

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2016

Public Authority: The Cabinet Office
Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office for the submissions received by the Holocaust Commission as a result of its national call for evidence. The Cabinet Office withheld the submissions on the basis of the exemptions contained at the following sections of FOIA: section 36 (effective conduct of public affairs), 38 (health and safety), 40 (personal data) and 41 (information provided in confidence). The Commissioner has concluded that the submissions are exempt from disclosure on the basis of the sections 36(2)(b)(i) and (ii) and that in all of the circumstances of the case the public interest favours maintaining the exemptions.

Background

2. The Prime Minister's Holocaust Commission was set up in January 2014 tasked with establishing what more Britain must do to ensure that the memory of the Holocaust is preserved and that the lessons it teaches are never forgotten.
3. The Commission ran a national call for evidence and there were nearly 2,500 responses. From this evidence, two expert groups focusing on education and commemoration reviewed the current provision and identified gaps and opportunities for the future.
4. The Commission's report was published in January 2015 and can be viewed here: <https://www.gov.uk/government/publications/prime-ministers-holocaust-commission-report>

Request and response

5. The complainant submitted the following request to the Cabinet Office on 28 April 2015:

'Please send me copies of all evidence submitted to the Holocaust Commission pursuant to the call for evidence launched on 27 January 2014. I understand that the majority was submitted by way of an online form but other evidence was submitted in other formats. For convenience, I anticipate that the evidence will include that submitted by the entities listed in the appendix to this letter, but I also understand that the list s [sic] not exhaustive.

I would like the above information to be provided to me as paper or electronic copies, or an opportunity to view.'

6. The Cabinet Office responded on 7 July 2015. It confirmed that it held the information falling within the scope of the request but considered it to be exempt from disclosure on the basis of following sections of FOIA:
- Sections 36(2)(b)(i) and (ii) – effective conduct of public affairs
 - Section 38(1)(b) – safety of an individual
 - Section 40(2) – personal data
 - Section 41(1) – information provided in confidence
7. The complainant contacted the Cabinet Office on 25 August 2015 and asked it to conduct an internal review of this decision.
8. The Cabinet Office informed her of the outcome of the review on 25 November 2015. The review upheld the application of the various exemptions cited in the refusal notice.

Scope of the case

9. The complainant contacted the Commissioner on 20 January 2016 in order to complain about Cabinet Office's failure to provide her with the information she had requested.

Reasons for decision

Section 36 – effective conduct of public affairs

10. The Cabinet Office argued that the withheld information was exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) of FOIA. These state 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, or

(ii) the free and frank exchange of views for the purposes of deliberation'

11. In this case the Minister for the Cabinet Office provided the opinion in relation to the application of sections 36(2)(b)(i) and (ii). The Commissioner is satisfied that the Minister is a qualified person for the purposes of section 36.
12. In determining whether these exemptions are 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.
13. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance 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.

14. The qualified person argued that release of this information would inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. This was because if the Prime Minister wished to establish a commission in the future, which required consultation with the public, advice would be less likely to be offered if the public believed that their views would be disclosed. Moreover, if still offered, the qualified person argued that the advice given may be materially different because of the possibility of disclosure potentially distorting the discussions and exchanges of views.
15. The complainant questioned whether disclosure of the withheld information would cause an inhibiting effect on the contributions to future consultations precisely because contributors would be aware of FOIA and thus the potential for disclosure of their submissions. In support of this she pointed to cases such as MPs' expenses and The Prince Wales correspondence being well covered in the media and raising the public's awareness of FOIA. Furthermore, she noted that the 'Cookies and Privacy Policy' of the Holocaust Commission specifically explained that '*We may pass on your personal information if we have a legal obligation to do so, or if we have to enforce or apply our terms of use and other agreements*'.¹ She also emphasised that subsequent calls for evidence from government departments have made this clear, such as the call for evidence on the Fifth Carbon Budget which states: '*All information provided in response to this consultation, including personal information, may be subject to publication or disclosure in accordance with the access to information legislation (primarily the Freedom of Information Act 2000, the Data Protection Act 1998 and the Environmental Information Regulations 2004)*'.²
16. She also emphasised that the consultation involved a *public* call for evidence and not, for example, a private request for information from particular bodies or representatives. Moreover, she suggested that it

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<http://webarchive.nationalarchives.gov.uk/20140128151644/https://www.gov.uk/help/privacy-policy>

² <https://www.theccc.org.uk/call-for-evidence/>

was hard to understand how a call for evidence on memorialization and education about the Holocaust would be susceptible to such inhibition of frankness; the nature of the enquiry was not a particularly sensitive one.

