

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2015

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

Decision (including any steps ordered)

1. The complainant requested all communications between Fiona Woolf and the Home Secretary and the Permanent Secretary of the Home Office between 3 September 2014 and the date of the request. 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 this exemption correctly and so it was not obliged to disclose this information.

Request and response

3. On 22 October 2014, the complainant wrote to the Home Office and requested information in the following terms:

"My request is as follows:

Please provide copies of all correspondence and communications between Mark Sedwill and Fiona Woolf from September 3, 2014, to today's date;

Please provide copies of all correspondence and communications between Theresa May and Fiona Woolf from September 3, 2014, to today's date."

4. The Home Office responded on 12 December 2014. The request was refused, with the exemptions provided by sections 36(2)(b)(ii) (inhibition to the free and frank exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs) of the FOIA cited.
5. The complainant responded on the same date and asked the Home Office to carry out an internal review. The Home Office responded with the outcome of the review on 15 January 2015. The refusal of the request was upheld on the grounds given previously.

Scope of the case

6. The complainant contacted the Commissioner on 16 January 2015 to complain about the refusal of his information request. The complainant indicated at this stage that he did not agree with the grounds given by the Home Office for refusing his request and that he believed that it would be in the public interest to disclose this information.
7. In correspondence with the ICO the Home Office notified that one document falling within the scope of the request was in the public domain. It stated that it would write to the complainant advising of where this document could be accessed and would cite the exemption provided by section 21 (information accessible by other means) of the FOIA in relation to it. The Commissioner has assumed that the complainant has accessed that document and so it is not covered in the analysis below.

Reasons for decision

Section 36

8. The Home Office has cited section 36(2)(b)(ii), which provides an exemption where disclosure would, or would be likely to, inhibit the free and frank exchange of views. Section 36(2)(c) exempts information the disclosure of which would, or would be likely to, otherwise prejudice the effective conduct of public affairs. The Commissioner's approach is that section 36(2)(c) should be cited only where the prejudice identified would not be covered by any other subsection from section 36, or any of the other exemptions in Part II of the FOIA.
9. These exemptions 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 Commissioner when deciding whether these exemptions are engaged is

to reach a conclusion on whether the opinion of the QP was reasonable. These exemptions are also qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.

10. The Commissioner has focussed on section 36(2)(c). 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 Lord Bates, Parliamentary Under Secretary of State for Criminal Information and supplied evidence that this opinion was given on 5 December 2014. On the basis of this evidence, the Commissioner accepts that an opinion was given by a valid QP.
11. 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) was that disclosure would deter suitable candidates from joining public inquiries due to what may be taken as an indication that sensitive communications between members of inquiries and the relevant government department could be disclosed.
12. The Home Office developed this argument further in correspondence with the ICO, indicating that the reasoning of the QP was that at least some potential candidates would be deterred from serving on such panels of inquiry if communications relating to their appointment were to be routinely disclosed under FOI. Whilst the outcome of this case would relate only to the information request quoted above and so would set no precedent for similar information to be "*routinely*" disclosed, the Commissioner accepts that the point being made by the Home Office concerned the inference that could be drawn by future candidates.
13. The Home Office stated that the opinion of the QP was that prejudice "*would*" result, rather than "*would be likely*" to result. Whilst the Home Office stated the opposite to this in the internal review response to the complainant, that the QP believed that the stronger test applied is borne out by the wording of the submission mentioned above. The approach of the Commissioner to other prejudice based exemptions is that to accept that prejudice *would* result, this outcome must be more probable than not. Applying the same approach here, the question is whether it was reasonable for the QP to hold the opinion that disclosure of the information in question would be more likely than not to discourage future potential members of inquiries.

