

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 August 2016

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

Decision (including any steps ordered)

1. The complainant requested copies of two review reports concerning English language test suppliers and a review of the Life in the UK Test. The Home Office refused to disclose this information and cited the exemption provided by section 36(2)(c) (prejudice to the effective conduct of public affairs) of the FOIA.
2. The Commissioner's decision is that the Home Office cited section 36(2)(c) correctly so it was not obliged to disclose this information.

Request and response

3. On 7 July 2015 the complainant wrote to the Home Office and requested information in the following terms:

"Under the terms of the Freedom of Information Act 2000, please provide me with full copies of each of the following:

i. The review of English language test suppliers carried out by Moore Stephens and referred to on p78 of the Home Office annual report 2014-15.

ii. The review of the Life in the UK test carried out by Moore Stephens and referred to on p78 of the Home Office annual report 2014-15."

4. After a lengthy delay that, as recorded in decision notice reference FS50607090¹, resulted in a breach of the Act, the Home Office responded on 4 December 2015. It stated that the request was refused and cited the exemptions provided by the following sections of the FOIA:

36(2)(c) (prejudice to the effective conduct of public affairs)

40(2) (personal information)

43(2) (prejudice to commercial interests)
5. The complainant responded on 4 December 2015 and requested an internal review. After a further delay, the Home Office responded with the outcome of the review on 19 April 2016. 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 19 April 2016 to complain about the refusal of his information request. The complainant indicated that he did not agree with the reasoning of the Home Office for the refusal of his request.

Reasons for decision

Section 36

7. The Home Office cited section 36(2)(c), which provides an exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs in a way other than specified elsewhere in section 36. The Commissioner's approach is that section 36(2)(c) should be cited only where the prejudice identified would not be covered by any of the other exemptions in Part II of the FOIA.
8. This exemption can only be cited on the basis of a reasonable opinion from a specified qualified person (QP). In the case of government departments, the QP is any Minister of the Crown. The task for the

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1560506/fs_50607090.pdf

Commissioner when deciding whether this exemption is engaged is to reach a conclusion on whether the opinion of the QP was objectively reasonable. This exemption is also qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

9. As to whether this exemption is engaged, the first issue to cover here is whether this exemption was cited on the basis of an opinion from a government minister. On this point the Home Office stated that this exemption was cited on the basis of an opinion from James Brokenshire, then Minister for Security and Immigration, and supplied evidence that this opinion was given on 19 November 2015. On the basis of this evidence, the Commissioner accepts that an opinion was given by a valid QP.
10. The next step is to consider whether that opinion was reasonable. The Home Office supplied to the ICO a copy of a submission that was prepared for the QP in order to assist in the formation of their opinion. This shows that the reasoning for citing section 36(2)(c) concerned the integrity of the process for carrying out internal audits. The submission stated that the two reports specified in the request were “*effectively*” internal audits, albeit carried out by a third party organisation for the Home Office. The submission argued that disclosure of the requested information would harm the internal audit process as third parties would be less willing to volunteer information to the audit if they believed that this may later be disclosed. The submission also suggested that a space away from the possibility of disclosure should be preserved to enable the Home Office to “*fully react*” to recommendations made in the report.
11. The Commissioner was supplied with copies of the withheld information, which consists of the two reports described in the request. These reports were commissioned in response to a television documentary that established that these tests were subject to cheating. The Commissioner recognises that these reports covered an issue that it was important the Home Office reacted to effectively, and that it would have been easier to secure the cooperation of third parties to this process with a guarantee of confidentiality for a certain period.
12. The submission advised the QP that prejudice *would* result through disclosure, rather than *would be likely* to result. The approach of the Commissioner in relation to other exemptions in Part II of the FOIA is that he will accept that an outcome *would* occur where this is more likely than not to come about as a result of disclosure. The question here is, therefore, whether it was objectively reasonable for the QP to hold the opinion that prejudice in the manner described in the

submission would be more likely than not to come about as a result of disclosure of the information in question.

