

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 21 July 2014

Public Authority: National Museums and Galleries of Northern Ireland

Address: Cultra
Holywood
Co Down
BT18 0EU

Decision (including any steps ordered)

1. The complainant has requested information produced or commissioned by National Museums Northern Ireland (NMNI) concerning creationism. NMNI provided some information but withheld two documents under sections 36(2)(b) and 36(2)(c) of the FOIA. The Commissioner's decision is that the exemptions are engaged but that the public interest in maintaining those exemptions does not outweigh the public interest in disclosing the withheld information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the two withheld documents to the complainant.
3. 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 FOIA and may be dealt with as a contempt of court.

Background

4. NMNI is the operating name for National Museums and Galleries of Northern Ireland.¹ It is a Non-Departmental Public Body (NDPB) accountable to the Northern Ireland Assembly through the Department of Culture, Arts and Leisure. NMNI a public authority in its own right for the purposes of the FOIA.

Request and response

5. On 2 November 2012 the complainant made the following request to NMNI:

"I would like to request any documents that National Museums Northern Ireland has produced or commissioned concerning creationism."

6. On 10 December 2012 NMNI provided the complainant with a press statement, and advised that it was considering the exemption at section 36 of the FOIA.
7. On 1 March 2013 NMNI issued a refusal notice advising that it held two additional documents, both of which were considered exempt under sections 36(2)(b) and (c) of the FOIA. The complainant requested an internal review on the same day.
8. On 24 September 2013 NMNI communicated the outcome of the internal review to the complainant. NMNI upheld its original reliance on sections 36(2)(b) and (c) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 30 December 2013 to complain about the way his request for information had been handled.
 10. The withheld information in this case comprises two documents:
 - A "peer review" on the Ulster Museum Nature Galleries, which was commissioned from an independent third party; and
-

¹ www.nmni.com

- An extract from NMNI's Post Project Evaluation (PPE) relating to the peer review.
11. The Commissioner has considered whether NMNI was entitled to withhold this information on the basis of sections 36(2)(b) and 36(2)(c) of the FOIA. The Commissioner has also considered the time taken to deal with the request.

Reasons for decision

Section 36: prejudice to the effective conduct of public affairs

12. The relevant parts of section 36(2) state that:

"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, 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. Section 36(5) sets out who may act as the qualified person in relation to a public authority. Section 36(5)(l) provides that the qualified person for a Northern Ireland public authority other than the Northern Ireland Audit Office is either the public authority or any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly.
14. In this case the relevant opinion was given by the Board of Trustees. NMNI has provided the Commissioner with two briefing notes produced for the Board, and copies of minutes of meetings detailing the Board's decision to rely on section 36. The Commissioner is satisfied that the Board was the authorised qualified person in this case.
15. In determining whether the exemptions cited are engaged the Commissioner must next decide whether the qualified person's opinion was reasonable. The Commissioner has published guidance which sets

out his approach:² if the opinion is in accordance with reason and not irrational or absurd, then it is reasonable. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold.

16. In order to determine whether the qualified person's opinion was reasonable the Commissioner has considered:
- Whether the prejudice claimed relates to the specific subsections of section 36(2) that NMNI is relying upon;
 - The nature of the requested information and the timing of the request; and
 - The qualified person's knowledge of or involvement in the issue.

Sections 36(2)(b)(i) and (ii)

17. NMNI did not specify to the complainant which subsections of section 36(2)(b) it sought to rely on in relation to the two withheld documents. However the submission to the qualified person set out the importance of NMNI being able to obtain "impartial and expert opinion" from external sources. NMNI stated to the Commissioner that disclosure of the peer review "*would inhibit its ability, in the future, to obtain free and frank advice*", which clearly refers to section 36(2)(b)(i) of the FOIA. NMNI argued that, if such third parties considered that their views would be disclosed into the public domain, they may either decline to provide their views, or at least temper their advice.
18. NMNI confirmed that it had not consulted the individual who was commissioned to produce the peer review. It advised the Commissioner that it had experience of commissioning reports on sensitive issues from professional consultants. NMNI suggested that such reports can be carefully worded,
- "...no doubt because the authors are guarding against the unanticipated publication of their report or the publication of same to a different audience to the one they anticipated".*

²www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx

19. The Commissioner appreciates that public authorities cannot be expected to prove conclusively that prejudice would or would be likely to occur as a result of the disclosure of information into the public domain. However he considers that NMNI's argument is somewhat weakened by the fact that it is an assumption as to the motives of authors of reports, rather than a result of consulting with the author of the peer review in this particular case.
20. NMNI also stated that disclosure of the PPE into the public domain would have a similarly inhibiting effect on staff in terms of exchanging views and ideas. This argument is relevant to section 36(2)(b)(ii) of the FOIA. NMNI pointed out that the PPE concluded with a range of options, and argued that the viability of this exercise depended on staff being able to set out their thoughts openly and fully. NMNI did accept that the withheld information in this case would not identify any individual member of staff, but remained of the view that the fear of disclosure would make staff more reluctant to contribute freely to the discussion.
21. Having inspected the withheld information and the submissions provided to the qualified person, the Commissioner considers it reasonable for the qualified person to form the opinion that disclosure of the withheld information would engage the exemption at sections 36(2)(b)(i) and (ii). The Board of Trustees has corporate responsibility for ensuring that NMNI meets its statutory remit and fulfils its aims and objectives. The Board has considered and discussed the withheld information, both when it was originally presented and in the context of the information request. Therefore the Commissioner accepts that the Board would be sufficiently informed and experienced to consider the possible effects of disclosure. However the Commissioner considers that the lower level of inhibition, ie "*would be likely to*", should apply as he does not consider that sufficient evidence has been provided in order to engage the higher level of "*would*".

Section 36(2)(c)

22. NMNI argued that the ability to freely and frankly engage with staff and third parties would be undermined by the prospect of disclosure. This would consequently prejudice NMNI's ability to meet its objective of effectively evaluating and developing curatorial decisions, practices and policies.
23. Again, having regard to the withheld information and the qualified person's knowledge of the issues, the Commissioner accepts as reasonable the qualified person's opinion that section 36(2)(c) is also engaged in relation to both documents. Similarly the Commissioner is of the view that the lower level of prejudice should be applied.

Public interest test

24. NMNI provided the complainant with very little explanation of its public interest considerations. The Commissioner notes that the information provided to the qualified person listed factors in favour of disclosure, and in favour of withholding the two documents. The Commissioner would remind public authorities that the correct public interest test, as set out in section 2(2)(b) of the FOIA, is to consider whether:

"in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information".

25. NMNI combined its arguments in relation to all the subsections of section 36 claimed. In this case the Commissioner has agreed to consider the public interest arguments considered as a whole. The arguments put forward by NMNI overlap and can be interpreted as applying to more than one subsection of section 36. However the Commissioner would remind public authorities that they are required to consider the public interest fully in respect of each exemption (including subsections) claimed. It is for the public authority to satisfy the Commissioner that any exemption has been properly considered and applied in any particular case.

26. The Commissioner asked NMNI for further details of its public interest considerations, as he was of the view that they were brief and lacking in detail. NMNI declined to provide any further explanation, and stated that in its view the public interest arguments were *"clear, concise and self-explanatory"*. The Commissioner wishes to stress that it is for the public authority to satisfy the Commissioner that it has properly considered the public interest. The Commissioner must make his decision based on the information provided, and cannot make assumptions or speculate as to arguments the public authority may have wished to rely on.

Public interest arguments in favour of disclosure

27. NMNI identified the following arguments in favour of disclosing the withheld information:

- By releasing the documents the public would be able to see the process by which decisions are reached in relation to exhibitions and their content.
- The advice given by external advisers and NMNI's reaction to them might contribute to a debate of public interest.

28. NMNI has also advised the Commissioner that it has a statutory duty under the Museums and Galleries (Northern Ireland) Order 1998 to

"...generally promote the awareness, appreciation and understanding by the public of ...science".³

29. The fact that NMNI engaged an external party to conduct an independent assessment will inform the public as to the steps taken by NMNI to evaluate its fulfilment of this duty. The Commissioner also agrees that disclosure of the withheld information would assist a more informed debate on NMNI's functions.

Public interest arguments in favour of maintaining the exemptions

30. When assessing the public interest the Commissioner has given due consideration to protecting what is inherent in these exemptions. With regard to section 36(2)(b)(i) and (ii) this includes the avoidance of unwarranted inhibition to the free and frank provision of advice, or to the free and frank exchange of views for the purposes of deliberation.

