

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 February 2018

**Public Authority:** Ministry for Housing, Communities, and Local Government

**Address:** Fry Building  
2 Marsham Street  
London  
SW1P 4DF

### Decision (including any steps ordered)

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1. The complainant has asked the Ministry for Housing, Communities and Local Government ("MHCLG") for copies of communications between Sajid Javid and Brian Martin concerning Grenfell Tower and fire safety standards for building materials. Having initially refused the complainant's request in reliance on section 35 of the FOIA, the MHCLG altered its position to one where it relies on sections 36(2) and 40(2).
2. The Commissioner's decision is that the MHCLG has correctly applied section 36(2) to the information the complainant has asked for. She has not gone on to consider the Department's additional application of section 40(2).
3. No further action is required in this matter.

### Request and response

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4. The complainant wrote to the MHCLG on 23 February 2018 to request the following information:  
  
"Please provide a copy of all communications between Brian Martin and Sajid Javid concerning:  
  
a. Grenfell  
b. Fire safety standards for building materials

From 13.06.17 to 23.02.18".

5. The MHCLG responded to the complainant's request on 23 March 2018, advising him that the Department holds information within the scope of the request. The MHCLG informed the complainant that the information is exempt from disclosure by virtue of section 35(1)(a) of the FOIA, as it relates to the formulation and development of government policy.
6. A link to the Department's website was provided to the complainant where information about building safety<sup>1</sup> and the Building Safety Programme<sup>2</sup> is frequently published. The MHCLG advised the complainant that it would continue to provide updates in appropriate levels of detail.
7. On 23 March 2018, the complainant asked the MHCLG to conduct an internal review. The complainant made the following points:

"Firstly, you have applied section 35 in a blanket manner, not permitted under the FOIA. While at least some of the communications may include direct policy formation, it seems highly likely that other matters were also discussed.

For example, it seems highly likely that these documents will also include operational discussions, advice on implementing existing policy, and press advice etc, not information on policy formation and therefore not exempt under section 35, and which must therefore be provided.

As such, please reconsider the information held within scope that can be released.

Secondly, you have not fully considered the public interest in releasing this information. As one of the main advisers to the government on fire safety, it is vital that Brian Martin's advice be publicised so his actions after the Grenfell disaster can be fully publicly accessible and held to account.

This release would also demonstrate the openness requested by those who lost loved ones at Grenfell, and help to engage them in the process of inquiry and to allow them to have confidence in the process, currently lacking. This clearly seems to overrule any concern for preserving a policy safe space, especially for older communications where this safe space argument is considerably weaker."

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<sup>1</sup> <http://www.gov.uk/government/collections/grenfell-tower>

<sup>2</sup> <http://www.gov.uk/guidance/building-safety-programme>

8. On 31 July 2018, the MHCLG wrote to the complainant to advise him of its internal review decision. The MHCLG upheld its decision to apply section 35 and it advised the complainant that sections 36(2)(b)(1) and 36(2)(b)(ii) applied to information which relates to operational discussions, communications involving press advice or Ministerial briefing for parliamentary questions. Additionally, the MHCLG apologised to the complainant for the "blanket approach" taken in respect of its application of section 35.
9. The Department said, "[disclosure of that information] would be likely to inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation. The Department informed the complainant that the withheld information pertains to advice and discussion on the handling of questions from the media or in preparation for parliamentary business.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 18 July 2018 2018 to complain about the way his request for information had been handled.
11. The complainant informed the Commissioner that he challenges the MHCLG's decision not to release the information he has asked for. He argues that, "while some information may be subject to section 36 that is not subject to section 35, it seems likely that there could be considerable information covered by neither exemption", and he says that he would like the Department to release the remainder in full.
12. The complainant asserts that, "openness about the government's response to Grenfell is of the highest public interest. As has been widely reported in the media, the families of victims that have lost loved ones have been very dissatisfied by the progress of the investigation into its causes, and it seems clear a release of this information would demonstrate the department's commitment to openness, as well as allowing itself to be held fully to account. This public interest seems to strongly outweigh any generic concerns about free and frank advice and policy development in this case".
13. The Commissioner advised the complainant that her investigation would be focussed on whether the MHCLG is entitled to withhold information he has requested in reliance on section 35(1)(a) and sections 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA.
14. Following its receipt of the Commissioner's enquiry, the MHCLG withdrew its application of section 35 and advised the Commissioner that it had informed the complainant of this change. The Department informed the complainant and the Commissioner that its position had

changed because the overwhelming and vast majority of the information is exempt by way of section 36 and the remainder by way of section 40 – personal data.