17. The Commissioner agrees with the complainant that those who submit responses to public consultations run by government departments are likely to be aware of FOIA and thus the potential for their submissions to be disclosed under that legislation. However, the Commissioner considers it important to remember that FOIA obviously contains a range of exemptions and that it is also possible that any submissions may in fact be withheld and contributors to any consultation are likely to be aware of that also. Indeed this possibility is reflected in the wording of the privacy statement quoted by the complainant about Fifth Carbon Budget consultation, ie '*All information provided in response to this consultation, including personal information, **may be** subject to publication* [emphasis added].
18. Furthermore, the Commissioner has had the benefit of reviewing a sample of the responses provided to the Commission. It is clear from these responses that many participants provided free and frank views on the topics under consideration by the Commission. In light of this in the Commissioner's view it is reasonable for the qualified person to conclude that the candour of future submissions to other consultations could be inhibited if the withheld information was disclosed. Sections 36(2)(b)(i) and (ii) are therefore engaged.

Public interest test

19. 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 either of the exemptions cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

20. The complainant emphasised that public funds were used for both the creation and operation of the Commission. Furthermore, following the publication of the report, the government committed £50 million of public funds for the creation of the National Memorial, Learning Centre and endowment fund. Given the significant public funds that have been committed following a recommendation by the Commission, she argued that there was a strong public interest in understanding the basis and rationale for the distribution of such funds and the disclosure of the submissions considered by the Commission would assist with this aim. More broadly, the complainant emphasised that greater transparency by

government with regard to how it makes decisions can lead to increased trust and engagement.

Public interest arguments in favour of maintaining the exemption

21. The Cabinet Office emphasised that the responses to the consultation informed the Commission's report, and the report is already publicly available, and this provides an overview of the responses received. Therefore, it argued that the Commission operated with an appropriate level of transparency and in these circumstances the Cabinet Office argued that there is little public interest in disclosing the actual responses. Furthermore, the Cabinet Office argued that if the nature of the submissions provided to future consultations were inhibited this would affect the deliberative process undertaken by the consultation following the provision of the advice. The Cabinet Office suggested that this would lead to a less informed picture of the public's views, leading to less informed conclusions and recommendations by any such commissions.

Balance of the public interest test

22. 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.
23. With regard to attributing weight to the public interest arguments in favour of disclosure, the Commissioner acknowledges the Cabinet Office's point that the Commission's report itself provides, to some extent, an overview of the responses. However, the report, as its own introduction notes, is 'deliberately brief.' Therefore, in the Commissioner's opinion the degree to which the report actually provides an insight into the various responses is arguably quite limited. This is to some extent unsurprising given that nearly 2500 responses were received and, from the sample considered by the Commissioner, many were detailed in nature. Disclosure of the responses themselves would provide a far more detailed insight into the range of evidence the Commission considered as part of its work. Furthermore, the Commissioner agrees with the complainant that in light of the significant level of public funds committed following the recommendations of the Commission, the public interest in understanding its work should not be underestimated. The Commissioner therefore believes that there is a significant public interest in disclosure of the withheld information.

24. Ultimately however, he has concluded that this is outweighed by the public interest in maintaining the exemption. The Commissioner has reached this conclusion because he is satisfied that disclosure of these submissions would have a chilling effect on the nature of contributions that would be made to future consultations. The Commissioner accepts the complainant's point that this was a public, rather than a private, consultation. However, as noted the submissions contain candid responses to the call for evidence and in part, contain personal views and opinions on how the Holocaust is remembered in the UK, in some instances clearly expressed with a degree of frankness. In the Commissioner's view if such submissions were disclosed, and in particular disclosed relatively soon after the consultation was completed, then there is a real risk that submissions to other high profile consultations in the future would be materially different. The Commissioner agrees with the Cabinet Office that such an effect would clearly impact upon the ability of such consultations and moreover that this would be firmly against the public interest. Consequently, the Commissioner has therefore concluded that the public interest favours maintaining the exemptions contained at sections 36(2)(b)(i) and (ii).
25. In reaching this conclusion, the Commissioner is conscious that a small number of the organisations who provided submissions to the Commission proactively published their responses online. The Cabinet Office noted that although this was the case it believed that it would be disproportionate for it to ascertain whether or not each of the 2,500 respondents had taken steps to put their response in the public domain.
26. In respect of the very small number of responses that are easy to locate online, in the Commissioner's view such responses would technically be exempt from disclosure on the basis of section 21 of FOIA which provides an exemption for information which is reasonably accessible to the applicant. However, for the remainder of the responses, which includes the vast majority of the 2,500, these are clearly not available and for such information the Commissioner considers section 36 to be applicable for the reasons set out above.
27. In light of this decision the Commissioner has not gone to consider the Cabinet Office's reliance on the other exemptions cited.

Right of appeal

28. 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

29. 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.
30. 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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