023. They confirmed that they had no complaint over section 40 of FOIA but did wish to dispute the application of section 36(2)(b) and (c). They also raised concerns that further recorded information was held relating to MEPO 3/1875 (correspondence with the Metropolitan Police).
9. TNA carried out an internal review and notified the complainant of its findings on 8 November 2023. It explained why no additional

information falling in the scope of the request was held relating to MEPO 3/1875 and upheld its application of section 36(2)(b) and (c) of FOIA.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way their request for information had been handled. They wished to challenge the application of section 36(2)(b) and (c) of FOIA to the remaining withheld information.
11. The Commissioner considers the scope of his investigation is to determine whether or not TNA is entitled to rely on section 36(2)(b) and/or (c) of FOIA.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

12. 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.
13. TNA confirmed that it obtained the opinion of the qualified person – its Chief Executive and Keeper - on 6 September 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 to be engaged. It is the qualified person's opinion that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation and therefore sections 36(2)(b)(i) and (ii) are 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.
14. 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.

15. TNA argued that it is the qualified person's opinion that section 36(2)(b) is engaged because disclosure would be likely to inhibit the ability of TNA officials to discuss the contents of the records, to provide advice and recommendations regarding potential sensitivities, relevant FOIA exemptions and the resultant reclosure of records where necessary. It stated that this exemption protects the process of consultation, as disclosure of discussions and the provision of advice concerning reclosing cases would be likely to inhibit free and frank discussions in future, and therefore may damage the quality of advice and deliberation and lead to poorer quality decision making. TNA confirmed that this exemption applies to the 'processes' that may be inhibited, rather than the information itself.
16. TNA advised that it is the qualified person's opinion that whilst officials are expected to be robust when providing advice and making decisions, disclosure would be likely to have a chilling effect whereby a form of 'self-censorship' may commence and therefore hamper the quality of decisions made under FOIA and TNA's reclosure policy. It argued that if officials felt that their recommendations and the information they highlight as sensitive was to be disclosed to the world at large, they may be less likely to operate under TNA's reclosure policy or provide detailed reports outlining their thought processes and justifications. It stated that it is the qualified person's opinion that this would in turn be likely to inhibit the operation of scrutiny provided by the reclosure panel, the ACRNA and the Director for Public Records, Access and Government Services as they may be presented with brief justifications that do not outline the entirety of the sensitive information for consideration. It also stated that although these cases have been decided, the operation of the reclosure policy and the requirement of FOI practitioners to identify sensitive information and make closure recommendations continues.
17. In respect of section 36(2)(c), TNA commented that disclosure would be likely to prejudice the 'safe space' required by TNA FOI practitioners to make recommendations and provide opinions on the application of FOIA exemptions, away from external interference, thus having an adverse effect on TNA's ability to meet its objectives and offer an effective public service.
18. Section 36(2)(b) and (c) are two separate exemptions and for section 36(2)(c) to apply a public authority must demonstrate that disclosure

would or would be likely to 'otherwise' prejudice the effective conduct of public affairs. In other words, it must provide submissions that differ from the process section 36(2)(b) is designed to protect.

19. Dealing with section 36(2)(c) first, the Commissioner considers the arguments presented focus on the ability of TNA staff to provide advice and opinions, deliberate and make recommendations. It refers to the safe space that is required to do that. The Commissioner considers these arguments are very similar to those presented in support of section 36(2)(b) of FOIA. There are no submissions on how disclosure would or would be likely to 'otherwise' prejudice the effective conduct of public affairs and so the Commissioner is unable to accept the qualified person's opinion that this is engaged.
20. Turning now to sections 36(2)(b)(i) and (ii), the Commissioner considers it is a reasonable opinion to hold that disclosure of the withheld information would be likely to prejudice the processes these exemptions are designed to protect. He considers it is a reasonable opinion to hold and this is sufficient to engage the exemptions.
21. For that reason he will now go on to consider the public interest test.

