

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2017

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

Decision (including any steps ordered)

1. The complainant requested information relating to the 'mystery shopper' research undertaken as part of the Home Office's evaluation of the 'Right to Rent' scheme.
2. The Home Office ultimately relied on sections 40(2) (personal information), 41(1) (information provided in confidence) and 43(2) (commercial interests) of the FOIA to withhold the information it held that fell within the scope of the request.
3. The complainant disputed the Home Office's application of section 41(1) to the information withheld by virtue of that exemption.
4. The Commissioner's decision is that the Home Office failed to demonstrate that the exemption in section 41 of the FOIA is engaged.
5. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:
 - disclose the information withheld by virtue of section 41(1).
6. The Home Office 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

7. BDRC Continental¹ is the UK's largest independent research consultancy.
8. ESA Retail² is the leading provider of retail insight services in the UK and Ireland, offering a range of services from price, promotion, space, range, availability and compliance audits through to large scale customer feedback surveys and mystery shopping programmes.

Request and response

9. On 27 April 2016, using the 'WhatDoTheyKnow' website, the complainant wrote to the Home Office and requested information about the results of a mystery shopping exercise:

"I am writing to request the documents which record the results of the mystery shopping exercise conducted by BDRC Continental - 'Mystery shopping to test the potential for discrimination within the private rental sector: Research report 85', part of the Home Office evaluation of the 'right to rent' scheme – 'Evaluation of the Right to Rent scheme Full evaluation report of phase one: Research Report 83' published in October 2015.

The final research reports categorise the results into two groups: 'white British' and 'BME'. However, the research was undertaken using three separate scenarios. I request documents that provide a detailed breakdown of the results of each individual scenario.

This would include documents that contain:

- 1. The original record sheets completed by individual mystery shoppers.*
- 2. A breakdown of the responses from each individual within each pair of the three separate scenarios tested, clearly indicating which role they acted...".*

¹ <http://bdrc-continental.com/>

² <https://www.esa-retail.co.uk/>

10. The Home Office responded on 7 June 2016. It refused to provide the requested information citing the following exemptions:

- section 41 (information provided in confidence); and
- section 43 (commercial interests).

11. The complainant requested an internal review in which she also requested additional information:

"1. The contractual agreement between the mystery shoppers and BDRC continental undertaken for the purposes of the above research

2. A copy of any consent form signed by the mystery shoppers as part of the research.

3. The level of compensation, payment or reimbursement that mystery shoppers received for their participation in the research".

and

"Details of any contact between the Home Office or BDRC Continental and landlords and agents who were the subject of the mystery shopping exercise. Explicitly, any contact that sought consent from landlords or made them aware that they would be or had been the subject of a mystery shopping exercise".

12. Following an internal review, the Home Office wrote to the complainant on 23 August 2016. It stated that it had revised its position: it confirmed that it considered that section 41 applied but that it was no longer relying on section 43.

13. With respect to the further information requested, the Home Office additionally cited section 40(2) (personal information) in respect of some of that information and denied holding the remainder.

Scope of the case

14. The complainant contacted the Commissioner on 21 October 2016 to complain about the way her request for information had been handled. She told the Commissioner:

"Specifically, the request related to:

1. the original record sheets completed by individual mystery shoppers; and

2. a breakdown of the responses by scenario within each pair of the three scenarios tested.

...

3. *the contractual agreement between the mystery shoppers and BDRC Continental undertaken for the purposes of the research;*
 4. *a copy of any consent form signed by the mystery shoppers as part of the research; and*
 5. *information about the level of compensation, payment or reimbursement that mystery shoppers received for their participation in the research”.*
15. She disputed the Home Office’s application of section 41 of the FOIA to the record sheets and a breakdown of the mystery shopping results by scenario (items 1 and 2 above).
 16. The complainant also disputed that the additional information she requested at internal review (items 3-5 above) was exempt from disclosure under section 40(2).
 17. During the course of the Commissioner’s investigation, the Home Office wrote to the complainant clarifying the amount of information it held that falls within the scope of the request and the exemptions it considers apply.
 18. Having been advised by the Home Office that it had revisited the request, the complainant wrote to the Commissioner confirming that she would like the Commissioner to investigate its application of section 41(1).
 19. In light of the above, the analysis below considers the Home Office’s application of section 41(1) of the FOIA to the information withheld by virtue of that exemption.

