

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 July 2016

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) for information concerning the interview given by the Chief of the Defence Staff, Sir Nicholas Houghton, to the BBC's Andrew Marr Show in November 2015. The MOD provided the complainant with some information but withheld the remainder on the basis of sections 36(2)(b) and (c) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of these exemptions.

Request and response

2. The complainant submitted the following requests to the MOD on 11 November 2015:

'Please note that I am only interested in information which relates to the period 15 October 2015 to the present day.

Please note that the reference to Sir Nicholas Houghton [the Chief of the Defence Staff] should ALSO include his private office and or anyone acting on his behalf.

1...During the aforementioned period did Sir Nicholas Houghton exchange correspondence and communications including emails with any representative and employee of the BBC which in any way related to his appearance and or interview on The Andrew Marr Show on Sunday 8 November. Some of this correspondence and communication will have predated the interview. Some of it will have occurred afterwards. The correspondence and communications will include but

will not be limited to the topics to be covered in any interview. It will also include but not be limited to the actual questioning and the reaction to the interview. If the answer is yes can you please provide copies of this correspondence and communication including emails.

2...During the aforementioned period did any member of the MOD's press and public relations team exchange correspondence and communications including emails with and BBC employee/representative about Sir Nicholas's appearance on The Andrew Marr Show on Sunday 8 November. Some of this correspondence and communications will have predated the interview. Some of it will have occurred afterwards. The correspondence and communications will have included but will not have been limited to the topics covered in any interview. It will also include but not be limited to the actual line of questioning and the reaction to the interview. If the answer is yes can you please provide copies of this correspondence and communication including emails.

3...Can you please provide copies of all documentation held by the department's press team including emails which in any way relates to Sir Nicholas's appearance on the show and or his interview with Andrew Marr and or the reaction to his comments. This documentation will include but will not be limited to communications with Sir Nicholas's office; communications with other sections of the MOD, reactions to the interview and briefing notes for individual press officers. Please note that I am only interested in information generated since 15 October 2015 to the present day.'

3. The MOD contacted the complainant on 10 December 2015 and confirmed that it held information falling within the scope of his requests but it considered this to be exempt from disclosure on the basis of section 36 of the FOIA and it needed further time to consider the balance of the public interest test.
4. The MOD provided him with a substantive response to his requests on 15 December 2015. The MOD explained that no information was held in relation to the first and second parts of the request although information falling within the third part was. However, this information was considered to be exempt from disclosure on the basis of section 36 of FOIA.
5. The complainant contacted the MOD on 5 January 2016 in order to challenge this decision.
6. The MOD informed him of the outcome of the review on 17 February 2016. The review concluded that section 36(2)(b) had been correctly used to withhold the briefing material for the Chief of the Defence Staff

(CDS) itself and to all advice and free and frank exchanges of views that arose in preparing it. The review also concluded that section 36(2)(c) had been correctly applied to withhold secondary internal communications arising from CDS's interview, such as official clearance or agreement of the briefing material itself and the limited amount of post-interview analysis. The MOD also explained that the names of junior officials were exempt from disclosure on the basis of section 40(2) of FOIA. However, the MOD explained that two items of information were not covered by the section 36 exemption, namely a transcript of the interview, to which a link was provided, and a weekend media update, a copy of which was provided.

Scope of the case

7. The complainant contacted the Commissioner on 25 February 2016 to complain about the MOD's decision to withhold information falling within the scope of his request.

Reasons for decision

Section 36 – effective conduct of public affairs

8. Sections 36(2)(b)(i) and (ii) and section 36(2)(c) 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

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

9. In this case the Secretary of State for Defence provided the opinion in relation to the application of sections 36(2)(b) and (c). The Commissioner is satisfied that the Secretary of State is a qualified person for the purposes of section 36.
10. In determining whether these exemptions are engaged the Commissioner must consider whether the qualified person's opinion was

a reasonable one. In doing so the Commissioner has taken into account 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.
11. 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.
12. The qualified person argued that in relation to sections 36(2)(b)(i) and (ii) disclosure of the briefing material could inhibit the free and frank exchange of views for the purposes of deliberation when officials were preparing briefing material for senior officials' TV appearances in the future. In relation to section 36(2)(c), it was argued that disclosure would interfere with the free space of any briefing material that officials needed to conduct a meaningful clearance process and any post-interview analysis.
13. The Commissioner accepts that the qualified person's opinion is a reasonable one. In relation to the application of section 36(2)(b), the withheld information includes a comprehensive briefing of the nature of questioning CDS could face and the Commissioner accepts that it is reasonable to argue that disclosure of the material could potentially lead to a chilling effect on officials' contributions to similar briefing material in the future. In relation to the application of section 36(2)(c), the material withheld under this exemption clearly represents a free and frank discussion of CDS' interview and again the Commissioner accepts it is reasonable to argue that disclosure of this information could have a chilling effect on similar discussions in the future.

