

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 August 2017

**Public Authority:** School of Oriental & African Studies

**Address:** University of London  
Thornhaugh Street  
Russell Square  
London  
WC1H 0XG

### **Decision (including any steps ordered)**

---

1. The complainant has requested information from the School of Oriental and African Studies ("the SOAS") regarding its Southeast Asian Academic Art Programme ("SAAAP"). The SOAS disclosed some of the requested information. However it withheld other information under various FOIA exemptions. The exemptions regarding which the complainant complained to the Commissioner are sections 36(2)(b)(i) and (ii) of the FOIA.
2. The Commissioner's decision is that sections 36(2)(b)(i) and (ii) of the FOIA are engaged in relation to the specific withheld information, however the public interest in disclosure of the information outweighs that in maintaining the exemptions in all the circumstances of the case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose to the complainant the information previously withheld under sections 36(2)(b)(i) and (ii) of the FOIA.
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.

### **Background to request**

5. The Southeast Asian Art Academic Programme (SAAAP) at the SOAS aims to make a transformational contribution to the study of Southeast Asian Buddhist and Hindu art and architecture. Its primary objective is to train a new generation of students, curators and heritage managers in these subjects from the region in the countries of Brunei, Cambodia, East Timor, Indonesia, Laos, Malaysia, Myanmar (Burma), Singapore, Thailand and Vietnam where the heritage of Buddhist art and architecture is historically pervasive. SAAAP supports new academic posts, scholarships, events and outreach activities that will build and foster a network of organisations in the Southeast Asia region with the objective of nurturing long-term sustainability in the subject.
6. The SAAAP is funded by a £20 million donation from the Alphawood Foundation, Chicago. This is the Alphawood Foundation's largest endowment and is one of the largest recorded to a UK Institute of higher education. The donation included a £5 million contribution to expanding the SOAS campus, the other £15 million was allocated to four specific areas – creation of academic posts, scholarships, an Academic Support Fund and administrative support to the programme throughout its lifetime.
7. As the SAAAP is almost at the mid-point of its funding cycle, an external review was carried out of its progress to date in order to assess its challenges and opportunities going forward. This was to help to better inform the aims and objectives of the programme and assess its progress so far. The review implemented clear recommendations for progressing further the work of the SAAAP.

## Request and response

8. On 25 July 2016, the complainant wrote to the SOAS and requested information in the following terms:

“Earlier this year, a review of the Southeast Asian Art Academic Programme (SAAAP) was undertaken and completed by Prof Shearer West, appointed as external reviewer by SOAS.

Please provide the following:

- (a) All emails relating to the external review which the listed individuals sent to or received from each other from 1 January to 31 March 2016.
- (b) All emails sent by any of the listed individuals to the external reviewer, Prof West.

Please include copies of all attachments to all of the emails.

- 1) Chair of the SAAAP Project Board [Prof Gurharpal Singh]
  - 2) SAAAP Project Administrator [Ms Simone Green]
  - 3) SAAAP Communications, Publications and Outreach Manager [Dr Peter Sharrock]
  - 4) Chair of the SAAAP Scholarships Committee [Prof Anna Contadini]”
9. The SOAS responded on 19 September 2016. It disclosed some of the requested information to the complainant, however it withheld some of the information, citing sections 36, 40(2) and 43 as a basis for non-disclosure.
10. On 22 September 2016, the complainant requested an internal review of the SOAS’ decision. She stated that she accepted the application of sections 40(2) and 43 of the FOIA to some of the requested information was reasonable, so her request for review was solely related to the SOAS’ application of section 36 of the FOIA to some of the requested information.
11. Following an internal review, the SOAS wrote to the complainant on 2 November 2016. The reviewer upheld the original decision, however it did specify the specific subsections of section 36 upon which the SOAS was relying as a basis for non-disclosure, namely sections 36(2)(b)(i) and 36(2)(b)(ii). It also went into some more detail about its consideration of the public interest test.