31. NMNI identified the following arguments in favour of maintaining the exemption:

- The documents do not contain any new facts or opinions and their release would not add anything to the public debate.
- The release would be likely to restrict NMNI's ability to elicit candid advice from external sources and as there is a need for such candour the release would have a detrimental effect on the public interest.

32. NMNI also drew attention to the ongoing public debate on creationism and evolution, describing it as contentious, and *"likely to continue indefinitely and without resolution"*.

33. NMNI confirmed to the Commissioner that it had not consulted the author of the peer review or sought their consent to disclose the withheld information. NMNI also confirmed that it had considered redacting the author's name but concluded that this would not prevent the author from being identified.

³ www.legislation.gov.uk/nisi/1998/261/article/4, Article 4(1)(d)(i)

Balance of the public interest

34. The Commissioner notes that there is a legitimate public interest in informing the public as to the way NMNI meets its objectives, and disclosure of the withheld information would assist the public's understanding in this regard. The Commissioner must consider whether the public interest in maintaining the exemptions outweighs the public interest in disclosure. If the public interest factors are evenly balanced the information must be disclosed.
35. In accepting that the exemptions are engaged the Commissioner has accepted as reasonable the view that disclosure of the withheld information would be likely to have an inhibiting effect on the exchange of views and provision of advice. NMNI has put forward a "safe space" argument, based on the premise that it is in the public interest for officials to be able to evaluate, contemplate and develop its policies and procedures with the benefit of independent advice and through internal discussion and debate. However NMNI has not explained how disclosure of the specific information in this case would have a detrimental impact on safe space, as opposed to protecting a general principle. The Commissioner also considers that NMNI's arguments relate to a possible "chilling effect". This is where it is argued that disclosure of the information in question would inhibit free and frank discussions in the future, which would in turn damage the quality of advice and lead to poorer decision making.
36. The Commissioner notes that the peer review was commissioned to evaluate an existing approach, rather than help develop a new policy. Having regard to the content of the peer review the Commissioner notes that much of it is descriptive, and its focus is on presentational aspects relating to the museum galleries. Although the peer review contains some explanatory information regarding various perspectives of creationism, the author is clear that they have sought to be neutral as to the truth or otherwise of evolutionary theory. Having had sight of the withheld information, the Commissioner accepts that the subject matter may be seen as sensitive, but does not consider that the information itself is particularly sensitive in terms of the views expressed or advice given.
37. The Commissioner is also mindful that the withheld information was nearly three years old at the time of the request. Both the PPE and the peer review were discussed at a Board meeting on 13 May 2011, the

minutes of which are publicly available on the NMNI website.⁴ In particular the Commissioner notes the Board's assessment of the peer review:

"[The peer review] had fully endorsed the approach taken by the Museum regarding the portrayal of the origins of the human species..."

38. Therefore the Commissioner is of the view that the withheld information was not "live". It had been received and discussed by the Board in May 2011, and the Board did not at any stage suggest to the Commissioner that any part of the PPE or peer review was under consideration at the time of the request.
39. The Commissioner considers that the content of the withheld information itself is key to balancing the public interest, but NMNI has not referred to the content of the withheld information in its arguments. The Commissioner is not persuaded, on the evidence provided by NMNI, that disclosure of the information contained in the peer review would have such a detrimental consequence that the public interest in maintaining the exemption would outweigh the public interest in disclosure. The Commissioner acknowledges that public authorities cannot speculate as to the effects of disclosure, but NMNI appears to have based its position on an untested assumption rather than consultation with independent experts who may be affected.
40. The Commissioner notes that NMNI considered redaction, but concluded that it could not disclose any part of the peer review. The Commissioner disagrees and is of the view that, for example, information describing the museum exhibits and layout is innocuous. This suggests that NMNI has failed to consider the withheld information in detail when balancing the public interest.
41. With regard to the PPE, the Commissioner notes that there is no reference to any individual member of staff, although the names of two individuals who conducted peer reviews are included. The Commissioner's conclusions in relation to the peer reviewers follow his findings as set out above, and the Commissioner has also considered NMNI's arguments relating to its own staff.
42. The Commissioner has accepted as reasonable the qualified person's opinion that disclosure of the withheld information would be likely to

⁴ <http://www.nmni.com/Documents/NMNI/BoardMeetingMinutes13May2011>

inhibit the free and frank exchange of advice and views under sections 36(2)(b)(i) and (ii). However the Commissioner found that the lower test of “would be likely” applied, and the Commissioner considers that the public interest arguments in favour of maintaining the exemption are similarly weak. Given that no member of staff could be identified from the PPE the Commissioner considers it less likely that disclosure would have the effects ascribed by NMNI. Rather the Commissioner believes that NMNI staff would continue to carry out their duties, including the evaluation of NMNI approaches.