14. That Fiona Woolf resigned as chair of the inquiry in question shortly after the date of the request is relevant here. Whilst the operation of that specific inquiry has not been cited as part of the QP's reasoning, the Commissioner has taken it into account as evidence of the issues that can surround appointments to inquiries and the possibly sensitive nature of correspondence between candidates and departments about such appointments. This background illustrates why suitable candidates may prefer not to serve on an inquiry if they perceived that this may lead to sensitive correspondence being disclosed.
15. Taking into account this background, the Commissioner accepts that it was objectively reasonable for the QP to hold the opinion that disclosure would result in prejudice in the way described. He also accepts that it was appropriate to cite section 36(2)(c), rather than any of the other exemptions in Part II of the FOIA. The conclusion of the Commissioner is, therefore, that the exemption provided by section 36(2)(c) was engaged.
16. 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 his conclusion of the reasonableness of that opinion. Instead, his 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.
17. 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 public inquiries to appoint suitable candidates. As to how much weight this should carry in the balance of the public interests, the question here is what the severity, extent and frequency would be of the prejudice identified by the QP.
18. On the issue of severity, the Commissioner again refers to the inquiry to which the withheld information relates. The impact of the difficulties in finding a suitable chairperson for that inquiry has been severe. At the time of writing the reconstituting of that inquiry, including a new chair, has only recently been announced. The difficulty in constituting the membership of that inquiry means that it has yet to begin work in earnest, approximately seven months after it was first announced.
19. Given the evidence from the child abuse inquiry, the Commissioner's view is that the prejudice caused to inquiries through difficulty in appointing suitable candidates would be severe. As to the frequency and

extent of that prejudice, inquiries of the extent and profile of the child abuse inquiry are likely to be rare. It is more relevant, however, that where such inquiries do take place, they are likely to concern only those matters of the gravest nature. That they would be subject to severe prejudice is therefore a significant issue, even if the rareness of inquiries of this importance means that the extent and frequency of that prejudice would not be great.

20. The Commissioner's view is that the public interest in avoiding severe prejudice to inquiries of comparable stature to the child abuse inquiry is a matter of fundamental public interest. The public interest in avoiding the outcome that the QP believes would occur as a result of disclosure of the information in question is, therefore, a factor in favour of maintenance of the exemption of very significant weight.
21. Turning to factors that favour disclosure of this information, the Commissioner recognises that there is a very strong public interest in information relating to the appointment of Fiona Woolf as chair of the child abuse inquiry. Mrs Woolf stood down as chair of this inquiry due to perceived conflict between her background and the remit of the inquiry. As previously mentioned, the problems with appointing a chairperson has led to the work of this inquiry being delayed. How it was that, for the second time, an individual was appointed as chair who was considered by many of the inquiry stakeholders as unsuitable for that position, with the resultant delay, is a matter of pressing public interest.
22. However, the relevance that public interest has to the information in question here is somewhat limited. This gives little insight into the reason why the Home Secretary chose to appoint Mrs Woolf; the wording of the request has the effect of excluding any documents internal to the Home Office that comment on that reasoning. The particular reason why Mrs Woolf was considered by many an unsuitable appointment was her relationship with the Brittans. This is commented on briefly within the withheld information, but most of its content does not relate to this.
23. The Home Office referred the Commissioner to a letter from Mrs Woolf to the Home Secretary that is in the public domain¹. This letter comments more substantively on Mrs Woolf's relationship with the Brittans than any of the content of the withheld information. The Commissioner has taken into account here that this information that is

¹ <https://childsexualabuseinquiry.independent.gov.uk/wp-content/uploads/2014/10/Letter-to-the-Home-Secretary.pdf>

within the scope of the complainant's information request is already in the public domain.

24. Whilst there is very significant public interest in information relating to the appointment of Fiona Woolf to chair the child abuse inquiry, the weight that this carries as a factor in favour of disclosure in this case is somewhat reduced. This is due to the reasons mentioned above about the content of the withheld information and the information that is already in the public domain.
25. In conclusion, the Commissioner has recognised that there is strong public interest in disclosure given the subject matter of the information, but that the weight of this public interest is reduced from the level it would otherwise have reached due to the circumstances covered in the preceding paragraphs. The public interest in the maintenance of the exemption is, meanwhile, in the Commissioner's view of very great weight and, as a result, his conclusion is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. The Home Office was not, therefore, obliged to disclose this information.

Right of appeal

26. 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>

27. 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.
28. 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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