

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

### **Decision notice**

**Date:** 7 November 2019

**Public Authority:** The Advisory Council on National Records and Archives

**Address:** The National Archives  
Kew  
Richmond  
Surrey  
TW9 4DU

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

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1. The complainant has requested information relating to the papers relating to Lord Denning's Profumo Report which were being transferred to The National Archives. Specifically the complainant asked for all records of discussions from 1 January 2014 relating to whether such papers should be made public and when. The Advisory Council on National Records and Archives (the Advisory Council) disclosed some information to the complainant at the internal review stage but refused to disclose the remainder citing sections 23, 27 and 36(2)(b)(i) and (ii) and 36(2)(c) of the FOIA.
2. The Commissioner's decision is that the Advisory Council is entitled to withhold the remaining withheld information under section 36(2)(b)(i) and (ii) and that the public interest rests in maintaining this exemption. She has however found the Advisory Council in breach of section 10 of the FOIA in this case.
3. The Commissioner does not require any further action to be taken.

## Request and response

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4. On 30 April 2018, the complainant wrote to the Advisory Council and requested information in the following terms:

"This request concerns papers relating to Lord Denning's Profumo Report which were being transferred to The National Archives.

1. Please send me copies of all records of discussions since 1 Jan 2014 relating to whether such papers should be made publicly available or at what time they should be made publicly available
  2. Please send me copies of all meeting papers and presentations since 1 Jan 2014 relating to whether such papers should be made publicly available or at what time they should be made publicly available
  3. Please send me copies of all emails and other communications with the Cabinet Office since 1 Jan 2014 relating to whether such papers should be made publicly available or at what time they should be made publicly available
  4. Please send me copies of all emails and other communications since 1 Jan 2014 between the council secretariat and one or more council members relating to whether such papers should be made publicly available or at what time they should be made publicly available"
5. The Advisory Council responded on 4 September 2018. It refused to provide the requested information citing sections 27, 36(2)(b)(i) and (ii), 36(2)(c), 40 and 41 of the FOIA.
6. The complainant requested an internal review on 10 September 2018.
7. The Advisory Council carried out an internal review and notified the complainant of its findings on 5 November 2018. It released some information, withdrew the application of section 40 and 41 of the FOIA but remained of the opinion that the remaining withheld information is exempt from disclosure under sections 27, 36(2)(b)(i) and (ii) and 36(2)(c) of the FOIA. It also applied an additional exemption; section 23 of the FOIA.

## Scope of the case

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8. The complainant contacted the Commissioner on 28 January 2019 to complain about the way his request for information had been handled. Specifically the complainant is dissatisfied with the application of the

exemptions cited and considers the requested information should be disclosed.

9. The Commissioner will first consider the application of sections 36(2)(b)(i) and (ii) and 36(2)(c) of the FOIA, as these have been applied to the withheld information in its entirety. If she finds that some or all of the withheld information is not exempt under section 36(2), she will then go on to consider the application of the other exemptions cited.

## **Reasons for decision**

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

10. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information
  - (b) would, or would be likely to, prejudice-
    - (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.
11. The Advisory Council confirmed that the qualified person for the purposes of section 36 of the FOIA is the Master of the Rolls. It stated that the qualified person's opinion was requested on 15 May 2018. The qualified person responded on 4 June 2018 confirming that section 36(2) is engaged. The public interest test consultation then took place between June and early September 2018. During this process it came to light that certain background documents had not been provided to the qualified person. A full set of documentation was therefore provided and the qualified person provided a revised opinion on 31 July 2018 which again authorised the application of section 36(2)(b)(i) and (ii) and 36(2)(c).
12. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.

13. The Advisory Council confirmed that it performs functions under section 1 of the Public Records Act 1958, which states that:

"There shall be an Advisory Council on Public Records to advise the Secretary of State on matters concerning public records in general and, in particular, on those aspects of the work of the Public Record Office which affect members of the public who make use of the facilities provided by the Public Record Office."

"The matter on which the Advisory Council on Public Records may advise...include matters relating to the application of the Freedom of Information Act 2000 ["**FOIA**"] to information contained in public records which are historical records within the meaning of Part VI of that Act."

