

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2014

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

Decision (including any steps ordered)

1. The complainant requested information relating to the business case that supported the establishment of the Disclosure and Barring Service (DBS).
2. The Home Office refused to disclose the information it confirmed it held on the basis that sections 36(2)(c) (prejudice to effective conduct of public affairs), 40 (personal information) and 43 (commercial interests) of the FOIA apply.
3. The Commissioner's decision is that the Home Office correctly engaged section 36(2)(c) but that the public interest favours disclosure. He does not find section 43 engaged. In relation to the other redactions he is satisfied that the Home Office was entitled to apply section 40(2).
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose to the requestor the information withheld by virtue of section 36(2)(c) (which includes the information also withheld by virtue of section 43), with the information covered by section 40(2) redacted.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. The Disclosure and Barring Service (DBS)¹ helps employers make safer recruitment decisions and prevent unsuitable people from working with vulnerable groups, including children. It replaces the Criminal Records Bureau (CRB) and Independent Safeguarding Authority (ISA).

Request and response

7. On 11 January 2013 the complainant wrote to the Home Office and requested information in the following terms:

"I am writing under the Freedom of Information Act 2000 to request a copy of the full and final business case which supported the establishment of the Disclosure and Barring Service and the related Public Private Partnership contract with Tata Commercial Services and which was agreed by ministers in the final quarter of 2012".

8. The Home Office responded on 12 February 2013. It confirmed that it holds a Full Business Case (FBC) document and also a contract with Tata Commercial Services but does not hold a Public Principle Partnership contract with Tata Commercial Services. The Home Office refused to provide the information it confirmed it holds citing the following exemptions:
- section 35(1)(a) formulation / development of government policy; and
 - section 43(2) commercial interests.
9. The complainant requested an internal review of the Home Office's decision to withhold the FBC on the basis that the FBC for the DBS is an approved document.
10. The Home Office provided its internal review response on 30 July 2013. It revised its position, advising that it no longer considers that section 35(1)(a) applies to the FBC. In that respect it told the complainant:
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¹ <https://www.gov.uk/government/organisations/disclosure-and-barring-service/about>

"I agree that there are sections of the document that are covered by the exemption at section 43(2). However, I consider that the remainder of the information cannot now be withheld under the exemption at section 35(1)(a), primarily because the DBS is now in operation and the FBC (which has on it an approval date noted) cannot reasonably be said to relate to the formulation or development of government policy".

11. It confirmed that, in the alternative, it considers that section 36(2)(c) (prejudice to effective conduct of public affairs) applies to the whole of the FBC, including that information also covered by the exemption at section 43(2).

Scope of the case

12. The complainant contacted the Commissioner on 12 November 2013 to complain about the way his request for information had been handled.
13. During the course of the Commissioner's investigation, the Home Office additionally cited section 40(2) of FOIA (personal information) in relation to the withheld information - in respect of the names of officers below the grade of Senior Civil Servant.
14. The Commissioner considers the scope of his investigation to be whether the Home Office correctly applied sections 36, 40 and 43 of the FOIA to the FBC.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

15. The Commissioner has first considered the Home Office's application of section 36.
16. To engage section 36, the qualified person must give an opinion that the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur. However, that in itself is not sufficient - the opinion must be reasonable.
17. The Home Office told the complainant that it considers that section 36(2)(c) *"applies to the whole of the FBC"*.
18. Section 36(2)(c) 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—

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

19. Following the ruling of the Tribunal, the Commissioner takes the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. Furthermore, 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).
20. In determining whether section 36(2)(c) was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - establish that an opinion was given;
 - ascertain who was the qualified person or persons;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
21. In this case, an opinion was sought from Lord Taylor of Holbeach, Lords Minister and Minister for Criminal Information, on 15 July 2013. In other words, the opinion was sought during the Home Office's handling of the request for an internal review. The Commissioner accepts that the timing of the requesting of the opinion was due to the Home Office revising its position with respect to the exemptions that it considers apply in this case.
22. The opinion on the application of section 36(2)(c) was provided on 22 July 2013. The Commissioner is satisfied that Lord Taylor, as a Minister of the Crown, is a qualified person for the purposes of section 36.
23. In determining whether the exemption is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
 - whether the prejudice relates to the specific subsection of section 36(2) that is being claimed;
 - the nature of the information and the timing of the request; and