Reasons for decision

Section 41 information provided in confidence

20. Section 41 sets out an exemption from the right to know when the information was provided to the public authority in confidence.
21. Section 41(1) of the FOIA states that information is exempt from disclosure if:

“(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

22. Therefore, for this exemption to be engaged, two criteria have to be met: the public authority has to have obtained the information from a third party and the disclosure of that information must constitute an actionable breach of confidence.
23. The information at issue in this case comprises a spreadsheet of collated returns which record the results of the mystery shopping exercise.

Was the information obtained by the Home Office from another person?

24. In its submission to the Commissioner, the Home Office stated that the mystery shoppers were contracted by BDRC Continental from ESA Retail's panel of mystery shoppers. The Home Office explained that the mystery shoppers were recruited to represent individuals posing as prospective tenants.
25. The Home Office told the Commissioner that the information it held that fell within the scope of the request was provided to the Home Office by BDRC Continental.

Would disclosure of the information constitute an actionable breach of confidence?

26. With regard to whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd [1968] FSR 415*. That judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

27. Further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

Does the information have the necessary quality of confidence?

28. For the information to have the necessary quality of confidence it must not be trivial and not otherwise available to the public. Information

which is of a trivial nature or already available to the public cannot be regarded as having the necessary quality of confidence.

29. The Home Office offered no evidence regarding why it considered that the information was not of a trivial nature.
30. Regarding whether the information was otherwise accessible, the Home Office acknowledged that some of the results from this exercise were included in a report by BDRG Continental. Nevertheless, it remained of the view that the full results of the exercise are covered by the exemption at section 41 of the FOIA.

The obligation of confidence

Detriment to the confider

31. Regarding an obligation of confidence, the Commissioner's published guidance on section 41³ states:

"There are essentially two circumstances in which an obligation of confidence may apply:

- The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter); or

- The confider hasn't set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances. For example, a client in therapy wouldn't need to tell their counsellor not to divulge the contents of their sessions to others, it is simply understood by both parties that those are the rules.

...

If the authority is still in any doubt, then it would be best advised to seek the views of the parties who would be affected by the disclosure of requested information".

32. Regarding detriment to the confider her guidance states:

"...for commercial information, the authority will be expected to put forward an explicit case for detriment. Usually the detriment to the

³ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

confider in such cases will be a detriment to the confider's commercial interests".

33. In correspondence with the complainant, with respect to the spreadsheet of information, the Home Office told her:

"This was provided to us by BDRC with no expectation that it would be made public in this format. As stated in our reply we accept that some of the results of this exercise have been reported on but this does not mean that the complete data should be disclosed".

34. Similarly, in correspondence with the Commissioner, the Home Office confirmed its view that the whole spreadsheet:

"is exempt from disclosure by virtue of section 41 of the Act. This is because it was provided to us with no expectation that it would be released in full to the public".

35. The Commissioner noted that the Home Office's submission did not provide any evidence in support of that view, nor did it address the issue of potential detriment to the confider.

Is the exemption engaged?

36. Given the nature of the information in this case, the Commissioner considered that disclosure would only constitute a breach of confidence if it would have a detrimental impact on the confider.

37. Where an authority fails to provide sufficient evidence in its submissions or does not otherwise explain why information should be withheld, the Commissioner does not consider it is her role to generate arguments on its behalf.

38. In this case, the Commissioner considered that the Home Office failed to prove that disclosure of the information withheld by virtue of section 41(1) would constitute an actionable breach of confidence.

39. It follows that the exemption at section 41 does not apply.

Right of appeal

40. 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

41. 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.

42. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF