

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2012

Public Authority: Arts & Humanities Research Council

Address: Polaris House
North Star Avenue
Swindon
SN2 1FL

Decision (including any steps ordered)

1. The complainant requested information relating to a Delivery Plan and funding settlement agreed between the Arts and Humanities Research Council (the AHRC) and the Department for Business Innovation & Skills (BIS).
2. The Commissioner's decision is that the exemptions at sections 36(2)(b) and 36(2)(c) of the Freedom of Information Act 2000 (the Act) were correctly engaged but in all the circumstances of the case, the public interest in maintaining the exemptions did not outweigh the public interest in disclosure in respect of most of the withheld information.
3. The Commissioner requires the AHRC to take the following steps to ensure compliance with the legislation.
 - Disclose all of the withheld information excluding the information specifically marked as withheld in the confidential annex to be disclosed only to the AHRC.
4. The AHRC 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 3 April 2011 the complainant wrote to the AHRC to request information under the terms of the Act. The request was worded as follows:

'(1) Any records you hold on the inclusion of the concept of "Big Society" in the AHRC's Delivery Plan 2011-2015. This includes but is not limited to internal and external correspondence as well as records of meetings.'

(2) Any records you hold on the recent funding settlement with BIS and its negotiation. This includes but is not limited to internal and external correspondence as well as records of meetings.'

6. The AHRC responded on 18 April 2011. Information within the scope of Part 1 of the request (the disputed information 1) above was withheld on the basis of the exemptions at sections 36(2)(b) (i) and (ii) of the Act. Information within the scope of Part 2 above (the disputed information 2) was, in addition to section 36(2)(b), withheld on the basis of the exemption at section 36(2)(c) of the Act.
7. Following an internal review, the AHRC wrote to the complainant on 10 May 2011. The decision to withhold the information within the scope of both parts of the request was upheld.

Scope of the case

8. On 10 May 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to rule on the AHRC's decision to withhold the information requested.

Reasons for decision

Part 1 of the request

9. The relevant request is reproduced below for ease of reference:

'Any records you hold on the inclusion of the concept of "Big Society" in the AHRC's Delivery Plan 2011-2015. This includes but is not limited to internal and external correspondence as well as records of meetings.'

10. A list of the documents which constitute the disputed information relevant to the above request can be found in the confidential annex to be disclosed to the AHRC only.
11. As mentioned, the AHRC claimed that disputed information 1 was exempt from disclosure on the basis of the section 36(2)(b) (i) and (ii).
12. Information is exempt from disclosure on the basis of the exemptions at sections 36(2)(b) (i) and (ii) if in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free

and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

Qualified Person

13. The AHRC informed the Commissioner that its Chief Executive, Professor Rick Rylance was the designated qualified person at the time of the request. Section 36(5)(o)(iii) states that any officer or employee of a public authority may be designated a qualified person by a Minister of the Crown. The Commissioner is satisfied that Professor Rick Rylance was the designated qualified person at the time of the request.¹

The Qualified Person's Opinion

14. The opinion was that disclosing disputed information 1 which consists of 12 draft versions of the AHRC's Delivery Plan 2011 – 2015 (the Delivery Plan) '*would or would be likely to*' inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

Was the Qualified Person's Opinion reasonable?

15. The Commissioner understands that the Delivery Plan relates to the AHRC's strategic plans for the relevant period (2011 – 2015) as part of negotiations regarding its funding settlement from BIS following the Department's (i.e. BIS) spending review.
16. In view of the fact the Delivery Plan was a central part of the negotiations between the AHRC and BIS, the Commissioner accepts it was not unreasonable for the qualified person to reach a view that disclosure would be likely to inhibit free and frank exchanges or the free and frank provision of advice by officials in relation to future negotiations regarding its funding. It is certainly not far fetched to expect that officials would be less likely to be as candid as they were in previous discussions about funding should the earlier drafts of the Delivery Plan be disclosed.