- the qualified person's knowledge of, or involvement in, the issue.
24. 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.
25. In the Commissioner's view, if the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
26. In correspondence with the complainant, the Home Office described the information at issue as follows:
- "Although the FBC does not relate to the formulation or development of government policy, it is nevertheless a living document which reflects all aspects of the DBS's business and hence changes in the way the DBS operates. The FBC will be revised and updated throughout the life of the DBS Programme. There have already been changes to some of the details of the FBC and this process will continue".*
27. The Home Office explained to the complainant that section 36(2)(c) applied because:
- "The DBS is a relatively new organisation and its operating procedures and other aspects of its business are, in some respects, still in the course of development.disclosure of the FBC would prejudice the ability of the DBS to manage its business and to make changes to its business model and its operating procedures in a 'safe space' away from scrutiny. I therefore believe that the exemption at section 36(2)(c) applies".*
28. The Home Office told the Commissioner:
- "I can confirm that the qualified person was fully aware of the issued involved in this case. As the Minister for Criminal Information Lord Taylor was very familiar with the subject matter".*

29. Having viewed the withheld information and the submission provided to the qualified person, the Commissioner is satisfied that the qualified person's opinion – that disclosure would otherwise prejudice the effective conduct of public affairs - is reasonable. It follows that he finds that the withheld information is exempt under section 36(2).

The public interest test

30. The fact that the exemption is engaged by the qualified person's opinion does not automatically mean that the information should be withheld. The public interest test is separate from the qualified person's opinion.
31. The Commissioner has gone on to consider, in accordance with section 2(2)(b) of FOIA, whether the public interest requires disclosure, despite the valid application of the exemption.

Public interest arguments in favour of disclosing the requested information

32. The Home Office recognises that there is a public interest in openness and transparency in all aspects of government. It told the complainant:

"The work of the DBS concerns everyone and the release of information about the business case underpinning the DBS would lead to greater public understanding of its purpose and procedures".

33. The Commissioner considers that there is a public interest in the Home Office operating openly and transparently, for example in relation to the business case to which the withheld information in this case relates. There is a clear public interest in disclosing information which provides the public with a better understanding behind the Home Office's decision-making processes and holding it accountable for decisions made. There is a significant public interest in the operation of the DBS, given the role the service plays in disclosing sensitive personal information about individuals, providing accurate information to ensure informed and safer decisions in relation to recruitment and access to vulnerable groups. The work of DBS therefore has a significant societal and business impact. The services that DBS replaced, when it was set up in 2012, were the subject of significant public debate and criticism. There is a strong public interest in understanding the full business case for the DBS.

Public interest arguments in favour of maintaining the exemption

34. In favour of maintaining the exemption the Home Office told the complainant:

"The DBS will constantly be judged against the FBC and the DBS will be held to account for the outcomes that the FBC says it will achieve....The DBS cannot manage its business effectively if its business model is in effect in the public domain as it continues to develop. This would not be in the public interest".

35. In correspondence with the Commissioner, the Home Office put forward further arguments, for example about officials needing to be free and frank throughout the development of a business case. While the Commissioner recognises its submissions as valid public interest arguments, in his view they appear to relate more to section 36(2)(b) than to section 36(2)(c) – the subsection which the Home Office confirmed it is relying on.

Balance of the public interest arguments

36. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
37. The Commissioner notes that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, he must give weight to that opinion as a valid piece of evidence in his assessment of the balance of the public interest.
38. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner will consider the severity, extent and frequency with which prejudice to the effective conduct of public affairs will, or may, occur.
39. In this case, the Home Office has argued that the DBS needs a 'safe space' to manage its business and to make changes in its business model and operating procedures, away from external interference and distraction.
40. In the Commissioner's view, the need for a safe space will be strongest when the issue is still live. The timing of the request will therefore be an important factor. In this case, the complainant describes the information at issue as being contained within an approved document.
41. Similarly, when the Home Office told the complainant that it no longer considered the requested information could be withheld under section 35(1)(a) it said that was:

"primarily because the DBS is now in operation and the FBC (which has on it an approval date noted) cannot reasonably be said to relate to the formulation or development of government policy".

42. The Commissioner acknowledges that, once operational, the FBC may well be revised and updated throughout the life of the DBS programme. However, in the Commissioner's view the Home Office failed to provide sufficient explanation about the severity, extent and frequency of those changes to support its view that disclosure in this case would have a prejudicial effect on the DBS that could be regarded as severe, frequent or extensive. In the absence of such evidence, the Commissioner finds himself in some difficulty with respect to attributing weight to the Home Office's arguments.
43. Having considered the matter, the Commissioner's view is that the public interest arguments in favour of maintaining the exemption at section 36(2)(c) do not outweigh the public interest arguments in favour of disclosure. The Commissioner's view is, therefore, that while section 36(2)(c) is engaged by virtue of the prejudice identified being different to that covered by another exemption, in all the circumstances of this case the public interest favours disclosure of the business case.

Section 43 – commercial interests

44. As the Commissioner has not upheld the citing of section 36, he has gone on to consider its application of section 43 to the information withheld by virtue of that exemption.
45. The Home Office confirmed that it considers section 43(2) of FOIA applies to some sections of the withheld information. Specifically it told the Commissioner:

"In summary, this information focuses on the tendering for, evaluating and selecting of a new supplier".