## Scope of the case

12. The complainant contacted the Commissioner on 14 November 2016 to complain about the way her request for information had been handled. The complaint related solely to the part of the requested information to which the SOAS had applied sections 36(2)(b)(i) and (ii) – for the purposes of this decision notice, this will be referred to as the “withheld information.” The withheld information is specifically within the scope of part a) 1), 3) and 4) of the complainant’s request.
13. The Commissioner has considered the SOAS’ application of sections 36(2)(b)(i) and (ii) to the withheld information.

## Reasons for decision

---

### Section 36 – prejudice to the effective conduct of public affairs

14. The SOAS considers that sections 36(2)(b)(i) and 2(b)(ii) are engaged in relation to the withheld information. The Commissioner has viewed the withheld information, which consists of e-mails and attachments to e-mails.
15. Section 36(2)(b)(i) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank provision of advice.
16. Section 36(2)(b)(ii) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
17. In determining whether any of these limbs of the exemption have been correctly applied, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning which informed that opinion. Therefore the Commissioner must:
  - Ascertain who the qualified person is,
  - Establish that they gave an opinion,
  - Ascertain when the opinion was given, and
  - Consider whether the opinion was reasonable.

18. The SOAS has explained that for the purposes of section 36 its qualified person is its Director, by virtue of section 36(5)(o)(iii). In this case the opinion was provided by the SOAS' Director on 19 September 2016, the date upon which it issued its response to the complainant's request. The Commissioner is satisfied that this was the qualified person at the time the request was made. The SOAS has explained that the qualified person was not initially provided with the withheld information, but that the information was described to her. However, after the complainant had sought an internal review of the SOAS' decision, the qualified person was provided with the withheld information on 25 October 2016. She was also provided with arguments both for and against disclosure of the withheld information.
19. The SOAS has also asked the Commissioner to note that, as it was its Director who first commissioned the external review into the SAAAP, she was intrinsically aware of all aspects of the case.
20. The qualified person may apply the exemption on the basis that the prejudice to the relevant interests protected by section 36(2)(b) either 'would' occur or 'would be likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged.
21. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition or prejudice should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition or prejudice would occur.
22. The qualified person has stated that her opinion is that the prejudice 'would' occur. It is on this basis that the Commissioner will consider whether the qualified person's opinion is reasonable.
23. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject, or even the most reasonable one. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. It is also not necessary that the Commissioner agrees with the qualified person's opinion, simply that she finds it to be a reasonable opinion.

### **Section 36(2)(b)(i) and (ii)**

24. The SOAS has argued that disclosure of the withheld information would inhibit both the free and frank provision of advice and the exchange of views for the purposes of deliberation. It argued that the withheld information consists of personal individual opinions, which would have been provided in the expectation that these would remain confidential.
25. The SOAS further argued that disclosure of the withheld information would take away the 'safe space' which academics perceived that they had in which they could freely and honestly share critical views and provide advice without fear that their comments would be disclosed into the public domain.
26. The SOAS has also argued that taking away such a 'safe space,' which it deems 'vital for individual expression and critical thought' would create a 'chilling effect' which would lead to less forthright views being shared in writing in future, thereby prejudicing future decision making.
27. In terms of why the need for a safe space was still a consideration after the external SAAAP review had been completed and the Director issued her response, the SOAS has asked the Commissioner to note that this response and the external review were published on SOAS's website on 6 July 2016<sup>1</sup>. The second-to-last bullet point in the 'Director's Report to the SAAAP Project Board'<sup>2</sup> refers to next steps taking place by 22 July and in late September. The complainant's FOI request was received on 25 July 2016 so SOAS felt the review and its ramifications were still live issues at the time of the request.
28. The Commissioner recognises that disclosure of the withheld information could make individuals less free and frank in the expression of their views and in the provision of advice, if they believed that their opinions would not be kept confidential. She has considered this in the context and purpose of the discussions that took place over email and she accepts that the individuals' contributions to these exchanges were provided to assist in the SOAS contributing towards a very important external review in a relevant and helpful manner.

