

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 November 2016

Public Authority: Home Office

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested a copy of the 4 June 2014 independent internal review of the domestic homicide review process of the Home Office Domestic Violence Unit. The Home Office refused the request relying on the section 36(2)(b) FOIA exemption.
2. The Commissioner's decision is that the section 36(2)(b) FOIA exemption is engaged but the public interest in disclosing the review outweighed that in maintaining the exemption so that the exemption had therefore been wrongly applied.
3. The Commissioner requires the public authority to disclose the review to ensure compliance with the legislation.
4. The public authority must make this disclosure 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.

Request and response

5. In December 2014 the Home Office (HO) published the HM Inspectorate of Constabulary (HMIC) Domestic Abuse Review National Oversight Group Update Report (the HMIC report). The HMIC report said at recommendation 9 that HO should reconsider its

approach to domestic homicide reviews. It added that an independent internal review of the domestic homicide review process had been completed and its recommendations regarding systems and resources were being implemented. It added that HO guidance would be released in the coming months.

6. On 16 January 2015, the complainant wrote to HO requesting information in the following terms:

*Under the terms of the Freedom of Information Act 2000, please provide me with a full copy of the following report referred to in Recommendation 9 of this document:
[https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/395680/Domestic Abuse National Oversight Group Update v4 WEB.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/395680/Domestic_Abuse_National_Oversight_Group_Update_v4_WEB.PDF)*

Namely, the 'independent internal review of the domestic homicide review process'.

7. HO refused to provide the information, initially relying on the section 35 (Formulation of Government policy) FOIA exemption. Following a severely delayed internal review, HO relied instead on the section 36(2) FOIA (Prejudice to effective conduct of public affairs) and section 40(2) FOIA (Personal information) exemptions to withhold the full set of information requested.

Scope of the case

8. The complainant contacted the Commissioner on 13 May 2016 to complain about the way his request for information had been handled. He said that more than a year after he had asked for an internal review of the refusal decision, HO had rejected his request on spurious grounds.
9. The Commissioner considered the application of the section 36(2) and 40(2) FOIA exemptions. During her investigation, the Commissioner considered representations from the complainant and HO. Her staff reviewed the withheld information comprising the Domestic Violence Unit process review dated 4 June 2014 (the DVU review). She also considered the 23 June 2015 submission put to the Qualified Person (QP) and the response sent by his private office of 10 May 2016.

Reasons for decision

10. In their refusal notice of 17 March 2015 HO relied on the section 35 FOIA exemption to withhold the requested information. However at internal review HO decided to rely instead on the section 36(2)(b) FOIA exemption.
11. The sections 35 and 36 FOIA exemptions protect many of the same interests. However, sections 35 and 36 are mutually exclusive. This means that if any part of section 35 is engaged, section 36 cannot apply. In this matter HO were entitled to decide at internal review that section 35 did not, after all, apply and to rely instead on the section 36 exemption.

Section 36 – prejudice to effective conduct of public affairs

12. Section 36 FOIA provides that,

"(2) 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, ..."

13. HO applied the section 36(2)(b)(i) and (ii) FOIA exemptions to all of the withheld information.
14. Consideration of these exemptions is a two-stage process. First, the exemptions must be engaged on the basis of a qualified person having provided a reasonable opinion. Secondly, these exemptions are 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.
15. In determining whether the exemptions were correctly engaged by HO, 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.

16. HO explained that on 23 June 2015 a submission had been put to a QP, Rt Hon Mike Penning MP the Minister for Policing, Crime and Criminal Justice. The submission invited the QP to agree that the DVU review should be disclosed subject to redacting sections dealing with: key issues faced by the DVU; key risks; recommendations for improvement; and, conclusion and handover. The submission invited the QP to request a copy of the information to be withheld if he wished to see it which the QP did not do.
17. In their submission to the QP officials said that disclosing the information would inhibit the free and frank provision of advice and the free and frank exchange of views. They said that advice on the effectiveness of a department and recommendations for improvement must be free and frank if it is to be of value. Free and frank discussions were integral to improving and streamlining DVU working practices and procedures. The submission said that release of the DVU review would have an inhibiting effect because future reviewers would be reluctant to include detailed accounts of a department's weaknesses if they believed that the information was likely to be released. Officials added that some recommendations would also be withheld if they could be seen as controversial or unconventional.
18. HO did not provide the Commissioner with the QP's opinion. However on 10 May 2016, some eleven months after it had been submitted, the QP's private office told HO officials who told the Commissioner that the QP had 'cleared' the submission.
19. In considering whether or not the opinion from the QP was reasonable, the Commissioner noted that HO had put a reasoned submission to a QP who had 'cleared' it without comment, albeit after a delay of almost a year. HO attributed this delay to extensive scrutiny by the QP's private office combined with an administrative oversight.
20. HO said that the opinion of the QP was based upon the submission put to him. The Commissioner has seen no indication that the QP saw the DVU review at first hand nor has she seen any comment about it by the QP. However, in the light of the submission and the confirmation by his private office, the Commissioner accepted that the QP had given an opinion and that it was reasonable. She therefore decided that the Section 36(2)(b) FOIA exemption was correctly engaged.
21. As the Commissioner has decided that the exemption is engaged, she has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the

information. In her approach to the competing public interest arguments, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke Case, EA/2006/0011; EA/2006/0013).