¹ The Secretary of State (i.e. Minister of the Crown) has designated persons in charge of non-ministerial government departments as qualified persons for the purposes of section 36 of the Act. The AHRC is a non – ministerial government department. A list of qualified persons for public authorities can be found at;
<http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/index.htm>

17. The Commissioner therefore finds that it was a reasonable opinion that disclosing disputed information 1 would have been likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
18. The Commissioner therefore finds that the exemptions at section 36(2)(b) (i) and (ii) were correctly engaged in respect of the earlier drafts of the Delivery Plan (i.e. disputed information 1).
19. The Commissioner however finds that there is insufficient evidence to justify the opinion that disclosure 'would inhibit' the interests at sections 36(2)(b) (i) or (ii). In the Commissioner's opinion, 'would inhibit' places a much stronger evidential burden on a public authority and must be at least more probable than not. In view of the nature of the disputed information in question and the context in which it was produced, the Commissioner is not satisfied that the qualified person could reach a reasonable opinion that the likelihood of its disclosure inhibiting free and frank exchanges or the provision of advice was more probable than not. He therefore finds that the opinion was unreasonable in substance in so far as it was that disclosure 'would inhibit' the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

Public Interest Test

20. Section 36(2)(b) is a qualified exemption. The Commissioner must therefore also decide whether in all the circumstances of the case, the public interest in maintaining the exemptions outweighed the public interest in disclosing disputed information 1.
21. The AHRC recognised the public interest in transparency and accountability with regard to the expenditure of public funds on arts and humanities research.
23. The AHRC also considered whether disclosure would enhance the quality of internal discussions and decision making. It also considered whether there would be any beneficial impact on individuals or the wider public in disclosure.
23. The AHRC was however of the view that the public interest was weighted in favour of maintaining the exemption because disclosure 'would' prevent free and frank discussions between the Chief Executive Officer, members of the Senior Management Team, AHRC's Council members and Chairman when formulating potentially sensitive strategic plans with regard to the delivery of its strategic aims.
24. The Commissioner has already rejected the opinion that disclosure 'would inhibit' the free and frank provision of advice or exchange of views.

25. The Commissioner agrees that there is a significant public interest in transparency and accountability regarding the expenditure of public funds on arts and humanities related research. In his opinion, disclosure would enhance the accountability of the AHRC with regards to how the substantial amount of funding it receives from the government is spent. The Commissioner understands that it received £112million in the current financial year (2010-11) to specifically fund research.²
26. The Commissioner also considers that disclosure would enhance the quality of future public debate and this could inform future decision making in relation to the AHRC's funding and strategic objectives.
27. The Commissioner does not consider that the severity of the chilling effect on AHRC's officials in future discussions regarding its strategic objectives and funding would be significant or material enough to inhibit robust and constructive contributions to those discussions. Given that the discussions are important to the future direction of the AHRC, it is unlikely in the Commissioner's opinion that senior officials would be deterred from making constructive contributions to future debates. Whilst it is possible that they may be less candid; in his view, the quality of their contributions is unlikely to be significantly or materially affected as a result.
28. The Commissioner also considers significant the fact that the request was made approximately 4 months after the funding settlement was announced and the Delivery Plan published. There is therefore a weaker public interest in maintaining the exemptions in view of the fact that negotiations had been completed. In other words, the prejudicial effects of disclosure to the final agreement in that regard would have been substantially less in comparison to disclosure during ongoing negotiations.
29. The Commissioner therefore considers that in all the circumstances of the case, the balance of the public interest was in favour of disclosing most of the relevant disputed information.
30. The Commissioner however agrees that in relation to a small part of disputed information 1 the severity of the chilling effect is likely to be significant in the event of disclosure. In his view, there is a strong public interest in protecting this information from disclosure given the chilling effect it could have on future discussions. The relevant information specifically consists of contributions regarding some of the

² <http://www.ahrc.ac.uk/About/Pages/default.aspx>

options the AHRC could explore to maintain an advantageous position in relation to its future funding. It is highly likely that disclosure could significantly affect the quality of future contributions to funding negotiations.

31. The limited information he considers should not be disclosed because he agrees it could have a strong chilling effect on future discussions can be found in the confidential annex.

Part 2 of the request

32. The relevant request is reproduced below for ease of reference:

'Any records you hold on the recent funding settlement with BIS and its negotiation. This includes but is not limited to internal and external correspondence as well as records of meetings.'

