

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 June 2024

Public Authority: Immigration Services Commissioner
Address: 5th Floor, 21 Bloomsbury Street
London WC1B 3HF

Decision (including any steps ordered)

1. In a seven-part request, the complainant requested information about competence assessments. The Office of the Immigration Services Commissioner (OISC) advised it doesn't hold some of the information and applied section 35 of FOIA to the remainder. OISC also applied section 43(2) to one part of the request. Its final position, however, is that it doesn't hold information within scope of any part of the complainant's request.
2. The Commissioner's decision is that, on the balance of probabilities, OISC doesn't hold the requested information. By relying on section 35 initially, OISC indicated that it held some relevant information within scope of parts 1, 2 and 3; as such it didn't comply with section 1(1)(a) and 10(1) of FOIA as it didn't confirm it didn't hold any of the requested information within the statutory time period.
3. It's not necessary for OISC to take any corrective steps.

Request and response

4. The complainant sent the following information request to OISC on 11 October 2023:

"With reference to the examination(competence assessment) for registration as the immigration adviser:

- (i) minutes of meetings, internal memos, external memos and any kind of correspondence, document and archive indicating, listing and/or describing the specific qualifications and work experience which has satisfied the Commissioner in terms of Schedule 6 Section 2(1) of the Immigration and Asylum Act 1999, granting applicants direct registration at level 1, level 2 and level 3, without the need to undergo an examination (competence assessment).
 - (ii) minutes of meetings, internal memos, external memos and any kind of correspondence, document and archive indicating, listing and/or describing the specific qualifications and work experience which has satisfied the Commissioner in terms of Schedule 6 Section 2(1) of the Immigration and Asylum Act 1999, granting applicants direct registration at level 1, level 2 and level 3 , without the need to provide additional documents and information,
 - (iii) minutes of meetings, international memo, external memos, any kind of correspondence, document and archive related to the decision making process adopted by the OISC when introducing the examination (competence assessment) for registration at level 1, level 2 and level 3.
 - (iv) the number of applicants who were granted direct registration without sitting the examination (competence assessment) from the date the OISC was established by statute, specifying their qualifications and work experience and, in the case, the reasons for the waiver.
 - (v) the number of applicants who were granted direct registration without sitting the examination(competence assessment) from the date the examination for registration was introduced by the OISC, specifying their qualifications and work experience.
 - (vi) number of applicants requesting a waiver from sitting the examination for registration (competence assessment), number of the waivers granted and the reasons for granting them.
 - (vi) [sic] minutes of meetings, internal memos, external memos and any kind of correspondence, document and archive related to the decision to delegate the conduct of the examination (competence assessment) to an external entity as well as any document related to the actual delegation itself.”
5. The Commissioner understands from OISC that the request relates to its decision to outsource competence assessments to HJT [a training provider].

6. In its response to the request, OISC advised that it doesn't hold the information requested in parts 4, 5 and 6 of the request. It advised that the information requested in parts 1, 2, 3 and 7 (as OISC understood part 7 and which the complainant incorrectly labelled as a second part (vi)) is exempt under section 35 of FOIA. It also applied section 43 to part 7, as it understood that part. With regard to parts 1, 2 and 6 OISC directed the complainant to relevant information published on its website.
7. In its internal review, OISC addressed points the complainant raised and confirmed that due to its retention schedule, it doesn't hold historical information about advisors and applicants. However, OISC upheld its application of section 35 of FOIA to some parts of the request.

