

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 September 2021

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant wrote to the public authority seeking information relating to the Government's response to a letter from the Chairman of the Grenfell Tower Inquiry to the previous Prime Minister with his recommended terms of reference for the Inquiry.
2. The public authority withheld the information held within the scope of the request (the disputed information) relying on the exemptions at section 36(2)(b) FOIA.
3. The Commissioner's decision is that:
 - The public authority was entitled to withhold the disputed information on the basis of the exemptions at section 36(2)(b).
4. No steps required.

Request and response

5. The complainant submitted a request for information to the public authority on 17 June 2020 in the following terms:
6. "On 10 August 2017, the Chairman of the Grenfell Tower Inquiry wrote to the PM with his recommended terms of reference for the inquiry (attached). In this letter he also suggested that "a different kind of process or body" could be established to consider "questions of a social, economic and political nature...which could include persons who have experience of the provision and management of social housing..." and which could operate in parallel with his inquiry. On 15 August 2017, the PM replied that "Government will now consider how best to address the issues of social housing you have raised" and outlined some work that the Housing Minister would do (also attached).

I would be grateful if you could provide:

1. any records of the consideration that the Prime Minister's letter refers to, including for example briefings and meeting notes, relating to the time period between the two letters, and
2. any records of decision making on this issue after the PM's letter which resulted (I believe) in the decision to rely solely on the work of successive Housing Ministers leading to a green paper, "A new deal for social housing" (attached), and not to initiate any other process or body."
7. The public authority provided its response on 14 August 2020. It advised the complainant that it considered the information held within the scope of item 1 of his request exempt from disclosure on the basis of the exemptions at sections 36(2)(b)(i) and (ii) FOIA. The public authority further advised that it did not hold any information within the scope of item 2 of the request.
8. The complainant requested an internal review of this decision on 20 August 2020 disputing the decision to withhold the information held by the public authority within the scope of item 1 of his request.
9. The public authority wrote to the complainant with details of the outcome of the internal review on 8 September 2020. The review upheld the decision to withhold the information held within the scope of item 1 of the complainant's request on the basis of the exemptions at sections 36(2)(b)(i) and (ii) FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 14 September 2020 to complain about the public authority's refusal to disclose the information held within the scope of item 1 of his request.
11. The focus of the Commissioner's investigation therefore was to consider whether the public authority was entitled to rely on the exemptions at section 36(2)(b) FOIA as the basis for withholding the information it holds within the scope of item 1 of the complainant's request above of 17 June 2020 (the disputed information).

Reasons for decision

Background

12. On 15 June 2017 then Prime Minister The RT Hon Theresa May MP announced a public Inquiry chaired by Sir Martin Moore-Bick into the fire at Grenfell Tower on the night of 14 June 2017. The Grenfell Tower Inquiry was formally set up on 15 August 2017 pursuant to the Inquiries Act 2005¹.
13. Phase 1 of the Inquiry focussed on the factual narrative of the events on the night of 14 June 2017. Hearings began for Phase 1 on 21 May 2018 and concluded on 12 December 2018. The Phase 1 report was subsequently published on 30 October 2019. Phase 2 of the Inquiry examines the causes of these events, including how Grenfell Tower came into a condition which allowed the fire to spread in the way identified by Phase 1. Hearings for Phase 2 were scheduled to resume on 19 July 2021².

The Disputed Information

14. The disputed information comprises of; submission to the Prime Minister³ of 11 August 2017 (including the box return version with the Prime Minister's comments) on the Inquiry's Terms of Reference (ToR),

¹ [Inquiries Act 2005](#)

² <https://www.grenfelltowerinquiry.org.uk/about>

³ The RT Hon Theresa May MP served as Prime Minister from 13 July 2016 – 24 July 2019.

supplementary advice to the Prime Minister of 12 August 2017, draft advice to the Prime Minister of 10 August 2017 and, draft press lines including Q and A of 11 and 12 August 2017 on public handling of the announcement of the ToR.

