

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 October 2023

Public Authority: Home Office
Address: 2 Marsham Street
London
Sw1P 4DF

Decision (including any steps ordered)

1. The complainant requested information on, and a copy of a redacted inspection report for, MBR Acres. The Home Office provided some information within the scope of the request but refused to provide the remainder, citing sections 36(2)(b)(ii) (prejudice to effective conduct of public affairs), 44(1)(a) (prohibitions on disclosure), 38(1)(a) and (b) (health and safety) and 40 (personal information) of FOIA.
2. The Commissioner's decision is that the Home Office is entitled to apply section 36(2)(b)(ii) of FOIA to refuse to disclose the withheld information and that the public interest favours maintaining the exemption.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 4 October 2022, the complainant wrote to the Home Office and requested information in the following terms:

"1 .Can you please tell me how many project licence applications for use of animals in regulated procedures, under ASPA [Animals (Scientific Procedures) Act] 1986 were rejected in each of the 21 years 2000 to 2021.

For MBR Acres, Wyton

2. Can I please have a redacted copy of the Inspectors report for the unannounced visit on 5th July 22
 3. Please can you also confirm that this establishment was found to be compliant in all respects
 4. If any non compliance was identified can you please tell me the nature of this and what remedial action was taken
 5. Has this establishment ever self reported any instances of non compliance
 6. At the time of the inspection can you please tell me how many dogs were in the facility and if possible a split between breeding bitches, stud dogs, donor dogs and puppies”.
5. The Home Office responded on 1 November 2022. It provided a response to part (1) of the request. It confirmed it holds information in scope of parts 2-5 of the request, but refused to provide it, citing section 36(2)(b)(ii) of FOIA. It denied holding information in scope of part (6) of the request.
 6. The Home Office maintained its application of section 36 following an internal review.

Scope of the case

7. The complainant was dissatisfied with the Home Office’s refusal to provide information in scope of parts 2-5 of the request. They considered that a redacted version of the inspection report should be disclosed.
8. The Commissioner wrote to the Home Office asking it to explain its handling of parts 2-5 of the request.
9. During the course of the Commissioner’s investigation, the Home Office confirmed its application of section 36 to those parts of the request. It additionally cited section 44(1)(a) (prohibitions on disclosure) of FOIA to withhold the information in scope of parts 2-5 of the request, on the basis that there is a prohibition on disclosure in section 24 of ASPA. It subsequently also cited sections 38(1)(a) and (b) (health and safety) and 40 (personal information).
10. The Home Office wrote to the complainant advising them of the additional exemptions being relied on in this case.
11. The Commissioner recognises that the complainant was extremely dissatisfied about further exemptions being applied at this late stage.

However, the Commissioner accepts that a public authority has the right to claim an exemption for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.

12. In its submission to the Commissioner, the Home Office also confirmed that the responses to parts 2-5 of the request can be found in the requested report.
13. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of FOIA.
14. The Commissioner accepts that requested information is found in a document whose purpose is to provide an audit template for a facilities audit of an establishment. In this case, he takes the position that the report comprises standard, pre-defined sections and paragraphs as well as content relating specifically to MBR Acres.
15. The Commissioner recognises that the Home Office considers that section 36(2)(b)(ii) applies to the withheld report as a whole. It also confirmed that it considers that the exemptions at sections 44(1)(a), 38(1)(a) and (b) and 40 are engaged for parts of the information in the withheld report.
16. The Commissioner has first considered whether the Home Office was entitled to apply section 36(2)(b)(ii) to withhold the requested information. If the Commissioner considers that it has been incorrectly cited, he will go on to consider the other exemptions the Home Office considers apply.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

17. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
18. The exemption at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that Lord Sharpe of Epsom, a Minister of the Crown, is authorised as the qualified person under section 36(5) of FOIA.
19. The Home Office provided the Commissioner with a copy of a submission to the qualified person and of the qualified person's opinion.

20. It acknowledged that the opinion was sought on 24 October 2022 and received on 25 October 2022.
21. From the evidence he has seen, the Commissioner accepts that the information that the qualified person considered when they gave their opinion was the information that falls to be considered under section 36 in this case.
22. In determining whether the exemption is engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one.
23. 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 unreasonable 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.
24. The Home Office confirmed that it was relying on section 36(2)(b)(ii) on the basis that disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation. Specifically, it considers that disclosure of the report would be likely to inhibit the free and frank exchange of views needed to ensure effective regulation in the area of work that is the subject of this request. It argued that disclosure would hinder the continuation of delivering effective regulation.
25. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focussing only on the content of the information.
26. With regard to section 36(2)(b)(ii), the issue is whether disclosure would be likely to inhibit the process of exchanging views. In order to engage the exemption, the information itself does not necessarily have to contain views that are in themselves free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the exchange of views. Therefore, although it may be harder to engage the exemptions if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order not to inhibit the free and frank exchange of views. This will depend on the facts of each case.