14. It explained that one of the Advisory Council's key functions is to consider applications for retention of historical documents by departments. These are required if a department wishes to retain such documents beyond the period of 20 (previously 30) years, when documents selected for permanent preservation would normally be transferred to The National Archives.
15. The Advisory Council explained further that a large number of applications are made by departments each year (for example, last year the Advisory Council dealt with 970 requests). As a result, to facilitate the scrutiny process, the relevant application information is set out in the form of "schedules", which summarise the details of each application. Draft schedules are then circulated before each council meeting and members provide comments and queries on individual entries, by exception. It argued that any feedback is then passed on to the relevant department, which provides a further response, as required. These responses are then brought to meetings and are either accepted or carried forward, as necessary. Some schedule entries are eventually withdrawn by departments and, very occasionally, there is a disagreement between the council and the department, which is escalated.
16. It stated that in the case of the Denning papers, as well as the relevant schedule entries, the Cabinet Office also provided several background papers for consideration, as a separate agenda item, at various council meetings. Members of the Cabinet Office also attended to discuss the matter in person.
17. It commented that in dealing with the complainant's request the Cabinet Office were consulted as part of the public interest consultation at both the initial and internal review stages.

18. The Advisory Council advised that it is the qualified person's opinion that disclosure would be likely to prejudice the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation both internally and between the Advisory Council and the departments it corresponds with. It stated that it is the qualified person's opinion that in order to evaluate the case for retention or closure of particular records, the Advisory Council must engage with departments on an ongoing basis and both sides must feel that they are able to communicate particular sensitivities freely and openly. If details of these communications were disclosed it would be likely to have an adverse impact of the willingness of departments to provide the level of detail which the Advisory Council requires, or even to engage with it at all. As a result the effectiveness of the Advisory Council would be inhibited.
19. The qualified person also said that the papers which are the subject of this request relate to a complex matter, which was discussed at a number of Advisory Council meetings. Important issues were aired, as Advisory Council members and the Cabinet Office representatives were able to engage and to conduct free and frank discussions. If disclosure took place it would be likely to inhibit the frankness with which they engage with the Advisory Council on future cases, thus impacting on the quality of advice which the Advisory Council is able to offer.
20. In addition, it is the qualified person's opinion that in order for the Advisory Council to carry out its statutory functions effectively, a "safe space" is required within which members can discuss applications freely and frankly. This enables the Advisory Council to challenge departments on their application and ensures that the discussions and debate are suitably robust.
21. For the above reasons the qualified person confirmed that both sections 36(2)(b)(i) and (ii) and 36(2)(c) are engaged in this case.
22. With regards to section 32(2)(b)(i) and (ii), the Commissioner considers it is a reasonable opinion to hold that disclosure would be likely to prejudice the free and frank provision of advice and views for the purposes of deliberation; both internally and between the Advisory Council and the departments that submit applications to it. She accepts that often sensitive and complex issues are discussed and that such issues require detailed discussion and deliberation. These discussions and deliberations need to be free, frank, candid and robust to enable the Advisory Council to carry out its function. It is reasonable to consider that disclosure would be likely to discourage those involved in the deliberations and the various departments that submit the applications from providing such free, frank and honest advice and views in future

applications and during the scrutiny process. For these reasons the Commissioner is satisfied that section 36(2)(b)(i) and (ii) is engaged.

23. For section 36(2)(c) to apply, the prejudice envisaged must be different to that covered by any other exemption. The fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). The First-tier Tribunal made this point in the hearing of *Evans v Information Commissioner and the Ministry of Defence (EA/2006/0064, 26 October 2007)*.
24. The Commissioner recognises that there is a need for public authorities to have a safe space in which to develop ideas or make decisions. If the disclosure of information would or would be likely to prejudice this, she accepts this may be an argument for engaging section 36(2)(c).
25. However, the safe space argument can also apply to section 36(2)(b) if disclosure would or would be likely to prevent or hinder the free and frank exchange of views or provision of advice.
26. Having read the qualified person's opinion and the submissions received from the Advisory Council the Commissioner does not consider the arguments presented with regards to safe space are sufficiently different to those that would come under section 36(2)(b) to warrant the application of section 36(2)(c). The arguments presented relate to the need for safe space to enable members of the Advisory Council and the departments it corresponds with to discuss applications freely and frankly so as to enable it to carry out its statutory functions effectively. These are more fitting to section 36(2)(b). For section 36(2)(c) to also apply the Advisory Council would have to provide arguments which suggest that the prejudice is different – for example disclosure would interfere with or distract from the process in another way or would prejudice or undermine the decision itself rather than the frankness of the discussions specifically.
27. For the above reasons, the Commissioner is not satisfied that section 36(2)(c) of the FOIA applies to this request. As stated above, however, she is satisfied that section 36(2)(b)(i) and (ii) are engaged and will therefore now go on to consider the public interest test.