Reasons for decision

8. In their complaint to the Commissioner, the complainant raised the following concerns:
 1. The OISC erroneously relied on the exemption of section 35.1a) being a NDPBs and not a Government-Department (see-page-1-Last-Attachment)
 2. Section 35 is not engaged because the OISC is not currently formulating nor developing a policy concerning the registration process, nor the competence assessment nor even the legal qualifications and experience granting the applicants direct registration and/or a waiver from the assessment. The last OISC's public consultation ended on 23.10.2023 and referred exclusively to establish a New-Code-of-Conducts, principle oriented (see-pages-5-8-Last-Attachment)with-no-relation-to-the-registration-process-or-the-competence-assessment.
 3. All documentation and information requested dates back many years (at-least-2013-2014) when the competence assessment was introduced and when the OISC decided to delegate the conduct of the exam to an external entity.
 4. In the event that section 35.1a) was properly engaged, public interest in knowing the criteria identified by OISC to grant direct registration or to establish a-de-facto entry-into-profession-examination, and subsequently delegate it to a private entity, clearly outweighs the OISC's interest in a safe space.

5. I did not request the agreement between OISC-HJT, but rather the document related to the OISC's decision to externalise the exam (including-if-the-case-a-tender-procedure-or-equivalent).
6. The OISC, being a regulator, needs to keep records of all applications and waivers granted."
9. In later correspondence to the Commissioner, on 13 May 2024, the complainant said that because OISC has enforcement and prosecutorial functions, it couldn't dispose of application records after six years.
10. The Commissioner put all the complainant's points to OISC and asked it to address them. On 30 May 2024, he also asked OISC to clarify what government policy it considered the information it appeared to hold relates to and whether that policy is still being formulated or developed.
11. In a submission to the Commissioner dated 3 June 2024 OISC clarified that it doesn't hold information within scope of parts 1, 2 and 3 which concern information about decisions OISC had made in the past.
12. With regard to part 7 of the request OISC confirmed that, since the complainant has now clarified that they're seeking decision-making information only and not contractual information, it has withdrawn its reliance on section 43 because it doesn't hold that information. As such, section 35 therefore can't be applied to part 7 either.
13. In light of OISC's clarified position, the Commissioner will consider whether OISC holds any information relevant to the seven parts of the complainant's request. He'll also consider the timeliness of its response.
14. Under section 1(1) of FOIA a public authority must (a) confirm whether it holds information relevant to an applicant's request and (b) communicate the information to the applicant if it's held and isn't exempt information.
15. Section 10(1) of FOIA obliges a public authority to comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
16. By way of a general explanation, in its initial submission to the Commissioner which it provided on 24 April 2024, OISC had advised that, broadly, data it holds is only retained for a limited retention period, which is a six-year period, and so the information sought is unavailable. However, relevant information about the assessment exists through the published OISC documents on its website and on 'OISC Assessment Frequently Asked Questions' on GOV.UK.

17. Parts 1, 2 and 3 of the request are for information about decisions OISC made about competence assessments; why it decided exams weren't necessary, why it decided additional documents and information weren't necessary and why it decided to introduce an exam for registration at level 1, level 2 and level 3.
18. With regard to these parts, in its initial submission OISC had explained that Schedule 6, part 1(1)b of the Immigration and Asylum Act 1999 (as amended) provides the Immigration Services Commissioner with the power to determine what information or supporting evidence should accompany an application for regulation. Based on that information or supporting evidence, the Immigration Services Commissioner will make the decision set out at section 2(1) whether the person is competent or otherwise fit to provide immigration advice and/or services.
19. Prior to 2013, OISC said, the Immigration Commissioner made the decision that a formal test should make up part of the information that would allow the Immigration Services Commissioner to determine Section 2(1). The Immigration Services Commissioner at this time had considered whether any exemptions might be applied in terms of the need to take the test, or any exemption from the need to supply supporting documents. OISC told the Commissioner that, given how long ago this was, and as it was predating the OISC six-year retention period, there's no record of how the decisions associated with parts 1, 2 and 3 of the request were made.
20. In its further submission of 3 June 2024, OISC noted that the complainant is seeking information relating to the OISC's decision to outsource the competence assessment to HJT. OISC confirmed that this decision wasn't formulated or deliberated at the time of the request but was something that had been formulated over ten years ago. As such, any relevant information isn't retained by the OISC, due to its data retention policy.
21. OISC went on to explain that the outcome of those deliberations has since resulted in the implementation of the competence assessments. This is one of the ways the Immigration Service Commissioner assesses whether applicants meet competency criteria in order to join his regulatory scheme. Therefore, all information about OISC competence assessments is already on its website.
22. Parts 4, 5, 6 and 7 of the request are for: the number of applicants who were granted direct registration without sitting the competence assessment examination from the date OISC was established and from the date OISC introduced the examination for registration; the number of applicants requesting a waiver from sitting the examination for registration, the number of the waivers granted and the reasons for

granting them; and information on the decision to delegate delivering the examination to an external entity.

23. Regarding part 6 specifically, in its initial submission OISC confirmed that it doesn't record the number of applicants who were granted a waiver from sitting an exam in a way that is reportable for statistical analysis. It went on to explain that those who will be granted a waiver will be those who satisfy the exemption under its 'Application for Registration Guidance Note.' OISC says it assesses all applications in the round and considers all the evidence. For example, applicants are granted a waiver if:
- they have successfully completed the Law Society Immigration and Asylum Accreditation Scheme (IAAS)
 - they are already regulated with another organisation at the same level they are applying for
 - they are applying for registration after leaving the OISC regulatory scheme for a short period of time (six months).
24. In its initial submission to the Commissioner, OISC had advised the following about parts 4 to 6:
- "The exemptions that have existed over the last 11 years are much the same as those that currently apply. These relate to applicants who are either already OISC regulated and have been regulated within a set period, those that don't require assessment because they are only applying in a specific category that does not require a test (Asylum Level 1 or EUSS only), or those who hold IAAS accreditation. Details on exemptions etc can be seen within OISC's current guidance documents*"
25. OISC also told the Commissioner that enquiries it made to the relevant members of staff found that there's no knowledge of any meetings or documents in which the OISC indicates, lists, or describes additional ways in which applicant advisers may gain registration without the need to follow the required application processes set out above, due to the document retention period. OISC has noted that the Immigration Services Commissioner occasionally gets applications that because of disabilities require reasonable adjustments to be made in relation to testing, or other exceptional reasons, but has confirmed that there are no records of these.
26. Regarding the point the complainant made to the Commissioner on 13 May 2024, in its further submission of 3 June 2024, OISC confirmed first, that it does prosecute offences and that it keeps any data relating to those prosecutions for as long as necessary. However, OISC says, the

information the complainant has requested doesn't relate to prosecution data. And, in any event, in line with [UK] General Data Protection Regulation Article 5(1)(e) and the legal limitation periods, OISC has a policy of, broadly, not keeping records beyond six years.

The Commissioner's conclusion

27. OISC's final position is that it doesn't hold the historical information the complainant has requested. Current information about regulated immigration advisers and how to become one is contained in a range of guidance material and Frequently Asked Questions published on its website and to which it's directed the complainant.
28. FOIA isn't concerned with information an applicant considers a public authority **should** hold; it's focus is solely on the information an authority holds at the time of a request. On the basis of the nature and age of the requested information, OISC's retention policy, the internal enquiries it's carried out about any relevant information and its corporate knowledge about the information it holds and doesn't hold, the Commissioner's satisfied that, on the balance of probabilities, OISC doesn't hold any information relevant to the seven parts of the complainant's request.
29. Leaving aside part 7 of the request which the complainant subsequently clarified, OISC's response to parts 1, 2 and 3 of the request suggested it held information relevant to these parts as it applied section 35 of FOIA to them. During the course of the Commissioner's investigation, it's become apparent that OISC doesn't hold this information. OISC therefore didn't comply with section 1(1)(a) or 10(1) of FOIA as it didn't confirm it doesn't hold any relevant information within 20 working days of the request.

Right of appeal

30. 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

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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