Application of section 36(2)(b) FOIA

15. The relevant provisions in section 36 state⁴:

“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”

The Qualified Person's Opinion

16. The exemptions at section 36(2)(b) can only be engaged on the basis of the reasonable opinion of a Qualified Person.

17. The Qualified Person's opinion (QPO) was sought by officials on 21 July 2020. The opinion was issued on 31 July 2020 by the Minister for the Constitution in her capacity as the Qualified Person by virtue of section 36(5)(a) FOIA⁵.

18. The QPO is summarised below.

19. The submission to the PM (including the box return version with the Prime Minister's comments) and the supplementary advice are exempt on the basis of section 36(2)(b)(i) FOIA. Releasing this information would be likely to prejudice the free and frank provision of advice in future. The information constitutes advice given by officials to the Prime Minister in submissions and deliberations on the policy surrounding the establishment of the Grenfell Tower Inquiry and its ToR. Disclosure of this information would inhibit future advice on the subject of the Inquiry

⁴ The full text of [section 36](#)

⁵ Section 36(5)(a) states that a Qualified Person in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.

because it would cause officials to be more reticent in expressing their views in relation to the Inquiry and related policies which are new, developing and sensitive. This would in turn risk both the substance and implementation of the policy, the quality of advice to Ministers and, may also discourage Ministers from seeking views and advice.

20. The rest of the disputed information namely, the draft advice to the PM and the draft press lines are exempt on the basis of section 36(2)(b)(ii) FOIA. Releasing this information would be likely to inhibit the free and frank exchange of views in the future. The information contains deliberation on public handling of the announcement of the Inquiry's ToR and draft advice to the PM. Disclosure of this information could result in exchanges becoming more reticent or circumscribed on the subject of the Inquiry in particular and public inquiries more widely.
21. The Commissioner notes that it is not absolutely clear from the submission to the Qualified Person whether officials were relying on either the lower ('would be likely') or higher ('would') level of probability of prejudice. However, it is clear from its submission to the Commissioner that the public authority is relying on the lower level of probability of prejudice.
22. In the Commissioner's view, if a public authority is withholding information under a prejudice-based exemption such as section 36(2)(b), it should always make a choice between 'would' or 'would be likely to' prejudice.

The complainant's position

23. The complainant's submission disputing that the public authority was entitled to engage the exemptions at section 36(2)(b) is set out below.
24. The public authority is concerned that disclosure will be likely to inhibit future discussion and advice. However, it is not clear that it has adequately considered that my request is limited to the very particular circumstances of an apparent glaring gap in a Prime Minister's decision making on an issue of the highest public importance. My request was made to the public authority and is limited to decision making between 10 and 15 August 2017. The Grenfell Tower Inquiry, which is an independent body, was not established until 15 August 2017. My request to a separate body, covering a period which largely precedes the establishment of the Inquiry, relates only indirectly to the Inquiry's ongoing work. For this reason, providing the information sought is not likely to create a broad precedent for disclosure, except perhaps in similar circumstances.

Is the Qualified Person's opinion reasonable?

25. In determining whether the exemption is engaged, the Commissioner must consider whether the QPO 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. Whether it concerns an important issue which there needs to be a free and frank exchange of views or provision of advice.
 - The QP's knowledge of, or involvement in, the issue.
26. 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 QPO is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the Qualified Person's position could hold. The QPO does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
27. In *John Connor Press Associates Limited v The Information Commissioner*, the Information Tribunal observed that 'would be likely to prejudice' means that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."⁶
28. There are a number of strongly held views on the scope of the Inquiry. For example, it was [reported by the BBC](#) on 4 August 2017 that Grenfell Tower fire campaigners were calling for a wide-ranging public inquiry to include an examination of local and national social housing policy and whether it increased risks to residents. Sir Martin More-Brick's initial comments that the Inquiry would be limited to examining the cause of the fire, how it spread and how to prevent future incidents is [reported](#)

⁶ EA/2005/0005

to have angered survivors of the Grenfell Tower fire. Recently, it was [reported](#) that there have been calls to amend the ToR of the Inquiry to include consideration of whether racial stereotyping and unconscious prejudice affected the actions of the local authority and firefighters.

29. The disputed information contains free and frank advice and views in relation to the scope of the Inquiry. Phase 2 of the Inquiry is ongoing and there may be further requests for officials to advise Ministers on matters arising out of this phase of the Inquiry.
30. Against this backdrop, the Commissioner considers that it was reasonable for the Qualified Person to opine that there was a real and significant risk that disclosure of the disputed information would inhibit the provision of free and frank advice and the free and frank exchange of views on the Grenfell Tower fire including the ongoing Inquiry. In addition, it was also reasonable for the Qualified Person to opine that there was a real and significant risk that disclosure of the disputed information, or at least the draft advice and press releases, could result in exchanges becoming more reticent or circumscribed on the subject of the Inquiry in particular and public inquiries more widely.
31. The public authority disagrees with the complainant's view that the request which was submitted to the public authority is limited to decision making between 10 and 15 August 2017 preceding the establishment of the Inquiry and relates only indirectly to the Inquiry's ongoing work.
32. The public authority considers that the Inquiry was established on 15 August 2017 and relates directly to decisions taken by the PM as the Inquiry's sponsoring Minister. The request directly concerns the establishment of the Inquiry.
33. The Commissioner considers that the disputed information contains views in relation to the scope of the Inquiry and therefore relates to the ongoing work of the Inquiry. She shares the view that the Inquiry was established on 15 August 2017⁷. The question in any event is whether it was reasonable for the Qualified Person to hold the opinion that that releasing the disputed information would be likely to prejudice the interests in the exemptions at section 36(2)(b); the Commissioner is satisfied that it was.

⁷ According to the [Grenfell Tower Inquiry website](#), "For the purposes of section 5 of the Inquiries Act 2005, the Inquiry was formally set up on 15 August 2017."

34. On the question of whether there is a "glaring gap" on the then PM's decision making "on an issue of the highest public importance", the public authority disagrees that there is. It noted that the PM presented the ToR to Parliament on 14 September 2017. In addition, it explained that Parliament has had and continues to have an opportunity to question the current PM on the ToR and the question as to whether those ToR are appropriate to deal with the issue the Inquiry is devised to investigate. Work of the Inquiry has also taken place within the public domain, supporting public assessment of its remit.
35. The Commissioner therefore finds that the public authority was entitled to engage the exemptions at section 36(2)(b) FOIA.

Public interest test

36. The exemptions at section 36(2)(b) are subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the disputed information.

The complainant's position

37. The complainant's submissions in support of the public interest in disclosing the disputed information are summarised below.
38. There is an inherent public interest in the workings and outcomes of statutory publicly funded public inquiries because of the public concern about the issues they examine and the importance of their outputs.
39. There is a compelling public interest in disclosure in view of the issue of discrimination having become particularly salient with the onset of Phase 2 of the Inquiry.
40. The then Prime Minister Theresa May MP made clear her commitment to the outcomes of the Inquiry saying in a written statement to Parliament on the appointment of the chair: "...it is also important that all the wider lessons...are identified and learnt...We must get to the truth about what happened."⁸
41. In his letter to the Prime Minister proposing the Inquiry's ToR, Sir Martin Moore-Brick clearly set out two areas that arose from the public

⁸ <https://questions-statements.parliament.uk/written-statements/detail/2017-06-29/HCWS18>

consultation which he suggests could be the subject of a parallel investigative process or body: (i) social housing, and (ii) "all aspects of the relationship between the residents of the Lancaster West estate on the one hand and the local authority and the tenant management organisation on the other."