Public interest test

14. 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

15. In his submissions to the Commissioner the complainant emphasised that CDS' comments during the interview in question about Jeremy Corbyn's support for unilateral nuclear disarmament sparked a great deal of public concern. He noted that the Labour party and several commentators, including some military figures, thought Sir Nicholas had exploited his position and allowed himself to become involved in a party political debate. The complainant also drew the Commissioner's attention to several press reports about the fall out of the interview.¹ The complainant argued that CDS' interview, rightly or wrongly, gave the impression that a senior member of the military had deliberately set out to embarrass the democratically elected leader of Her Majesty's Opposition. He argued that disclosure of the withheld information would allow the public to make an informed decision about what exactly happened.
16. The MOD acknowledged that disclosure of the briefing material would give assurance that officials had provided impartial, professional advice and there had been no inappropriate influence exerted by politicians or officials on CDS either to restrict or exceed the limits of personal expression that CDS might reasonably be expected to exercise when talking to the media in his official capacity. In relation to the material withheld under section 36(2)(c), the MOD acknowledged that release of this information would demonstrate FOIA's principle of openness and reveal how briefing material is cleared and the extent of any post-interview analysis.

Public interest arguments in favour of maintaining the exemption

17. However, the MOD argued that it was firmly of the view that the public interest favoured maintaining the exemptions. In relation to section 36(2)(b), the MOD suggested that disclosure of the information would

¹ <http://www.theguardian.com/politics/2015/nov/08/rmed-forces-chief-jeremy-corbyn-defence-trident>
<http://www.bbc.co.uk/news/uk-34759626>
<http://www.mirror.co.uk/news/uk-news/jeremy-corbyn-issues-furious-slapdown-6792567>

result in any apparent inconsistency between what was said by CDS and the written briefing material being misconstrued as demonstrating inconsistency between the views of CDS and government when no such difference existed. The MOD explained that clearly not all topics suggested in a brief will have been covered in the interview as such occasions are time-limited. If the information was released, the MOD argued that officials would become cautious about freely and frankly exchanging views and advice in email communications during the process of preparing future briefing material to the detriment of the quality of the briefing material itself.

18. In relation to section 36(2)(c), the MOD also emphasised that disclosure of the information withheld under this exemption would infringe upon the private space that officials needed to frankly undertake a meaningful clearance process of such briefing material and also the space needed to effectively discuss any post-interview analysis.

Balance of the public interest test

19. 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.
20. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when giving advice. They should not easily be deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
21. With regard to the safe space arguments, the Commissioner recognises that public authorities may need a safe space in which to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This need for a safe space will be strongest when the issue is still live. Once the public authority has made a decision, a safe

space for deliberation will no longer be required. If it was a major decision, there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly side-tracked.

22. With regard to the balance of the public interest under section 36(2)(b), in the circumstances of this case, at the point the complainant submitted his request, the interview in question had clearly already taken place. Therefore, the Commissioner does not accept that a safe space was needed in order to prepare the briefing in respect of that particular media appearance by CDS. However, the Commissioner accepts that disclosure of the briefing, even after the interview had taken place, could result in a chilling effect on the composition of, and discussion about, such briefings in the future. The Commissioner accepts that for such media briefings to be effective departmental officials need to be able to freely and frankly draft and discuss such briefings. Furthermore, the Commissioner also accepts that there is some logic to the MOD's line of argument that disclosure of the briefing material may result in undue, and incorrect, inference being drawn as to potential divergence between the interviewee's position and the government position. In terms of the public interest in disclosure of the briefing material, the Commissioner acknowledges the controversy that this interview created. Disclosure of the briefing material would shed some light on the matters covered by the briefing, albeit the extent to which such a disclosure would serve the specific interests identified by the complainant is, in the Commissioner's view, quite limited. Ultimately, therefore the Commissioner believes that on balance the public interest favours maintaining the exemptions contained at section 36(2)(b).
23. With regard to the balance of the public interest under section 36(2)(c) the Commissioner notes that the complainant submitted his request only three days after the interview had taken place. Given this timing, the Commissioner believes that disclosure of the emails which discuss the analysis and fall out from the interview itself could well have infringed the safe space that the MOD still needed to discuss such matters. The interview clearly attracted a notable level of media interest and in the Commissioner's view disclosure of the information withheld under section 36(2)(c) so soon after the interview itself would have clearly resulted in the MOD facing external interference and distraction. Furthermore, the Commissioner also accepts that disclosure of the material withheld under this exemption would be likely to result in a chilling effect on future post-interview discussions given the frank comments and indeed the controversy surrounding CDS' comments. That said, the Commissioner accepts that disclosure of this information would provide an insight into how the reaction to the interview was handled within the MOD and given the circumstances of the case, such a factor should not be underestimated. Nevertheless, and by a narrower

margin that in relation to the application of section 36(2)(b), the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 36(2)(c).

24. As the names of the junior officials are contained in the documents which the Commissioner has already determined are exempt from disclosure on the basis of section 36, he has not gone to consider whether section 40(2) also provides a basis to withhold this information.

Right of appeal

25. 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

26. 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.
27. 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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