#### *Public interest test*

28. The Advisory Council acknowledged that it is of benefit to the public to know and to understand the role of government and the independent organisations which work with it. It stated that the role of the Advisory Council includes advising the Secretary of State as to whether records held by government departments and other public bodies should be retained beyond the period of 20 years from their creation, or must be

transferred to The National Archives open or closed. It confirmed that disclosure of the requested information may lead to a greater understanding of the Advisory Council's operations and the benefits of its work. It also acknowledged the benefit to the public to know how decisions are made and what considerations are taken into account. There is a public interest in understanding the advisory council's decision making processes and confirming that these operate fairly. It said that this makes for greater accountability and increases public confidence in the Advisory Council.

29. It also observed that the Denning case is an example of council processes working well, as a result of the scrutiny process, as material which was originally to be retained by the Cabinet Office was eventually transferred to the National Archives.
30. However, it also considered whether disclosure of proceedings of the Advisory Council could inhibit free and frank discussions in the future and whether this could result in departments being less frank and candid in the future. It acknowledged that this could potentially damage the quality of information provided to the Advisory Council which could, in turn, lead to a reduction in its effectiveness. It stated that it gave particular weight to this latter point in relation to certain representations made by the Cabinet Office during the consultation process.
31. The Advisory Council also acknowledged the strong public interest in allowing the Advisory Council and the departments that submit such applications to it to be able to conduct discussions openly and candidly in order to reach a robust conclusion in terms of when, how and if information is to be released. It stated that this ensures departments are able to transfer records to The National Archives effectively and in compliance with the Public Records Act 1958.
32. It concluded by saying that it felt the public interest rests in maintaining the exemption.
33. The complainant believes the withheld information is of substantial historical importance and there is a public interest in the underlying events. He considers the historical importance substantially increases the public interest in disclosure as there is a greater need for accountability, transparency and in the public understanding the process of deciding whether, when or how records are made public.
34. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.

35. The Commissioner recognises the public interest in disclosure. It would provide accountability and transparency, enable the public to understand more clearly the decision the Advisory Council reached with regards to the Denning papers and why and assist the public in understanding the Advisory Council's function and how this is performed.
36. She also acknowledges that the Denning papers are of significant historical importance and interest. There is a public interest in knowing in more detail how the Cabinet Office's application was considered, what discussions took place and how the decision that was reached came about.
37. However, the Commissioner also accepts that there are compelling public interest arguments in favour of maintaining the exemption.
38. She notes that discussions on the Denning papers took place over a number of meetings covering a period between 2013 and 2016 and arguably by the time of the request in April 2018 the decision had been made by the Advisory Council. It can therefore be said that there was no ongoing deliberations or decision making in relation to these specific papers at the time of the request or need for safe space.
39. However, the Advisory Council has made the point that at the time of the request the latest deliberations on the Denning papers had taken place comparatively recently and while the need for safe space was no longer required and there was no outstanding discussions or deliberation, there still remained a real risk that disclosure would be likely to prejudice the willingness of participants and departments from engaging and providing advice and views so candidly, completely and honestly in future applications and deliberations. The Commissioner accepts that there remained a real risk of prejudice at the time of the request considering the function the Advisory Council has to perform and the often sensitive and complex issues it is presented with.
40. The Commissioner acknowledges that members of the Advisory Council and departments have an ongoing relationship (for example the Foreign and Commonwealth Office, the Ministry of Defence and the Prime Minister's Office submit a large number of applications to the Advisory Council each year) and for the Advisory Council to be able to operate effectively it must be able to engage with applicants in a spirit of openness and honesty. She accepts that if applicants were to self-censor when providing the information, because they are worried about possible publication, it could reduce the Advisory Council's ability to provide effective challenge. She accepts that this is a real risk despite the discussions in this particular case having closed by the time of the request.



41. The Commissioner also notes that the Advisory Council disclosed redacted versions of the various meeting minutes at the internal review stage. These outline the timescales that were involved, highlight to an extent what deliberations took place and explain the agreed actions at each meeting. She considers this information goes some way to meeting the public interest in disclosure while preserving the process that is involved and the free and candid discussions and information that is required.
42. On balance the Commissioner considers the public interest rests in maintaining the exemption. She notes the public interest factors in favour of disclosure and the significant interest in the Denning papers but considers the public interest factors in favour of maintaining the Advisory Council's ability to carry out its function effectively, especially in sensitive and complex cases, carry more weight in this particular request.

### **Procedural matters**

43. Section 10 of the FOIA requires a public authority to respond to requests for information promptly and in any event no later than 20 working days from receipt.
44. The Commissioner notes in this case that the request was made on 30 April 2018 yet the Advisory Council did not respond until 4 September 2018. This is an unacceptable delay and clearly in breach of section 10 of the FOIA.

## **Right of appeal**

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45. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

46. 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.
47. 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**

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