46. Section 43 of the Act sets out an exemption from the right to know if:
 - the information requested is a trade secret; or
 - release of the information is likely to prejudice the commercial interests of any person. (A person may be an individual, a company, the public authority itself or any other legal entity).

Applicable interests

47. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated. The Home Office confirmed that the section 43 exemption was applied in this

case because it would be prejudicial to the commercial interests of both the Home Office and third party suppliers.

Nature of the prejudice

48. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
49. Secondly, there must be what the Tribunal in the case of *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030) called a 'causal link' between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would or would be likely to lead to the prejudice.
50. With respect to the nature of the prejudice in this case, the Commissioner considers that the Home Office – in its correspondence with the complainant - appeared to rely on the requested material being self-evidently exempt.
51. It was not until during the Commissioner's investigation that the Home Office explained why it considered that disclosure of the information at issue would be prejudicial both to its own commercial interests and those of third party suppliers.

Nature of the prejudice – third party suppliers

52. With respect to prejudice to the commercial interests of third parties, the Home Office told the Commissioner:

"Information relating to the suppliers... could be used by competitors to gain a commercial advantage. Therefore for suppliers to be prejudiced in this way, it could lead to reluctance on their part, to engage with the Home Office on a commercial basis".

Nature of the prejudice – the Home Office

53. As a consequence of the prejudice to third party suppliers described above, the Home Office told the Commissioner:

"In turn, this would prejudice the Home Office's ability to achieve value for money, as there would be fewer businesses and in turn less competition, for the Home Office to choose from".

Likelihood of prejudice

54. The Home Office confirmed it considers that disclosure would, as opposed to would be likely to, prejudice its own commercial interests and those of third parties.

Is the exemption engaged – the Home Office?

55. In determining whether or not the effect of disclosure in this case would be detrimental or damaging in some way to the commercial interests of the Home Office itself, the Commissioner has considered the nature and likelihood of harm that would be caused.
56. The Commissioner can see some potential for the disclosure of the information to prejudice the commercial interests of the Home Office. However, he finds that its arguments, for example that it would impact its ability to achieve value for money and pose a risk that potential suppliers would be reluctant to engage with the Home Office on a commercial basis, have not been convincingly explained in terms of a causal link between disclosure of the information and prejudice to commercial interests to the extent that there is an identifiable real and significant risk.
57. In assessing whether there is a real and significant risk, the Commissioner considers that third party companies dealing with public authorities must expect a more robust approach to the issue of commercial sensitivity than would apply in the private commercial environment. His view is that, following the implementation of FOIA, companies submitting tenders to public authorities can reasonably expect that core information related to the services they provide, including some commercial information, will be subject to a high level of public scrutiny.
58. As the Home Office has not provided the required level of detail or evidence to support its statement that disclosure would cause prejudice, the Commissioner is unable to conclude that the exemption is engaged.

Is the exemption engaged – third parties?

59. From the Information Tribunal decision in the case *Derry Council v Information Commissioner* (EA/2006/0014) it is clear that it may often not be appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. However, the Commissioner considers that whilst this approach was appropriate in the particular circumstances of the Derry case, in other cases it may be that, due to time constraints for responding to requests, arguments are formulated and argued by a public authority, based on its prior knowledge of the third party's concerns. It will be necessary to establish the source of, and evidence for, any arguments

about the prejudice to the commercial interests of a third party and to weight them accordingly.

60. In this case, the Commissioner has not been provided with any evidence that the arguments advanced by the Home Office are based on its prior knowledge of third party supplier concerns.
61. In the same way that he has been unable to conclude that the exemption is engaged with respect to the Home Office, the Commissioner does not find those arguments relating to the harm resulting from disclosure have been explained satisfactorily in terms of establishing a plausible link between disclosure and commercial prejudice to third party suppliers. He is therefore unable to conclude that the exemption is engaged with respect to those suppliers.

Section 40 – personal data

62. The Home Office confirmed that the information withheld by virtue of section 40(2) comprises *"the names of officials which are below the grade of Senior Civil Servant (SCS)"*.
63. It told the Commissioner that it considered disclosure would be in breach of the first data protection principle:

"We do not consider it fair, in a general sense, given the expectation that these staff have about the disclosure of their identities and contact details".
64. The Commissioner has issued guidance² that explains to public authorities what they should bear in mind when dealing with requests under FOIA that would involve disclosing personal data about their employees and how section 40 FOIA applies in such cases.
65. The Commissioner is satisfied that the Home Office, in applying section 40(2) in this case, was entitled to apply the exemption.

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[http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental info reg/Practical application/section 40 requests for personal data about employees.ashx](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental%20info%20reg/Practical%20application/section%2040%20requests%20for%20personal%20data%20about%20employees.ashx)

Right of appeal

66. 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: www.justice.gov.uk/tribunals/general-regulatory-chamber

67. 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.
68. 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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