33. A list of the documents containing the disputed information (i.e. disputed information 2) relevant to the above request can be found in the confidential annex. Disputed information 2 broadly consists of internal exchanges and exchanges with BIS in connection with the funding settlement and the Delivery Plan.
34. The AHRC claimed that disputed information 2 was exempt from disclosure on the basis of the exemptions at sections 36(2)(b) and 36(2)(c).

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

35. The Commissioner has already found that the opinion of the qualified person was reasonably arrived at, and reasonable in substance, only to the extent the opinion was that disclosure 'would be likely to' inhibit the free and frank provision of advice and the exchange of views for the purposes of deliberation.

Public Interest Test

36. For the same reasons above in relation to Part 1 of the request, the Commissioner finds that in all the circumstances of the case, the public interest in maintaining the exemption did not outweigh the public interest in disclosure in relation to most of disputed information 2.
37. The limited information he considers should not be disclosed because he agrees that the severity of the chilling effect could have a significant effect on future discussions regarding the AHRC's funding can be found in the confidential annex. This information specifically consists of different financial modelling scenarios or options to accommodate the proposed cuts to the AHRC's funding. The views expressed are quite candid as to the actions which may be necessary to achieve the

savings required of the AHRC from 2011 – 2015. It is highly likely that disclosure could significantly affect the quality of future contributions to funding negotiations.

Section 36(2)(c)

38. The Commissioner next considered whether the disputed information within the scope of part 2 (i.e. disputed information 2) of the request which he found not exempt from disclosure on the basis of section 36(2)(b) was exempt on the basis of section 36(2)(c).
39. Information is exempt from disclosure on the basis of section 36(2)(c) if in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

The Qualified Person's Opinion

40. The opinion was that disclosing disputed information 2 would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs. Specifically that disclosure 'may lead to uncertainty within the research community and the wider public about the use of public funds.'

Was the Qualified Person's Opinion reasonable?

41. The Commissioner agrees that the disclosing the remaining part of disputed information 2 which he found was not exempt on the basis of section 36(2)(b) could have contributed to uncertainty within the AHRC regarding its future funding by the government. Set against the background of cuts to public spending, it was reasonable to conclude that disclosing the nature of the internal exchanges and negotiations with the BIS regarding future funding could have increased the uncertainty already being felt within the research community. The Commissioner agrees therefore that qualified person's opinion, that disclosure would have been likely to prejudice the AHRC's ability to continue to carry out its core activities effectively, was reasonable.
42. The Commissioner disagrees that disclosure 'would' have prejudiced the AHRC's ability to effective conduct its activities. As mentioned, in the Commissioner's opinion, 'would prejudice' places a much stronger evidential burden on a public authority and the Commissioner does not consider that evidential burden has been adequately discharged in this case. He therefore finds that the opinion was unreasonable in substance in so far as it was that disclosure 'would prejudice' the effective conduct of public affairs.

Public Interest Test

43. Section 36(2)(c) is a qualified exemption. The Commissioner must therefore also decide whether in all the circumstances of the case, the public interest in maintaining the exemptions outweighed the public interest in disclosing the part of disputed information 2 he considers exempt from disclosure on the basis of section 36(2)(c).
44. The AHRC recognised the public interest in disclosure for the same reasons it did in relation to the information exempt under section 36(b).
45. It however submitted that uncertainty about funding would not be in the public interest and the balance was therefore in favour of maintaining the exemption.
46. The Commissioner has already mentioned the significant public interest in transparency and accountability regarding the expenditure of public funds on arts and humanities related research. The Commissioner also noted that disclosure would enhance the quality of future discussions and decision making in relation to the AHRC's funding and strategic objectives. These public interest factors in disclosure are also relevant here.
47. In addition, there is a significant public interest in knowing the options and criteria considered before the final decisions were taken regarding future funding. Disclosure would enhance the quality of discussions regarding decisions to withdraw, reduce, and maintain funding for different research activities. It could also facilitate and enhance discussions on the AHRC's strategic objectives especially in relation to how they fit in with the government's community objectives.
48. Given that the request was made 4 months after the funding settlement had been agreed, the Commissioner considers that the impact of the uncertainty about future funding would not have been significant enough to outweigh the strong public interest in disclosure.
49. The Commissioner therefore finds that in all the circumstances of the case the public interest in maintaining the exemption at section 36(2)(c) did not outweigh the public interest in disclosure.

Right of appeal

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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

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

Steve Wood
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