27. Having viewed the withheld information, the Commissioner considers that it is not unreasonable to engage section 36(2)(b)(ii) in this case, given the nature of the withheld information.
28. Section 36 is subject to the public interest test. The Commissioner notes that the Home Office considers that disclosure would be likely to prejudice or inhibit the effective conduct of public affairs.
29. The Commissioner has carried this lower level of likelihood through to the public interest test.

Public interest arguments in favour of disclosing the information

30. The complainant considers that it is in the public interest to disclose the requested report. Furthermore, they consider that the Home Office's decision in this case is inconsistent with previous decisions about disclosure, observing that the Home Office has previously published inspection reports, with redactions.
31. Furthermore, they consider that the public being aware of information "should add to not subtract from the standards set in place by licence holders". In that respect, they told the Commissioner:

"It is not only in the public's interest, but the public is entitled to understand that the regulator is properly assessing any particular licence holder's conduct".
32. The Home Office recognised the public interest in openness and transparency and in enabling access to information about the use of animals in science.
33. It also recognised the specific public interest in information about establishments licensed under ASPA.

Public interest arguments in favour of maintaining the exemption

34. In its correspondence with the complainant, the Home Office simply stated that disclosure would be likely to inhibit the free and frank exchange of views and prejudice the effective conduct of public affairs, thus compromising effective regulation of establishments under ASPA.
35. In its submission to the Commissioner, the Home Office expanded on the view that disclosure of the requested information would hinder the public good of effective regulation of establishments using animals in science. It argued that it would not be in the public interest if disclosure of the requested information led to a loss of trust in the system.
36. It told the Commissioner:

“There would be a real risk to the confidence of licence holders being able to have a free and frank exchange of views with the Regulator if we were to disclose the findings of the report. To continue delivering effective regulation it is vital licence holders are able to be open and frank with the Regulator on an ongoing basis and not be deterred from engaging in an open manner, ...”.

The balance of the public interest test

37. In considering complaints regarding section 36, where the Commissioner finds that the qualified person’s opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
38. With respect to the nature of the withheld information in this case, the Commissioner accepts that the requested information relates to what is a sensitive topic.
39. With regard to the public interest in favour of disclosing the information, the Commissioner acknowledges that there is a public interest in information relating to animals and the activities of establishments licensed under ASPA.
40. However, the Commissioner also recognises that, having accepted the reasonableness of the qualified person’s opinion, he must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
41. In the circumstances of this case, the Commissioner accepts that there is a need for a safe space to exchange views free from external comment and examination. Having considered the content of the withheld information, the Commissioner accepts that disclosure would be likely to impact on the effectiveness of this process.
42. The Commissioner has been mindful of the public interest in the Home Office having effective processes which allow free and open conversations between establishments and the Regulator. In this case, he considers that the severity of the prejudice that may happen as a result of disclosing the withheld information affects the weighting of the public interest in disclosure.
43. The Commissioner has also considered the extent to which the content of the withheld information at the time of the request would add to the public debate and inform the public’s understanding.

44. The Commissioner has assessed the balance of the public interest. He has weighed the public interest in avoiding the inhibition of the free and frank exchange of views for the purposes of deliberation against the public interest in openness and transparency. His conclusion is that the public interest in avoiding this inhibition is a relevant factor and he considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.
45. It follows that his decision is that the Home Office was entitled to rely on section 36(2)(b)(ii) of FOIA to withhold the requested information.

Other exemptions

46. In light of the above decision, the Commissioner has not considered the Home Office's application of other exemptions to the same information.

Other matters

47. The Commissioner recognises¹ that the internal review process provides a public authority with the opportunity to:
- “... consider how the request was handled and the initial response, whether the relevant information was identified, and whether you wish to uphold the original exemptions or whether you wish to apply a different or additional exemption(s)”.
48. While he accepts that a public authority has the right to claim an exemption for the first time before the Commissioner or the Tribunal, the Commissioner is concerned that Home Office found it necessary to apply further exemptions on multiple occasions during the course of his investigation.
49. He encourages the Home Office to take the opportunity to review its handling of this case, and identify any potential weaknesses in its procedures, to help to improve its performance where necessary.

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-45-code-of-practice-request-handling/request-handling-freedom-of-information-frequently-asked-questions/#internal>

Right of appeal

50. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

51. 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.

52. 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

**Gerrard Tracey
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