13. As mentioned above, the question is whether the opinion held by the QP was objectively reasonable; in other words, whether it is an opinion that it is reasonable to hold. Having viewed the content of the withheld information and taking into account that the request was made soon after the publication date of the reports whilst the Home Office would have been in the process of reacting to the recommendations in the report, the Commissioner's view is that the QP's opinion was objectively reasonable. The Commissioner also notes that the prejudice identified in the submission may not have been covered by any of the other exemptions in Part II of the FOIA, hence it was appropriate to cite section 36(2)(c). Her finding is, therefore, that the exemption provided by section 36(2)(c) is engaged.
14. The next step is to consider the balance of the public interests. Having accepted that the opinion of the QP that prejudice would result was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her 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 interests, 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.
15. Covering first factors in favour of 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 draft training materials. As to how much weight this should carry in the balance of the public interests, the question is what the severity, extent and frequency would be of the prejudice identified by the QP.
16. Maintaining the integrity of the immigration system is a central part of the role of the Home Office and it is a matter of very considerable public interest that it is able to perform that role effectively. The prejudice identified by the QP concerned the performance of this role by the Home Office, specifically its ability to react to the issues and recommendations covered in the reports that make up the withheld information in this case. The problems covered in these reports were the subject of media

coverage at that time², which may be taken as indicating some measure of public concern about this issue.

17. The Commissioner does not believe that the frequency of the prejudice identified by the QP in this case would be great as the withheld information concerns a specific issue that is unlikely to be repeated, but she does accept that the impact of the prejudice identified by the QP would have been severe. The Commissioner's view is that there is a weighty public interest in favour of maintenance of the exemption in order to avoid that outcome.
18. Turning to factors in favour of disclosure of the information, the overall public interest in the matter to which the withheld information relates can also be cited in favour of disclosure. Disclosure of the withheld information would add significantly to public understanding about the steps taken by the Home Office to ensure the integrity of the testing process. The Commissioner's view is that this disclosure would be in the public interest and that this is a factor in favour of disclosure of the information in question of considerable weight.
19. As well as the public interest in the specific matter covered in the withheld information, the Commissioner is also of the view that there is a wider public interest in matters relating to immigration, which is a subject that is currently at the very top of the political agenda. This public interest is likely to apply in relation to any substantive recorded information concerning the work of the Home Office in relation to immigration and adds to the weight of the public interest in favour of disclosure here.
20. In conclusion, the Commissioner has recognised a weighty public interest in favour of disclosure on the basis of the subject matter of this information, particularly as this would add to public knowledge and understanding about the issue covered in the reports. However, she is also of the view that there is a very strong public interest in preserving the ability of the Home Office to respond effectively to this issue, prejudice to which was the basis for the opinion of the QP. Having accepted that the QP was reasonable to hold the opinion that this prejudice would be more likely than not to result through disclosure, the Commissioner's view is that this tips the public interest balance in favour of non-disclosure. Her conclusion is, therefore, that the public interest in the maintenance of the exemption outweighs the public

² <http://www.telegraph.co.uk/news/uknews/immigration/10922091/45000-immigrants-cheated-English-tests.html>

interest in disclosure and so the Home Office was not obliged to disclose this information.

21. Having reached this conclusion, it has not been necessary to go on to consider the other exemptions cited by the Home Office.

Other matters

22. Whilst, having issued the earlier decision notice, the Commissioner has not recorded the breach of the FOIA through the delay in responding again here, she does wish to note here her view that the handling of this request was extremely poor. The further delay that occurred at the internal review stage meant that it was more than nine months between the date of the request and the outcome of the internal review – a period of time that in the Commissioner's view was significantly excessive.
23. A record has been made of the delays that have occurred in this case. The Commissioner has been in contact with the Home Office concerning its response time to requests recently. She is particular concerned with lengthy delays ostensibly on the basis of additional time being required for considering the balance of the public interest and is considering action in that area.

Right of appeal

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

25. 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.
26. 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

Ben Tomes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF