

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2015

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

Decision (including any steps ordered)

1. The complainant has requested information about material that has been redacted and/or removed from the file PREM 19/588 which is available to view in the National Archives. TNA refused to provide the requested information under section 23(1), section 36(2)(b)(ii) and 36(2)(c) and 40(2) FOIA.
2. The Commissioner's decision is that TNA has correctly applied section 23(1), section 36(2)(b)(ii) and section 40(2) to the withheld information apart from, in relation to the redaction of one name throughout, which the Commissioner considers was incorrectly withheld under section 40(2) FOIA.
3. The Commissioner requires TNA to remove the redactions to the name, but not contact details, of the individual referred to in the Confidential Annex attached to this Notice.
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. On 9 March 2015 the complainant requested information of the following description:

- “1. Has material been redacted and or removed from the file PREM 19/588 which is available to view in the National Archives. The file is called Security. Sir Peter Hayman: Allegations against former public official of unnatural sexual proclivities; security service.
2. If the answer to the above question is yes can you please provide a list of and or description of the items removed. As far as these items are concerned could you please provide the names of any relevant correspondents as well as any relevant dates and the names of any relevant public bodies and government departments. Can you please explain why and on what grounds this material has been removed from the file.
3. Could you please provide copies of all items and documents removed and or redacted from this file. I am of course seeking access to the actual information which has so far not been disclosed?
4. Since 1 January 2012 has the National Archives exchanged correspondence and communications (including emails) with the Foreign Office and or the Cabinet Office which in any way relates to this file and its contents. This correspondence and communications will also touch upon information which has been removed or redacted from the file. If the answer is yes can you please provide copies of his correspondence and communications (including emails).
5. Is the National Archives aware of any other files (irrespective of whether it holds them or not) which contain material about Sir Peter's private life and or sexual preferences. If so can you please provide full details including all relevant dates, references and titles. Could you please state where these files are held.”
6. On 19 May 2015 the National Archives responded. It provided the complainant with some of the information requested but refused to disclose some information under section 23(1), section 36(2)(b) and (c) and section 40(2) FOIA.
7. The complainant requested an internal review on 20 May 2015. The National Archives maintained its original position.

Scope of the case

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8. The complainant contacted the Commissioner on 24 June 2015 to complain about the way his request for information had been handled.

9. The Commissioner has considered whether TNA correctly applied the exemptions it has cited to the withheld information.

Reasons for decision

Section 23(1)

10. Section 23(1) FOIA provides that, "Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)."
11. Section 23(3) FOIA provides that, "The bodies referred to in subsections (1) and (2) are-
- (a) the Security Service,
 - (b) the Secret Intelligence Service,
 - (c) the Government Communications Headquarters,
 - (d) the special forces,
 - (e) the Tribunal established under section 65 of the Regulation of Investigatory Powers Act 2000,
 - (f) the Tribunal established under section 7 of the Interception of Communications Act 1985,
 - (g) the Tribunal established under section 5 of the Security Service Act 1989,
 - (h) the Tribunal established under section 9 of the Intelligence Services Act 1994,
 - (i) the Security Vetting Appeals Panel,
 - (j) the Security Commission,
 - (k) the National Criminal Intelligence Service, and
 - (l) the Service Authority for the National Criminal Intelligence Service."
12. TNA has made three redactions under section 23(1) FOIA. This is because the information redacted from file PREM 19/588 under section 23(1) FOIA, has been referred to within the requested correspondence. To disclose this information would therefore disclose the information

redacted from file Prem 19/588. After viewing the information redacted from the correspondence under this exemption, the Commissioner is satisfied that it relates to one of the bodies specified in section 23(3) FOIA and does therefore fall within the scope of the exemption. As section 23(1) FOIA is an absolute exemption the information to which it has been applied was correctly withheld.

Section 36(2)(b)(ii) and (2)(c)

13. Section 36 FOIA provides 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-

(2)(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

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

14. TNA has applied section 36(2)(b)(ii) and section 36(2)(c) FOIA to two pieces of information (although the information is duplicated within the correspondence chain).

15. In determining whether the exemptions were correctly engaged by TNA, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable.

16. TNA explained that the qualified person is Jeff James, Chief Executive and Keeper at TNA. It explained that the qualified opinion was provided on 10 April 2015. The qualified person’s opinion was that section 36(2)(b)(ii) and section 36(2)(c) FOIA were applicable in this case. It

explained that the Qualified Person had access to all information in the scope of the request in addition to the recommendations of FOIA experts at TNA and other government bodies with an interest in the information at hand. In line with its FOIA responsibilities, FOI Centre staff at TNA provided and assisted the Qualified Person with the consideration of arguments both for and against the application of the exemption. A copy of the qualified opinion was provided to the Commissioner.

17. The Commissioner has first considered the application of section 36(2)(b)(ii) in this case.
18. TNA said that section 36(2)(b)(ii) had been engaged because government departments must have the ability to communicate confidentially with each other in order to manage how access to information is handled. Release of information of this kind would prejudice the ability of government departments to partake in a free and frank exchange of views or exchange free and frank opinions accordingly.
19. The qualified person's opinion is that disclosure would be likely to inhibit the free and frank exchange of views under s36(2)(b)(ii).
20. Upon viewing the withheld information, the arguments presented to the qualified person and the qualified person's opinion, the Commissioner considers that the opinion of the qualified person is a reasonable one.
21. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
22. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must

¹ EA/2006/0011; EA/2006/0013

give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

23. TNA argued that there is a public interest in showing a true and open account of government decision-making, making for greater accountability and increasing public confidence in political life.

Public interest arguments in favour of maintaining the exemption

24. TNA has explained that it believes the following public interest arguments favour maintaining the exemption:

The Chilling Effect

It argued that government departments, who are obliged to comply with statutory obligations under the Public Records Act 1958, should be able to provide information to TNA without the risk of release under freedom of information legislation. To release information which could prejudice this process and the future exchanges TNA has with departments, would not be in the public interest. It went on that it must be open to departments to communicate confidentially with each other in order to manage the release of information.

Balance of the public interest arguments

25. TNA argued that the balance of the public interest in relation to section 36 fell in favour of disclosure in all but two instances. As it has disclosed some of the requested information to the complainant, it considers this does go some way to meeting the public interest factors in favour of disclosure.
26. The Commissioner considers there is a strong public interest in openness and transparency, particularly in relation to how decisions are being made within government about the sharing of information with the

public. This is because it would provide the public with a greater understanding and reassurance of how TNA has tackled this matter and whether their actions have been appropriate in relation to the information concerned.

27. The Commissioner does however acknowledge that government departments involved in this process may need to have fairly frank and open dialogue to determine if, when and how information is released.
28. The Commissioner considers that there is a strong public interest in TNA and the government being open and transparent in relation to how decisions are made about the withholding of information from the public which is contained within an open file. However the Commissioner considers that there is a strong public interest in allowing the relevant parties to be able to discuss this openly and candidly in order to reach a robust conclusion in terms of when, how and if information is to be released. As this is an ongoing responsibility of TNA along with other relevant government bodies it is an ongoing concern to these parties. Furthermore, upon viewing the requested correspondence, the Commissioner would also note that it was dated January 2015 and was therefore fairly recent at the time the request was made in March 2015, this therefore adds weight to the chilling effect argument in this case.
29. On balance, given that some information has been provided to the complainant, the Commissioner considers that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining section 36(2)(b)(ii) in relation to the two instances it has been applied.
30. The Commissioner considers that section 36(2)(b)(ii) FOIA was correctly applied in this case.

Section 40(2)

31. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.
32. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:
"data which relate to a living individual who can be identified –
 - (i) from those data, or
 - (ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the

individual and any indication of the intention of the data controller or any other person in respect of the individual.”

33. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
34. TNA said that it has withheld the names of junior staff and the direct contact details of identified staff. The Commissioner considers the information withheld under section 40(2) is information from which the data subjects would be identifiable.
35. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.

Likely expectation of the data subject

36. TNA argued that in considering whether it is fair to release staff names it very much depends on the context in which they appear, that is the work the individuals are doing, rather than just their seniority or grade. It said if a person is in a front facing role and his/her name is already in the public domain, it accepts that it would not be appropriate to withhold it.
37. It clarified that not all names were withheld, where the judgment has been made that staff are of a more senior grade, who have greater responsibility for the decisions made and may be called upon to represent their department on such matters as discussed in the correspondence, the transfer and release of material at TNA, then their information has been released as there would be a greater expectation of disclosure.
38. It said that the redactions made under section 40 (2) FOIA were limited to junior officials and the direct contact email addresses of identified staff. It said that the majority of staff, whose names are

contained in the requested information, are junior and their names are being redacted because their roles relate to ensuring that records are transferred and accessioned into TNA for permanent preservation and access. They would not be expected to act as spokespersons on this matter and do not carry out public facing roles and so would not have an expectation that their names and contact details would be released.

39. The Commissioner agrees that junior members of staff who do not carry out publicly facing roles and would not be expected to act as spokespersons on this matter would not have a reasonable expectation that their names would be released.
39. It redacted the contact details of all members of staff (junior or senior) as to release their direct contact details, regardless of their grade, would be to provide a direct route of contact for the relevant individuals which would be likely to lead to a marked increase in speculative enquiries being forwarded to them. It argued this would not be a reasonable expectation of any of the data subjects.
40. The Commissioner considers that all members of staff would not have an expectation that their direct contact details would be made publicly available as it is highly likely to lead to correspondence potentially being directed incorrectly to specific members of staff. As a general guide, it is a reasonable expectation of employees that a public authority will receive correspondence in an organised way and then direct it accordingly internally and provide direct lines of communication when this appropriate rather than making this information publicly available from the outset.

The legitimate public interest

40. TNA said that while the seniority of staff is only one consideration, it is also important to remember that there does also need to be a legitimate interest in the names of officers where they are junior to be released. It said that a general argument about openness and transparency will not suffice for this information to be released.
41. TNA argued that disclosure of direct contact details would prevent the individuals concerned from being able to operate across the wider requirements of their job role appropriately, which it considers to be unfair. It argued that there is nothing of value which would be gained from the release of the direct contact details of these individuals. This information would not increase understanding of the information provided in response to the original FOIA request, or provide further insight into the way the organisations operate.

42. The Commissioner considers that whilst there is a legitimate public interest in the disclosure of information which would provide greater understanding and transparency behind the decision making process, he does not consider that the information withheld under section 40(2) would go any significant way to meeting that legitimate public interest.
43. The Commissioner therefore considers section 40(2) FOIA was correctly applied to the information withheld in this case apart from one name (not contact details) which appears to have been redacted throughout and where the individual does occupy a senior role and is likely to shoulder responsibility for decisions made. This name and further reasoning has been provided to TNA within the confidential annex to this Notice.

Right of appeal

44. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

45. 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.
46. 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

Pamela Clements
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SK9 5AF