42. In the same letter, Sir Martin provided a summary of the responses received during the public consultation on the terms of reference. This summary provided more detail about his suggestion. He noted that out of the 554 written responses received, "Over 30% of respondents said the Inquiry should cover how the Council and the Tenant Management Organisation dealt with complaints, concerns and suggestions of residents, including questions of discrimination", and "...approximately 10% said that it should cover wider social policy, including racial and ethnic discrimination in the provision of services." These percentages represent over 166 and approximately 55 responses respectively, showing a significant interest amongst the respondents in discrimination and its role in the lead up to the fire. Further allegations of discrimination have come to light in the accounts provided by victims and survivors to the Inquiry.
43. Despite the Chair's clear suggestion in his letter that these issues be investigated, the Prime Minister's response only addressed the first part of the Chair's suggestion in relation to social housing.
44. Disclosure may encourage Ministers and officials to avoid future requests by ensuring that decision making on the ToR of public inquiries is clear and comprehensive.
45. The complainant added that he would be content for the public authority to disclose the "documents sought with redactions on information that is unrelated to: (i) the Chair's suggestion for a separate process or body set up to examine "social housing and all aspects of the relationship between the residents of the Lancaster West estate on the one hand and the local authority and the tenant management organisation on the other", and (ii) any references to discrimination based on racial, ethnic, poverty, class or other, however expressed."

Public authority's submissions

46. The public authority's submissions on the assessment of the balance of the public interest are summarised below.
47. In favour of disclosing the disputed information, the public authority acknowledged there is a general public interest in disclosure of public information and that openness in government may increase public trust in and engagement with the Government. It noted that there was a

specific public interest in the workings of the Inquiry and the establishment of its ToR, particularly in view of recent calls for the amendment of those ToR.

48. In favour of maintaining the exemptions. There is a strong public interest in Ministers receiving free and frank advice from departmental colleagues. There is a public interest in the PM having the ability to receive free and frank advice to enable him to meet his statutory obligations as the Minister responsible for the Inquiry. There is a public interest in officials being able to exchange views in a free and frank way for the purposes of deliberation.
49. Given that the Inquiry is ongoing and the matters it is endeavouring to deal with are still very much live and of a highly sensitive nature, there is a strong public interest in preventing the chilling effects set out in the QPO. The Inquiries Act 2005 sets out the Ministerial role in making decisions in respect of inquiries and that such decisions must be supported by advice and deliberation which is both unrestrained and of high quality. It is therefore of great importance that the advice provided to Ministers on this is not prematurely disclosed to the public. The chilling effects of disclosing the advice provided could result in terms of reference of inquiries not being thoroughly considered at a juncture when full and thorough consideration is critical. The ensuing inquiry could therefore be impaired from the start and fail to properly deal with the issue that it was intended to examine. Such an outcome, in relation to any future inquiry, would patently not be in the public interest.
50. On the public interest in disclosure in light of the recent calls for the ToR of the Inquiry to be amended. A Minister does have the power to amend the terms of reference of an inquiry under section 5(3) of the Inquiries Act 2005. This emphasises that the matters under consideration by the Inquiry are still live and lends weight to the contention that the disclosure of the disputed information would have a chilling effect on the provision of advice and the exchange of views for the purposes of deliberation.
51. Although it considered the public interest factors referred to by the complainant to be substantial, the public authority concluded that they did not outweigh the strong public interest in maintaining the exemptions.

Commissioner's considerations - balance of the public interest

52. The Commissioner's consideration of the balance of the public interest is set out below.

53. If the Commissioner finds that the QPO was reasonable, she will consider the weight of that opinion in 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 (as she has in this case), occur. However, she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure. The Commissioner considers that she must give weight to the QPO as an important piece of evidence in her assessment of the balance of the public interest.
54. The Commissioner shares the view that there is a public interest in workings and outcomes of public inquiries. However, in this case in particular, relevant information can be found on the Inquiry's website. The disputed information only covers a part of this in relation to establishing the ToR. The Inquiry's website is much more informative in that regard.
55. The Commissioner considers that there is a public interest in disclosing the disputed information in view of the calls by survivors and campaigners including more recently for the Inquiry to address whether discrimination might have played a part in events leading up to the fire and its aftermath. Sir Martin's letter to the PM of 10 August 2017 does not directly call for the scope of the Inquiry to specifically include the question of discrimination. However, Sir Martin does say that those affected by the Grenfell tragedy wanted the scope of the Inquiry to be very broad and should include an examination of social housing policy and all aspects of the relationship between the residents of the Lancaster West estate on the one hand and the local authority and the tenant management organisation on the other.
56. The Commissioner considers that the disputed information would provide valuable insight on the Government's consideration of Sir Martin's comments that the broader questions emanating from his consultations regarding the scope of the Inquiry could be examined by a parallel Inquiry which would be welcomed by many. The public interest in disclosing the disputed information for this reason should not be underestimated.
57. The Commissioner has attached very little weight to the view that there is a public interest in disclosure because it may encourage Ministers and officials to avoid future requests by ensuring that decision making on the ToR of public inquiries is clear and comprehensive. In relation to the Inquiry, the Government was clear that it agreed with the ToR recommended by the Chairman of the Inquiry. Whilst there are opinions on the comprehensiveness of the ToR, the Government accepted the recommended ToR without amendment for reasons set out in the PM's

