

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2024

Public Authority: The National Archives
Address: Kew
London
TW9 4DU

Decision (including any steps ordered)

1. The complainant has requested information about a decision to close three specific files. The above public authority ("the public authority") relied on sections 36 (prejudice to the effective conduct of public affairs) and 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that the public authority has correctly applied section 40(2) of FOIA. Sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) are all engaged, but the balance of the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose all the information it has relied on any limb of section 36 to withhold.
4. The public authority 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

5. On 15 February 2024 the complainant requested information of the following description:

“I would like to request copies of all communications (including, but not limited to, the reclosure reports considered by the Reclosure panel) relating to the reclosure of MEPO 3/2728, CRIM 1/1806, and J 200/26. I would also like to request copies of all communications relating to the decision to withdraw PCOM 9/700 from public access on 24th January 2023.”

6. On 16 April 2024, the public authority responded. It provided some information within the scope of the request but refused to provide the remainder. The public authority relied on sections 36 and 40(2) of FOIA as its basis for withholding the information. It upheld this stance following an internal review.

Reasons for decision

Section 40(2) -third party personal information

7. Section 40(2) of FOIA allows a public authority to withhold information that is the personal information of someone other than the requester if there would be no lawful basis in data protection law that would allow that information to be published.
8. This exemption has been applied to the names of junior staff members of the public authority and to references to individuals featured within the closed files themselves. The Commissioner is satisfied that this exemption has only been applied to information that would identify someone who is, or is presumed to be, still alive.
9. For the avoidance of doubt, the Commissioner has seen no information in any of the “summary of decision” spreadsheets (which are contained within the withheld information) that constitutes personal information. The public authority referred in its submission to “sensitive information” being withheld from these documents but, unlike with the other documents it provided to the Commissioner, it did not indicate any specific information to which an exemption had been applied.
10. In respect of staff names, the Commissioner sees no legitimate interest in publication. There may be a legitimate interest in understanding what role **senior** staff had in the making of particular decisions, but naming

junior staff does not meet this interest. It would appear that the names of senior staff have been disclosed.

11. In respect of the individuals featured within the closed files, the Commissioner accepts that the identities of the individuals concerned does add something to the reasons for the decision to close the file. There is therefore a legitimate interest in the information and there is no less-intrusive method of meeting this interest than via publication.
12. However, the Commissioner considers that, given the circumstances in which they are referred to, the individuals concerned would have no reasonable expectation that their personal information would be made public. Publication, contrary to their reasonable expectations, is likely to cause them a certain amount of damage and distress. The rights of these individuals therefore outweighs any legitimate interest in publication.
13. The Commissioner is therefore satisfied that there would be no lawful basis for publication of any of this information. Consequently, section 40(2) of FOIA is engaged.

Section 36 – prejudice to the effective conduct of public affairs

14. Section 36 of FOIA states that information is exempt if its disclosure either would or would be likely to:
 - 36(2)(b)(i) – inhibit the free and frank provision of advice
 - 36(2)(b)(ii) – inhibit the free and frank exchange of views for the purposes of deliberation
 - 36(2)(c) – otherwise prejudice the effective conduct of public affairs
15. In order for the exemption to be engaged, a very senior individual within the organisation, known as the Qualified Person, must provide an opinion stating either that these harms would be caused by disclosure or that they would be likely to be caused. That opinion must be a reasonable one.
16. The public authority provided a copy of a submission that had been presented to and signed by, its then-Chief Executive and the Keeper of the National Archives, Jeff James. That document was dated 15 March 2024. The public authority also provided a copy of an email chain, involving Mr James, dated 24 July 2024. In that chain (which was prompted by the need to carry out an internal review in this case) Mr James confirmed that he was satisfied with his previous opinion.

17. As the Keeper of the National Archive (as he was at the time – though he has since left that position) Mr James was entitled to act as the public authority's Qualified Person. In signing the submission, he provided his opinion on 15 March 2024.

What was the opinion and was it reasonable?

18. When deciding whether an opinion is reasonable, the Commissioner must not substitute his own opinion for that of the Qualified Person. The opinion does not have to be the most reasonable opinion a person could hold – it simply has to be reasonable.
19. An opinion will not be reasonable if it is irrational, absurd or if it fails to identify an applicable interest.
20. In respect of limbs 36(2)(b)(i) and 36(2)(b)(ii), the Qualified Person explained that it was important that staff feel free to offer candid assessments of why particular files should be disclosed and to be able to discuss issues candidly and openly with each other. This was particularly important when discussing the organisation's approach to closing files more generally. Disclosure would be likely to make those staff less willing to offer their opinions or to offer less detailed opinions.
21. The Qualified Person was also concerned that disclosure would be likely to inhibit discussions between the public authority and other organisations.
22. The vast majority of the information the public authority holds originally belonged to other organisations. It is important that the public authority is able to have candid discussions with the original owners of information, to ensure that an appropriate balance is struck between transparency and the protection of sensitive information.
23. The Qualified Person has relied on the lower bar of likelihood ("would be likely to"). This means that the chance of the harm occurring is less than 50%, but is nevertheless more than remote or hypothetical.
24. The Commissioner does not consider it unreasonable to suppose that individuals may feel some inhibition in offering their opinions if they feared that those opinions would be made public. He is therefore satisfied that these two limbs of the exemption are engaged.
25. In respect of section 36(2)(c), the Qualified Person identified eight different reasons why disclosure would "otherwise" prejudice the effective conduct of public affairs. These included:
 - "The safe space required for FOI practitioners to make recommendations and provide opinions concerning the application

of FOI exemptions to specific categories of information, and thereby the ability of The National Archives to fulfil its obligations under the FOIA

