

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 August 2014

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested a report of an audit carried out of security at Cardiff Airport and Pembroke Dock. The Home Office withheld this information under the exemption provided by section 36(2)(b)(ii) (inhibition to the free and frank exchange of views) of the FOIA.
2. The Commissioner's decision is that the Home Office cited this exemption correctly and so it was not obliged to disclose this information.

Request and response

3. On 26 September 2013 the complainant wrote to the Home Office and requested information in the following terms:

"Any Home Office internal audits conducted within the past three months into Border Force presence, resources and performance at airports and ports in South Wales. I would like full copies of any audit reports so I am able to view them in their entirety."

4. The Home Office responded substantively on 21 November 2013. It confirmed that it held information falling within the scope of the request, but refused to disclose it in reliance on the exemptions provided by the following sections of the FOIA:

31(1)(a) (prejudice to the prevention or detection of crime)

31(1)(b) (prejudice to the apprehension or prosecution of offenders)

31(1)(e) (prejudice to the operation of the immigration controls)

5. The complainant responded on 18 December 2013 and requested an internal review. After a delay, the Home Office responded with the outcome of the internal review on 27 March 2014. The conclusion of this was that the refusal of the request under the exemptions cited previously was upheld.

Scope of the case

6. The complainant contacted the Commissioner on 1 April 2014 to complain about the refusal of his information request. The complainant indicated that he did not agree with the exemptions cited by the Home Office.
7. During the Commissioner's investigation the Home Office amended its reasoning for refusing to disclose the requested information. It maintained that the subsections from section 31 cited previously were engaged, but only in relation to some of the content of the withheld information. However, it now also cited the exemptions provided by sections 24(1) (national security) and 40(2) (personal information) in relation to some of the content and cited sections 36(2)(b)(ii) (inhibition to the free and frank exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs) in relation to the entirety of the content of the withheld information. The Home Office stated that it would contact the complainant to advise him that these exemptions had been introduced.
8. The Commissioner is obliged to consider late exemptions, therefore the scope of this case covers the exemptions cited both during the Home Office's correspondence with the complainant and those introduced during the Commissioner's investigation.

Reasons for decision

Section 36

9. The Home Office cited sections 36(2)(b)(ii) and 36(2)(c). The Commissioner has focussed here on section 36(2)(b)(ii), which provides an exemption for information the disclosure of which would, or would be likely to, inhibit the free and frank exchange of views. Consideration of section 36(2)(b)(ii) is a two-stage process; first, the exemption must be

engaged. Secondly, this exemption is qualified by the public interest, which means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.

10. Covering first whether this exemption is engaged, section 36(2)(b)(ii) can only be cited on the basis of a reasonable opinion from a specified qualified person (QP). For government departments, section 36 specifies that the QP is any Minister of the Crown. The task for the Commissioner here is to establish whether an opinion was given by a Minister and, if so, whether that opinion was reasonable.
11. The Home Office has supplied to the ICO evidence that Lord Taylor, Parliamentary under Secretary of State for Criminal information, acted as QP and gave an opinion on 1 July 2014. On the basis of this evidence the Commissioner accepts that an appropriate individual acted as QP.
12. Turning to whether the opinion was reasonable, the question here is simply whether the opinion was objectively reasonable, meaning that it was an opinion that a reasonable person could hold. If it was, the exemption will be engaged.
13. The Home Office has stated that the QP did not specify whether his opinion was that inhibition *would* result, or it was that inhibition *would be likely to* result. Where this has not been specified, the Commissioner will consider the lower test; *would be likely to*.
14. In relation to other prejudice based exemptions, the Commissioner takes the approach that he will accept that prejudice would be likely to result where there is a real and significant likelihood of this occurring. In line with this approach, he has considered here whether it was objectively reasonable for the QP to be of the opinion that disclosure of the information in question would lead to a real and significant likelihood of inhibition to the free and frank exchange of views.
15. The information withheld from the complainant is a draft report titled "*Cardiff Airport and Pembroke Dock – Port Security Visit*". The evidence provided to the Commissioner shows that the reasoning of the QP concerned the success of the process of carrying out audits of port security and the possibility of this being compromised if participants in that process were inhibited through concern that the record of their participation could be disclosed prematurely. Essentially, the QP believed that the disclosure of this report would be likely to result in inhibition to free and frank exchanges that take place as part of future audits.