43. The Commissioner has also accepted as reasonable the opinion that disclosure of the PPE would be likely to prejudice the effective conduct of public affairs more generally. He has consequently accorded weight to maintaining section 36(2)(c), whilst noting the lack of specific arguments advanced by NMNI relating to this exemption.
44. The Commissioner finds that NMNI has generally failed to put forward compelling arguments to support its position in respect of the peer review and the PPE. Therefore – when coupled with his analysis of this information and its context - the Commissioner finds that the public interest in maintaining the exemptions do not outweigh the public interest in disclosing the withheld information.

Procedural requirements

Section 17: refusal notice

45. Section 17(1) of the FOIA states that if the authority wishes to rely on any exemption it must issue a refusal notice promptly, and in any event no later than 20 working days after the date of receipt of the request. Section 17(2) of the FOIA allows a public authority to extend the time limit where it is still considering the public interest as long as certain measures are taken. Section 17(2) states that the refusal notice:

“must indicate that no decision ... has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached”.

46. The effect of this is that a public authority must reach a decision about whether or not a qualified exemption is engaged within 20 working days. If it determines that the exemption is engaged, then a refusal notice that complies with section 17(1) must be issued within 20 working days. The public authority therefore is only permitted to extend the time for compliance in order to consider the public interest test under an exemption which has been applied – and communicated to the applicant – within 20 working days of the request.

47. In this case the request was made to NMNI on 2 November 2013, and NMNI provided an initial response on 10 December 2013. This response disclosed some information and advised that NMNI was considering the exemption at section 36 so required further time to provide a full response. NMNI did not issue its substantive refusal notice until 1 March 2014, well outside the statutory time for compliance.
48. The Commissioner wishes to stress that public authorities must not cite section 17(3) in order to gain time to consider the engagement of exemptions. This extension of the time limit is available only for the purpose of deciding whether the public interest means that an exemption should be maintained or exempt information disclosed.
49. In addition the Commissioner notes that the refusal notice did not explain why the exemption applied to the withheld information, it merely repeated the wording of the exemption. Nor did the refusal notice provide details of the public interest test conducted.
50. In this case the Commissioner finds that NMNI failed to comply with section 17 as it failed to issue a valid refusal notice within the time for compliance. NMNI explained to the Commissioner that the delay was caused by the requirement that the Board act as the qualified person. The Board only meets four times a year, and NMNI added, "*has a very full agenda*". The Commissioner appreciates the logistical difficulties faced in co-ordinating Board meetings, but notes that the FOIA does not allow for the time for compliance to be extended in such circumstances. NMNI confirmed to the Commissioner that it has put steps in place to ensure that future requests are dealt with in the time allowed.

Other matters

51. Although it does not form part of this decision notice the Commissioner also wishes to comment on the time taken to complete the internal review.
52. The complainant requested an internal review on 1 March 2014, and did not receive the outcome until 24 September 2014. Although there is no statutory time limit for the internal review the Commissioner expects reviews to take no longer than 20 working days, or 40 working days in exceptional circumstances.
53. Again, NMNI explained to the Commissioner that it required additional time to conduct the internal review owing to the availability of Board members.

54. The Commissioner is of the view that the internal review offers an opportunity for a public authority to ensure that it has complied with the procedural requirements of the FOIA, and that it is content with its response. However the Commissioner notes that there is no statutory requirement for a public authority to conduct an internal review, and indeed it may not always be practical. If a public authority is unable to conduct an internal review promptly it may choose not to offer an internal review, and advise the complainant of their right to complain directly to the Commissioner.

Right of appeal

55. 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: 0300 1234504
Fax: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
57. 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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