15. In view of the MHCLG's change in position the Commissioner has gone on to consider its reliance on section 36(2).

## Reasons for decision

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

16. The MHCLG has provided the Commissioner with copies of the information it is withholding from the complainant. The Department has confirmed to the Commissioner that it relies on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to withhold the whole of the information within the scope of the complainant's request.
17. The MHCLG identified two types of documents which it is withholding: Type 1, where section 36 was applied at its internal review stage and Type 2, where section 35 had initially been applied and upheld at internal review, but following the Commissioner's enquiry the Department considers section 36 applies.
18. Section 36(2) states –  
  
*"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, or*  
  
*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*
19. The exemption provided by section 36 can be engaged if, in the reasonable opinion of a qualified person, disclosure would or would be likely to result in any of the effects set out above. In this case 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
20. The application of section 36 requires the public authority's "qualified person" to consider the withheld information and the exemption which applies to it. This consideration cannot be delegated to another person within the public authority.

21. The Commissioner asked the MHCLG to provide her with evidence that the qualified person considered the application of section 36 personally. The MHCLG did this by sending the Commissioner a signed copy of the document which records the qualified person's opinion.
22. The MHCLG's qualified person is the Right Honourable James Brokenshire MP, Secretary of State for Housing, Communities and Local Government. The document in which he gave his qualified person's opinion is signed and dated 23 January 2019.
23. In order to give his opinion, the qualified person was given a copy of the withheld information together with a detailed descriptive summary.
24. The qualified person's opinion records that he considered that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) applies to all of the withheld information. It also records the arguments given by his advisers in respect of the prejudice which would or would likely occur if the withheld information was to be disclosed.
25. For each of the cited subsections of section 36(2), the qualified person recorded his opinion that disclosure would be likely to occur.
26. In view of the document evidencing the qualified person's opinion, the Commissioner is satisfied that the Council's qualified person has given an opinion in this case. She must now consider whether that opinion is reasonable.
27. The Commissioner adopts the plain meaning of the word "reasonable" as defined by the Shorter English Dictionary: The definition given is; "in accordance with reason; not irrational or absurd".
28. To engage section 36, the qualified person's opinion needs only to be reasonable: It needs to be an opinion reasonably held by a reasonable person.
29. This is not a high hurdle. It is not necessary for the Commissioner to agree with the opinion given; she only needs to recognise that a reasonable person could hold the opinion given. In this case, the Commissioner is satisfied that a reasonable opinion has been given.
30. Whilst the contents of the withheld information is important for considering where the balance of the public interest lies, the primary

reason for the MHGLC's application of section 36 is the 'processes that may be inhibited, rather than what is in the information'<sup>3</sup>.

31. The MHCLG considers that release of the withheld information would likely to inhibit the free and frank exchange of views for the purposes of deliberation and might inhibit and undermine the need for a private space for the purpose of deliberation.
32. The MHCLG considers that there is strong causal evidence that the ideas, comments and views contained in the withheld information generated communications between its officials.
33. The MHCLG asserts that the communications and discussions which relate to the withheld information were only possible because its officials were able to engage in them in the knowledge that their communications would unlikely be disclosed in view of the recognised need for a safe discussion space.
34. The MHCLG argues that disclosure of the withheld information is likely to undermine its staff's confidence in this "safe space", with future discussions on equally sensitive topics being damaged through the inhibition of free and frank sharing of opinions. The MHCLG believes that its staff would be less forthcoming and their opinions and advice would be tempered or withheld due to a fear of future release.
35. The Department is aware that the safe space afforded its officials by way of section 36 can be time sensitive.
36. In this case, the MHCLG considers that the short time between the dates of the communications and the making of the complainant's request, together with the sensitive nature of communications and the intense public interest surrounding Grenfell Tower, the need to protect the safe discussion space is still required.
37. The MHCLG acknowledges its difficulty in providing evidence which provides a clear link between disclosure and any evidence which might occur. That said, the Department's position is that, "releasing [the withheld] information with respect the likely prejudice caused to the free and frank exchange of views is more likely than not, but also substantially more that remote".