letter of 15 August 2017 to the Chairman of the Inquiry. The unintended implication of the complainant's submission is that should the disputed information be released, Ministers are only likely to consider the need to avoid requests for information and not give appropriate weight to all of the relevant factors before establishing the ToR of public inquiries.

58. Although the public authority did not directly address the complainant's comments in relation to releasing a redacted version of the disputed information, the Commissioner does not consider that the comments weaken the public interest arguments in favour of withholding the disputed information which she turns to next.
59. The implication of the QPO is that the prejudicial effects of disclosing the disputed information would not be trivial, minor or occasional as to render them insignificant⁹. In the Commissioner's judgement, disclosing the disputed information is highly likely to lead to a significant chilling effect on the provision of free and frank advice and the free and frank exchange of views in relation to the Inquiry in particular, and on the subject of the Grenfell Tower fire more widely. It should of course be acknowledged that civil servants are not expected to be easily deterred from expressing their professionally held views by the possibility of future disclosure.
60. However, the Commissioner has attached more weight to the fact that the Grenfell Tower fire remains a highly sensitive subject on which there are strongly held views including on the scope of the Inquiry. In particular, whether a parallel Inquiry should be taking place to examine relevant wider social, economic and political issues which may have contributed to the fire and the perceived actions or lack of, of the local authority and firefighters in the aftermath. Against this backdrop, disclosing the disputed information which it must be emphasised, contains free and frank opinions, is highly likely to result in officials and Ministers becoming more guarded when offering their views on the Grenfell Tower fire or in relation to the ongoing Inquiry. This is likely to not only affect the ability of Ministers to make fully informed decisions but also of the ongoing Inquiry to carry out its work effectively and make recommendations to the Government of the highest quality. There is a significant public interest in preventing this outcome.
61. The Commissioner equally shares the view that there is a strong public interest in not prematurely releasing the disputed information on the

⁹ Guided by the Tribunal's comments in [Guardian Newspapers Ltd and Heather Brooke v IC EA/2006/0011; EA/2006/0013](#) – Paragraph 92

grounds that this is likely to also have a chilling effect on discussions in relation to future public inquiries of a similar nature.

62. In terms of the public interest in addressing concerns regarding the scope of the Inquiry, the Commissioner has attached some weight to the public authority's comments that Parliament has had and continues to have an opportunity to question the PM on the ToR and the question as to whether those ToR are appropriate to deal with the issue the Inquiry is devised to investigate. In addition, the work of the Inquiry is taking place in the public domain so that those with an interest in the Inquiry are able to assess whether specific concerns are not being addressed within the scope of the Inquiry and make appropriate representations to the Government.
63. For the above reasons, the Commissioner finds that on balance, the public interest in maintaining the exemptions outweighs the public interest in disclosing the disputed information.

Other Matters

64. The Commissioner is mindful of the impact of the Covid-19 pandemic restrictions on public authorities and notes that this is likely to have contributed to the public authority's response to the complainant's request being issued later than 20 working days in breach of section 10(1) FOIA.
65. Having said that, it has not escaped the Commissioner's notice that the response was issued on 14 August 2020 two weeks after the QPO was issued on 31 July 2020. The opinion itself was sought by officials on 21 July 2020.

Right of appeal

66. 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

67. 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.
68. 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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