Public interest test

22. When considering the public interest test under section 36 of FOIA, the Commissioner is permitted to consider the severity, frequency and the extent of the prejudice claimed.
23. TNA advised that it understands the public interest in showing a true and open account of the decision making process for public authorities, making for greater accountability and increasing public confidence in the integrity of the decisions made. It also recognised its obligations under the Public Records Act 1958 and the importance of access to historical public records. Also the need for openness and transparency around the reclosure process and around how TNA manages access to records.
24. However, in this case it considers the public interest rests in maintaining the exemptions. It is of the view that it is not in the public interest to prejudice the effective function of the process for reclosing records and the effective application of FOIA to sensitive information within closed records held by TNA. It argued that the public interest rests in officials being able to make recommendations and exchange views freely and frankly on the application of FOIA exemptions and how these relate to specific material under consideration. TNA believes disclosure may act as an inhibitor to necessary discussions which would not be in the public domain.

25. TNA also believes that there is a need to prevent a chilling effect from occurring and to preserve a safe space for discussion and to make recommendations. It stated that this is particularly compelling when the issue is still live. At the time of the request, the decision to close the files had been made. But it considers the disclosure of meta-data about the sensitivities within those closed records would be likely to cause a chilling effect on transferring departments, who would as a result be discouraged from providing detailed information about sensitivities within transferred records, in the knowledge that such information may be disclosed.
26. Furthermore TNA advised that disclosure would infringe upon the safe space officials need to apply FOIA exemptions, evaluate the status of open records and manage information effectively under TNA's reclosure policy.
27. It said that when it first handled the request and considered the public interest test it informed the complainant that the relevant case files were closed records. However, since the completion of this exercise, MEPO 3/870 has been opened in full and MEPO 3/1875 has been disclosed with a small amount of information redacted. It also said that it disclosed further information to the complainant in relation to MEPO 3/1875 under case reference IC-298633-W0D1 when it identified that an exemption no longer applied. TNA commented that whilst most of the information from the archival records is no longer deemed sensitive, the processes themselves are live and disclosure may inhibit TNA's ability to operate effectively under its Reclosure Policy and may inhibit the free space FOIA practitioners require.
28. The Commissioner recognises the public interest in openness and transparency and in providing the public with information which enables them to understand more closely how decisions are made by public authorities. In this case there is a clear public interest in understanding how TNA manages such records and its Reclosure Policy. In specific cases there is a public interest in understanding why decisions to close or open records to the public are made and in ensuring that the most appropriate decisions are reached.
29. While the Commissioner accepts that section 36 concerns the processes of deliberation, the free and frank exchanges of views and advice, he still must consider the contents of the withheld information to evaluate if disclosure would be likely to prejudice those processes in a given case. He must also consider the circumstances at the time of the request and where those processes were up to. Additionally he is entitled to consider the severity, extent and frequency of the prejudice claimed in a given case. To do that effectively he must consider the specific contents of the withheld information and how likely it is that disclosure of that

information would be likely to cause the consequences claimed. If this was not intended section 36 would be an absolute exemption.

30. TNA has confirmed that at the time of the request the decision over reclosure had already been made in relation to both cases. There was therefore no ongoing deliberation or exchange of views and advice or the need for safe space in relation to these two cases at this time. TNA has confirmed itself that the withheld information is no longer sensitive and is fairly mundane and high level in nature.
31. The Commissioner does not consider it is proportionate to argue that disclosure would be likely to hinder the operation of the Reclosure Policy on other cases going forward. The contents do not reveal any in depth considerations that took place or any candid and free exchange of views and advice. The Commissioner also believes that TNA officials, transferring departments and FOIA practitioners understand and expect some level of public scrutiny of the decisions it makes on access to such records. He would expect some justification to be given for the decision it reaches in a given case and he does not consider the remaining withheld information is any more than that.
32. The Commissioner therefore does not consider the prejudice claimed is as severe, frequent or as extensive as TNA has claimed in this particular case, given the contents of the withheld information and the circumstances at the time of the request.
33. TNA has drawn the Commissioner's attention to earlier decisions where he has supported the application of section 36 of FOIA. He has considered these but has reached the view that these were concerning different withheld information. Some considered the more in depth deliberations and provision of advice and views referred to in paragraph 31 above, some also with the transferring departments. Another case involved the internal discussions and deliberations of the Reclosure Policy itself. The Commissioner does not consider the withheld information in this case is of the same nature.
34. For the above reasons, the Commissioner has decided that the public interest rests in favour of disclosure in this case.

Procedural matters

35. TNA extended the time for compliance to consider the public interest test. It did however inform the complainant appropriately in accordance with section 17 of FOIA. TNA did not adhere to the Commissioner's guidance on what is considered to be a reasonable extension and so breached section 10 of FOIA.

Right of appeal

36. 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

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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