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[https://ico.org.uk/media/fororganisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/fororganisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

38. Having accepted that the exemptions provided by sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) are engaged, the Commission must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.

*The Public Interest*

39. In *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013), the Tribunal provided some general principles concerning the application of the public interest test in section 36 cases:

- The lower the likelihood is shown to be that the free and frank exchange of views or provision of advice would be inhibited, the lower the chance that the balance of the public interest will favour the exemption.
- While the Commissioner cannot consider whether prejudice is likely (that is for the qualified person to decide), she is able to consider the severity, frequency or extent of any likely prejudice.
- Since the public interest in maintaining the exemption must be assessed in the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
- The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
- In considering factors against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank exchange of views.
- While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption.
- Disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation of the public in the democratic process.

*Public interest arguments in favour of disclosing the requested information*



40. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities. It may also allow greater participation by the public in the Council's decision making process and to make appropriate challenges to those decisions.
41. In this case, the requested information relates to communications between the then Secretary of State, the Right Honourable Sajid Javid MP and Mr Brian Martin, Head of Technical Policy – Building Regulation and Energy Performance Division, and concerns Grenfell Tower and fire safety standards for building materials.
42. The Commissioner acknowledges the complainant's comments about the position held by Mr Martin and his role in providing advice following the Grenfell disaster. She further acknowledges that the release of Mr Martin's advice would demonstrate openness of the Government and thereby allow those who lost loved ones at Grenfell to engage in the process of inquiry. Clearly such openness would likely lead to the public having greater confidence in the process.
43. The Commissioner accepts the high level of public interest in the Grenfell Tower disaster and the implications it has or might have on existing and future buildings. This public interest is acknowledged to some extent by the MHCLH through its provision of information through parliamentary statements, press releases and the updates it published on the gov.uk website.

*Public interest arguments in favour of maintaining the exemption*

44. Having accepted that the cited exemptions are engaged, and having examined the withheld information, the Commissioner accepts that disclosure would likely result in the loss of a 'safe space' and would result in the so-called 'chilling effect'.
45. It is clear to the Commissioner that officials should be able to provide relevant advice to ministers in a safe space without fear of inappropriate disclosure. Without that space, the loss of frankness needed by ministers would damage the quality of advice and deliberation and impact on good decision making. This would result in Ministers being provided with less informative and candid advice; which clearly would not be in the public interest.
46. As noted above, the passage of time is a factor which is likely to reduce the public interest in withholding information. The Commissioner accepts that this is a factor which she must consider. In this case, the complainant made his request at a period when the Grenfell disaster



was very much in the public consciousness and the Government was actively assessing the information which its advisors and staff were providing. The timing of the request is significant and must provide some weight in supporting the public interest in the continued withholding of the requested information.

47. The need for public officials to be afforded a safe space to discuss sensitive matters in a free and frank environment is important and must also be given significant weight in terms of the public interest.
48. It is clear to the Commissioner that the MHCLG has given consideration to the public's interest in building safety following the Grenfell Disaster. The Commissioner cannot ignore the Department's commitment to releasing information via its regular public disclosures which must surely go some way in meeting the public interest to access authoritative and official information.
49. The Commissioner must afford some weight to the factors which favour the disclosure of the withheld information. The amount of weight is significantly reduced by the timing of the request and by the official information which the MHCLG has routinely published or made public through responses made in Parliament.
50. In consideration of the above, the Commissioner has decided that greater weight must be given to the potential negative impact of disclosure to the MHCLG's need to have a 'safe space' for consideration and to have the opportunity to receive candid advice from its staff and advisers.
51. The Commissioner's decision is that the public interest favours withholding of the information requested by the complainant. She has therefore decided that the MHCLG is entitled to rely on the exemptions it has cited.
52. The complainant's request information has, by its nature, included information which can properly be termed personal data. The Commissioner accepts that the names and contact details of the Department's staff and advisers constitutes personal data.
53. In making her decision, the Commissioner has accepted the MHCLG's position that all of the requested information engages section 36(2). By taking this broad approach, and in view of her decision at paragraph 51, the Commissioner is not required to go on to consider the MHCLG's additional reliance on section 40(2).

**Right of appeal**

54. 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)

55. 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.
56. 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 .....**

**Andrew White  
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Information Commissioner's Office  
Wycliffe House  
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