16. In correspondence with the ICO the Home Office provided further clarification of the reasoning of the QP, stating that the auditors as well as the subjects of the audit could be inhibited as a result of disclosure. It referred to the importance of auditors being able to report and make recommendations in a fully free and frank manner.
17. The Commissioner has reviewed the content of the report and recognises that this records a process to which the participants contributed without inhibition. Having viewed this content, the Commissioner recognises why the opinion of the QP was that disclosure of this report would be likely to cause inhibition to participants in future similar processes.
18. The complainant argued when requesting an internal review that publication by the Committee of Public Accounts of a report titled "*The Border Force: securing the border*" indicated that reports of this kind could be published without causing harm. In response to that point, the Home Office stated that the content of that report was more general in nature and did not have the same localised focus as the withheld report. The Commissioner also notes that the publication referred to by the complainant was of a finalised report, whereas the report requested by the complainant was in draft form at the time of the request.
19. The conclusion of the Commissioner is that the opinion of the QP on section 36(2)(b)(ii) was objectively reasonable. This exemption is, therefore, engaged.
20. The next step is to consider the balance of the public interests. The Commissioner has accepted that the opinion of the QP that disclosure would be likely to result in prejudice was reasonable; the role of the Commissioner here is not to challenge or reconsider his conclusion on the reasonableness of that opinion. Instead, his role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP. In forming a view on the balance of the public interest, the Commissioner has taken into account the general public interest in the openness and transparency of the Home Office, as well as those factors that apply in relation to the specific information in question here.
21. Covering first factors that favour maintenance of the exemption, having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the Home Office to audit the security of ports. As to how much weight this should carry in the balance of the public interest, the question is what the severity, extent and frequency would be of the inhibition identified by the QP.

22. The Commissioner recognises that prejudice would not be limited to future security audits only of Cardiff Airport and Pembroke Dock, but would extend to security audits of other ports. The severity, extent and frequency would therefore be wider than if it was limited only to Cardiff Airport and Pembroke Dock. This indicates that the weight that must be afforded to the public interest in maintenance of the exemption in order to prevent the inhibition identified by the QP is considerable.
23. Turning to arguments in favour of disclosure, the Commissioner considers there to be a strong public interest both in the disclosure of the specific audit report in question here, and in general in relation to information about the security of ports. On the public interest relating specifically to Cardiff Airport and Pembroke Dock, whilst the Commissioner is unable to go into details here without inappropriately revealing the content of the withheld information, his view is that the content of the report means that there is a strong public interest in it being disclosed. As to the wider public interest, the Commissioner believes that there is a strong public interest in the disclosure of all information concerning the security of UK ports.
24. In conclusion, the Commissioner has recognised a strong public interest in disclosure on the basis of the subject matter of the information. However, his view is that this is outweighed by the public interest in avoiding the prejudice identified by the QP; that is, in ensuring that audits of the security of the UK borders can be carried out effectively. The finding of the Commissioner is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure and so the Home Office was not obliged to disclose this information.

Other matters

25. The Home Office was responsible for delays in progressing the complainant's information request to this point. The first of these delays was in the completion of the internal review, which took more than three months. The Commissioner's guidance on internal reviews is that these should be completed within a maximum of 20 working days. A further delay was caused by the Home Office during the Commissioner's investigation, which necessitated the issuing of an information notice by the Commissioner obliging the Home Office to respond to his office.
26. The Home Office must improve the timeliness of its responses both to complainants and to the ICO. A record has been made of these issues and this may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

27. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

28. 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.
29. 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

Jon Manners
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