- The ability of The National Archives to evaluate open records that contain sensitivities, and to provide justification for the reclosing of previously accessible material under relevant FOI exemptions
 - The ability of The National Archives to prevent data breaches, leading to potential consequences in terms of fines and reputational damage
 - The ability of The National Archives to serve the public interest through the appropriate reclosure of sensitive information
 - The ability of The National Archives to implement an effective information management policy for archival records
 - The information seen to be covered by the exemption includes information added to SAR about closed records, the disclosure of which would undermine TNA's business relationships and ability to consult with the transferring department and Advisory Council."
26. For disclosure of information to "otherwise" prejudice the effective conduct of public affairs, the Qualified Person must be able to identify some form of harm that is not covered by any other FOIA exemption.
27. In the Commissioner's view, the Qualified Person's opinion is not reasonable where it relates to any of the six bullet points listed above.
28. It is irrational to suggest the public authority would pay less attention to its legal obligations under data protection legislation if the withheld information were disclosed.
29. Given that the remaining harms would all arise from either an inhibition to the free and frank provision of advice or the free and frank exchange of views, the Commissioner is of the view that they are already covered by the other limbs of section 36. Therefore the Qualified Person's opinion is unreasonable in this respect because it does not identify an interest applicable to this part of the exemption.
30. However, the Qualified Person also identified two other harms that could arise from disclosure. The Commissioner cannot expand on these arguments beyond noting that they related to certain internal processes. To go further than that would be to reveal some of the withheld information itself – undermining the public authority's right to appeal the Commissioner's decision. The Commissioner is satisfied that these harms would not be covered by any other FOIA exemption. He is also

satisfied that it is not unreasonable to suppose that the harms would be likely to result from disclosure.

31. Section 36(2)(c) of FOIA is therefore engaged.

Public interest test - sections 36(2)(b)(i) and (ii)

32. Even where disclosure would be likely to prejudice the effective conduct of public affairs, the information must still be disclosed unless the balance of the public interest favours maintaining the exemption.

33. Given that the Qualified Person has stated that there is a prospect of harm, there will always be an inherent public interest in preventing that harm from occurring. However the weight to be assigned to that public interest will depend on the likelihood of the harm occurring and the severity if it did occur.

34. The public authority has pointed out that the focus of this exemption is not the information itself, but the effect of disclosure. Therefore it is not necessary to demonstrate that the information contains particularly candid views.

35. The Commissioner accepts that the focus of the exemption is on the effect of disclosure. However, he also notes that that effect will, in turn be influenced by the type of information being disclosed. The Commissioner will consider how likely it is that a person would no longer provide similar information in future. A robust employee should not be deterred from providing factual information in future because previous factual information they provided has been disclosed.

36. The withheld information comprises of:

- Various "change of access" forms for each file.
- A research report into one of the files.
- Extracts from various "summary of decision" lists.
- Some sets of minutes and agendas for two meetings.
- An email circulating one of the change of access forms

37. Sections 36(2)(b)(i) and (ii) have been applied to parts of all but the last item of information listed above.

38. In decision notice [IC-319069-N7V7](#), the Commissioner considered very similar information to that covered by the first three bullet points above. He concluded that the public interest favoured disclosure.

39. For the same reasons given in that decision, the Commissioner also considers that the public interest favours disclosure of the information falling within the scope of the first three bullet points. In particular he considers that:
- there is a presumption that public records should be available to the public – unless there are particular sensitivities; and
 - there is a strong public interest in allowing members of the public to challenge the public authority's decision to close all or part of a public record – which they cannot do without a good understanding of the rationale for closure; and
 - he is not persuaded that the likelihood of professional archivists failing to comment on significant matters affecting a decision to close or not close a file, for fear that their comments will be made public, is especially high.
40. The Commissioner has not seen anything in the withheld information that identifies an opinion belonging to any transferring organisation. He is not persuaded that the chance of such organisations providing lower quality submissions in future is high. Even if it did occur, the severity is likely to be low. Transferring organisations have a strong incentive to protect information that remains sensitive. It is very unlikely that that incentive will be overridden, to any significant extent, by any fear of comments being made public.
41. Next the Commissioner turns to the minutes (which weren't within the scope of the previous decision). The references within the minutes to internal discussions are largely high level and generic. Once again, the Commissioner is sceptical that there is a likelihood of a significant reduction in the willingness of professional archivists to provide their professional view due to a fear of disclosure.
42. The Commissioner is therefore satisfied that where sections 36(2)(b)(i) and (ii) are engaged, the public interest favours disclosure.

Section 36(2)(c) – public interest

43. The Commissioner turns finally to section 36(2)(c), which has been applied to one part of a change of access form, some parts of the research report, large parts of the covering email and some parts of the minutes.
44. In order to preserve a meaningful right of appeal for the public authority (should it wish to exercise it), the Commissioner has had to place his analysis of the public interest in a confidential annex.

45. This is because meaningful analysis of the public authority's arguments is not possible without referring to the reasons the public authority is applying the exemption in the first place – thus defeating the purpose of the exemption.
46. The Commissioner appreciates that this may be somewhat frustrating to the complainant. For her benefit, the gist of his analysis is that he is not persuaded that the harms the qualified person has identified are sufficiently likely or severe as to outweigh the public interest in transparency.

Confidential annex

47. This decision notice comes with a confidential annex – which will only be provided to the public authority. The reasons for this measure are set out in paragraphs 44 and 45.
48. The confidential annex contains only the Commissioner's reasoning as to why he does not consider that the balance of the public interest favours maintaining section 36(2)(c) of FOIA. The remainder of the Commissioner's analysis is contained within this notice.

Other matters

49. The Commissioner notes that it took the public authority almost four months to complete its internal review in this case. He considers this to be poor practice.

Right of appeal

50. 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

51. 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.
52. 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

Roger Cawthorne
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