22. The Commissioner noted, and has adopted in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in her assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b) FOIA, the Commissioner is entitled and needs, to form her own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. In the present case, the Commissioner recognises that there are competing public interest arguments. In balancing those she has given due weight to the opinion in the submission to the QP that disclosure would inhibit the provision of advice and the exchange of views for the purposes of deliberation.

Public interest arguments in favour of disclosing the requested information

23. HO said that in favour of disclosure, there was public interest in openness and transparency in all aspects of government. HO acknowledged that there is a particular public interest in information about the work and efficacy of the DVU.

Public interest arguments in favour of maintaining the exemption

24. HO said that its capability to meet its objectives is dependent on the ability of officials to obtain appropriate advice and input from stakeholders – in this case, an independent reviewer of the DVU's systems and processes. The DVU review highlighted key issues and risks in the processes and systems used by DVU. HO said that aspects of this work were still ongoing and that officials still needed to be able to think through all the implications of the options provided before decisions were fully reached on the next steps to take. Releasing the findings of the report before full deliberation and possible implementation of the changes, would undermine the ability of the DVU to fully react to the recommendations.
25. HO added that if government routinely disclosed the views of others following consultation, individuals would be wary, reticent or circumscribed, when asked to provide advice in the future, leading to poorer decisions being made which would not be in the public interest.

26. In accepting that the effectiveness of the DVU was a matter of significant public interest, HO said that it did not necessarily follow that it was in the public interest to disclose any or all information relating to its efficiency. Disclosure would inhibit individuals who might be asked to contribute on any future matters.
27. HO said that the chilling effect argument was convincing here in that disclosure would inhibit free and frank discussions in the future. The loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making especially as the issue in question was still live. Future reviewers would be reluctant to include detailed accounts of units' weaknesses if they believed that their views were likely to be made public.

Balance of the public interest

28. The public interest test is separate from the qualified person's opinion. Befitting the standing of the QP, however, his opinion should be afforded significant weight when exercising the public interest balancing test. In doing so, the Commissioner will form her own view on the severity, extent and frequency of the prejudicial or inhibitive effects being claimed when determining whether or not the public interest favours disclosure.
29. The Commissioner noted that the submission to the QP assumed that much of the information in the DVU review would be disclosed. The issue before the QP and now the Commissioner was how much of it to withhold.
30. HO told the Commissioner that the higher threshold 'would' applied rather than the lower level of 'would be likely to'. However HO did not respond to her invitation to provide supporting evidence for applying the higher threshold and the Commissioner has accordingly applied the lower level threshold of 'would be likely to' within the public interest balancing test.
31. The Commissioner considers there is a strong public interest in openness and transparency, in relation to how Government interacts with other public bodies. HO themselves acknowledge, and the Commissioner has noted, that there is significant public interest in the work of the DVU and, by extension, in the efficiency of its systems and processes.
32. The Commissioner recognises that Ministers and officials need to be able to exchange views freely and frankly among themselves and with others to ensure robust decision making in the operation of public services. However she has given little weight to 'chilling effect' arguments considering that Ministers, officials and HO contractors

will be robust and not easily deterred from setting out their views and reasoning.

33. HO told the Commissioner, and the Ministerial submission said, that both limbs of the section 36(2)(b) FOIA exemption applied, ie both advice and deliberation. However at the date of the January 2015 request, the DVU review, which is dated 4 June 2014, was by then already some seven months old and HO decided that the section 35 FOIA (formulation of government policy) exemption did not apply. That in itself suggests that the decision making process was very far advanced by the time of the information request.
34. Moreover the December 2014 HMIC report said that the DVU review recommendations regarding systems and resource were already being implemented. HO had said that the matter was still live at the date of the request but that implies that advice had been given and deliberation completed by the time of the January 2015 request.
35. On balance the Commissioner has decided that the public interest arguments in favour of maintaining the exemption are not strong and are outweighed by the public interest in disclosure. The section 36(2)(b)(i) and (ii) FOIA exemptions were therefore applied incorrectly in this case.

Section 40 – personal information

36. HO additionally relied on the section 40(2) FOIA exemption to withhold a small amount of personal information, the personal information of junior officials. It was common ground among the parties that this was appropriate so the Commissioner did not consider that exemption.

Right of appeal

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

38. 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.
39. 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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