---

<sup>1</sup> <https://www.soas.ac.uk/news/newsitem113250.html>.

<sup>2</sup> <https://www.soas.ac.uk/about/news/2016/file113249.pdf>

29. As such, the Commissioner is satisfied that sections 36(2)(b)(i) and (ii) are engaged, that the qualified person's opinion that the disclosure would inhibit the free and frank exchange of views for the purposes of deliberation and the free and frank provision of advice, is a reasonable one.

### **The public interest test**

30. Section 36 is subject to the public interest test. This means that the requested information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. In assessing the public interest in maintaining the section 36(2)(b)(i) and (ii) exemption the Commissioner will consider the impact on the willingness of individuals within the SOAS to exchange views, engage in debate, and provide frank and candid advice and opinions.

### **Public interest arguments in favour of maintaining the exemption**

31. The SOAS states that the withheld information consists of confidential advice and views provided by named individual academics who are closely involved in the SAAAP. The SOAS argues that disclosure of the withheld information would inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation. The advice in question is in the form of individual personal opinions and the SOAS argues that it is important that SOAS staff members have a safe space within which they can freely share honest and critical views without fearing that they will eventually make their way into the public domain. It considers that taking this assurance away would create a chilling effect and lead to less forthright views being shared in writing in future, thereby prejudicing future decision-making.
32. The SOAS argues that the public interest in maintaining this "thinking space" is greater than the public interest in transparency. It states that such a space is vital for individual expression and critical thought and allows the SOAS to conduct its affairs effectively having considered a range of views, whether positive or negative.

### **Public interest arguments in favour of disclosure**

33. The SOAS acknowledges there is a general public interest in transparency. This would help further the public's understanding of the way in which the SOAS operates and its accountability.
34. The complainant argues that disclosure of the withheld information would enhance the transparency of SAAAP. As stated in paragraph

6 above, the programme was made possible by a gift of £20 million (from Chicago's Alphawood Foundation), one of the largest recorded private donations to a UK institute of higher education. SAAAP is the largest privately funded programme at the SOAS and transparency, as well as accountability, are especially vital in view of the troubled history of this flagship programme.

### **Balance of the public interest arguments**

35. Having perused the withheld information, the Commissioner must consider where the balance of the public interest lies. In doing so, she has taken into account the opinion of the qualified person that disclosure would cause the inhibitions described. This carries a certain amount of weight through to the public interest test.
36. However, the exact weight that should be given to maintaining the exemption depends on the particular circumstances of the case. This means that, whilst the Commissioner accepts that the opinion of the qualified person that inhibition would occur is reasonable, she will go on to consider the severity, extent and frequency of that inhibition to determine where the balance of the public interest lies.
37. The Commissioner notes there is a public interest inherent in section 36(2)(b), being a prejudice-based exemption, in avoiding harm to the decision-making process. She has taken into account that there is automatically some public interest in maintaining this exemption to avoid such harm.
38. However, the Commissioner considers that there is a strong public interest in viewing the withheld information. The SAAAP is a programme which was funded by one of the largest recorded donations ever made to a UK Institute of higher education. It has been indicated that the programme had incurred some problems to date and the external review was commissioned in order, amongst other factors, to address these. The withheld information consists of the input to the review of individual academics who are closely involved in the SAAAP. The Commissioner considers that there would be a strong public interest in seeing how those closely involved in the SAAAP view its progress to date and how they are willing to contribute to an external review which is likely to be a large part of ensuring the future success of the programme.
39. The main arguments advanced by the SOAS relate to the concepts of a 'safe space' and a 'chilling effect'. The 'safe space' argument is as outlined in paragraphs 32 and 33 above.



40. The SOAS has informed the Commissioner that the external review of the SAAAP and the Director's response to that review were published on the SOAS website on 6 July 2016, which was prior to the complainant's request. The SOAS argues that there were ongoing discussions in respect of steps to be taken on foot of the recommendations in the review and that therefore, the review was still very much a live issue at the time of the request.
41. The Commissioner accepts that the review was a live issue at the time of the request. However she notes that the withheld information consists of individual advice and opinions, which were provided in order to inform the review. Once the review had been completed and published, the individuals would have had no need of a 'safe space' in which to exchange that specific advice and opinions, therefore the Commissioner does not accept that a 'safe space' was still required in respect of the particular withheld information in this case.
42. The chilling effect argument is that disclosure of information would inhibit free and frank discussions in the future and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making. The SOAS argues that the advice and opinions of the individuals were provided in the expectation that these would remain confidential. Therefore disclosure of these would lead to a future reticence to express such opinions or provide such advice, as the fear would be that these may be eventually disclosed into to the public domain.
43. However, both the Commissioner and the Information Tribunal have frequently been unconvinced of a wide-ranging chilling effect as alleged by public authorities, expressing scepticism that the disclosure of information on one issue or policy would affect the frankness of exchange of views on another unrelated issue or policy. For example, in *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*<sup>3</sup> (para 61), the Tribunal commented:

*"It is not enough in this Tribunal's view to fall back on a plea that revelation of all information otherwise thought to be inviolate would have some sort of 'chilling effect'.*

---

<sup>3</sup> EA/2006/0073

44. The Commissioner's guidance on section 36(2) states that:

*"Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions."*

45. In this case, the completed external review was published a few weeks before the complainant's request and the withheld information was created several months before this. The Commissioner accepts that the opinion of the qualified person that future discussions may be inhibited is a reasonable one, however she needs to consider the extent, severity and frequency of this inhibition occurring in relation to the specific withheld information.
46. However, when considering the public interest, the Commissioner should give such 'chilling effect' arguments appropriate weight according to the circumstances of the case and the information in question.
47. Having viewed the withheld information, the Commissioner notes that although the information consists of both factual corrections and submissions of advice and opinions from the specified individual academics with regard to the Self-Evaluation statement which is part of the materials presented to the external reviewer, she could not identify significant content that is so frank and candid that its disclosure would hinder the free and frank provision of advice or exchange of views so severely or so frequently or extensively that it would outweigh the public interest in disclosure. As the complainant states in her complaint to the Commissioner:

*"Academics, by nature of their occupations, are far from shrinking violets who would be fearful of giving voice to and defending their views, especially in writing."*

48. The Commissioner tends to agree with this view and as such has not accorded the 'chilling effect' argument significant weight when weighing up the balance of the public interest arguments. Academics are likely to be robust and accustomed to expressing their views with frankness and candour and the Commissioner does not accept that disclosure of the withheld information in this instance would lead to a 'chilling effect' in respect of all future discussions.

49. The Commissioner acknowledges that there is information on this issue in the public domain (namely, the external review and Director's response, which are on the SOAS website) and that this goes some way to meeting the public interest in the matter. However, she considers that the withheld information is more detailed than the publicly available information and shows the views and opinions of the individuals who are closely involved in the SAAAP. In the external review, the reviewer refers to the Self-Evaluation Statement, which was clearly an important source of information in assisting the reviewer to compile the review. The input of the individual academics would provide the public with an insight into the thinking of those individuals regarding the SAAAP and the consideration they were giving as to the progress of the SAAAP in order to fully inform and assist the reviewer.
50. The Commissioner has considered the public interest arguments presented in this case and has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the free and frank provision of advice and exchange of views for the purposes of deliberation in the context of preparing for an external review.
51. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the withheld information and so the withheld information should be disclosed.

## Right of appeal

---

52. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

53. 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.
54. 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 .....

**Deirdre Collins**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**