

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2018

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

Decision (including any steps ordered)

1. The complainant requested information held by the Extremism Analysis Unit relating to the Stop the War Coalition. The Home Office refused to confirm or deny whether it held information within the scope of the request and cited the exemption provided by section 36(3) (prejudice to the effective conduct of public affairs) of the FOIA.
2. The Commissioner's decision is that the Home Office cited section 36(3) correctly and so it was not obliged to confirm or deny whether it held the requested information. However, the Commissioner also finds that the Home Office breached section 17(3) of the FOIA by failing to respond to the request promptly.

Request and response

3. On 8 November 2016 the complainant wrote to the Home Office and requested information in the following terms:

"Please would you let me know in writing if you hold information of the following description:

Information held by the Extremism Analysis Unit about the Stop the War Coalition.

Please may I see the information."

4. After a delay, the Home Office responded substantively on 8 February 2017. It refused to confirm or deny whether it held the requested information and cited the exemption provided by section 36(3) (prejudice to the effective conduct of public affairs) of the FOIA.
5. The complainant responded on the same date and requested an internal review. After an extremely lengthy delay, the Home Office responded with the outcome of the review on 20 October 2017. The outcome of more than eight months consideration was that the refusal of the request under section 36(3) was upheld.

Scope of the case

6. The complainant contacted the Commissioner on 20 October 2017 to complain about the refusal of his information request. The complainant indicated that he did not agree with the reasoning of the Home Office for the refusal of his request.

Reasons for decision

Section 17

7. Whilst section 17(3) allows a public authority to extend the time to respond to a request where additional time is needed to consider the balance of the public interests in relation to the citing of a qualified exemption, the approach of the Commissioner is that such an extension should be for a maximum of a further 20 working days. The total time taken to respond to a request should not, therefore, extend beyond 40 working days.
8. In this case the Home Office took more than 40 working days to substantively respond to the request and, in so doing, breached section 17(3) of the ICO. The Commissioner comments further on this delay and the delay at internal review stage in the Other matters section below.

Section 36

9. The Home Office cited section 36(3), which provides an exemption from the duty to confirm or deny where to do so would, or would be likely to, have any of the effects mentioned in section 36(2). In this case the Home Office indicated that its position was that provision of the confirmation or denial would be likely to have an effect relevant to section 36(2)(c), which provides an exemption where disclosure would,

or would be likely to, prejudice the effective conduct of public affairs in a way other than specified elsewhere in section 36.

10. The approach of the Commissioner is that section 36(2)(c) should be relied on only where the prejudice that is envisaged would not be covered by any of the other exemptions in Part II of the FOIA. In relation to section 36(3), this means that the view of the Commissioner is that the prejudice through provision of the confirmation or denial should not be covered by any of the other FOIA Part II exemptions.
11. Section 36(3) 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 this exemption is engaged is to reach a conclusion on whether the opinion of the QP was objectively reasonable. This exemption is also 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.
12. 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 Sarah Newton, Minister for Vulnerability, Safeguarding and Countering Extremism and supplied evidence that this opinion was given on 6 February 2017. On the basis of this evidence, the Commissioner accepts that an opinion was given by a valid QP.
13. 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. The copy of the submission supplied to the Commissioner was heavily redacted and the content that remained was somewhat sparse, but it suggested that the reasoning for citing section 36(3) concerned preserving a situation in which the detail of which organisations are being assessed by the extremism analysis unit (EAU) is confidential and that failing to preserve that confidentiality could be harmful to the work of the EAU. The Commissioner accepts first that this reasoning does not fall directly within the scope of any of the other FOIA Part II exemptions, and so it was appropriate to cite section 36(3) with reference to section 36(2)(c).
14. The submission did not specify whether it was believed that prejudice as a result of provision of the confirmation or denial *would* or *would be likely* to result. The Commissioner has taken the approach of considering whether prejudice *would be likely* to result. The approach of the

Commissioner in relation to other exemptions in Part II of the FOIA is that she will accept that an outcome would be likely where there is a real and significant likelihood of this, rather than that outcome being a remote possibility. The question here is, therefore, whether it was objectively reasonable for the QP to hold the opinion that there was a real and significant likelihood of prejudice in the manner identified in the submission as a result of confirming or denying whether the information requested by the complainant was held.

15. Whilst the Commissioner has reservations about the lack of detailed reasoning for how provision of the confirmation or denial would impact on the work of the EAU, the question here is not whether the Commissioner holds the same opinion as the QP. Instead, as mentioned above, it is whether the opinion held by the QP was objectively reasonable; in other words, whether it was an opinion that it was reasonable to hold. On balance, the Commissioner is willing to accept that the QP's opinion in this case was objectively reasonable. The exemption provided by section 36(3) is, therefore, 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 be likely to result was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her 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 the EAU to carry out its work. 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. As covered above, the Commissioner accepted on balance that the opinion of the QP was reasonable, but she had some reservations about doing so. Were this an exemption where it was necessary for the Commissioner to form her own view on the likelihood of prejudice, her view would have been that the likelihood of prejudice occurring was at the lower end of the scale that must be reached for the exemption to be engaged. In this case, this means that the Commissioner is of the view that the severity, extent and frequency of the prejudice identified by the QP would not be great. This means that the weight that the QP's opinion carries as a public interest factor in this case is less than would be the

case were the likely severity, extent and frequency of the identified prejudice greater.

19. The Commissioner must, however, recognise the importance of the area of the work of the EAU and weigh avoiding prejudice to that work in the balance of the public interest. Clearly the work of the EAU, which aims to tackle extremism, is of great public interest, and in general the Commissioner could only find that the public interest would favour disclosure of information that would be likely to result in prejudice to work in this area where there was very clear and weighty factors in favour of this. Clearly it would not be in the public interest for the work of the EAU to be prejudiced and given the nature and importance of that work, the Commissioner's view is that this public interest is of very significant weight.
20. Turning to arguments in favour of disclosure of the information, the Commissioner agrees with the complainant that the work of the EAU is a matter of significant and legitimate public interest. Provision of the confirmation or denial in this case would add to public knowledge about the work of the EAU.
21. The complainant's request relates to the Stop the War Coalition. Confirmation or denial in response to this request has the potential to add to public knowledge and understanding of the work of the EAU as it may indicate whether the EAU has carried out any work relating to that group. By indicating whether work has been carried out relating to a group that would not typically be regarded as extremist, provision of the confirmation or denial would enhance public understanding about the scope of the coverage of the EAU. The Commissioner believes that there is public interest in favour of provision of the confirmation or denial for these reasons.
22. In conclusion, the Commissioner has recognised the public interest in favour of disclosure of the confirmation or denial in order to enhance public understanding about the work of the EAU. However, she has also recognised the great importance of the work of the EAU and the very significant public interest in avoiding prejudice to that work. Her view is that, whilst the factors are finely balanced in this case, the area and importance of the work of the EAU tips the balance in favour of maintenance of the exemption. The Commissioner's finding is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in provision of the confirmation or denial and so the Home Office was not obliged to confirm or deny whether it held the information requested by the complainant.

Other matters

23. The delays in the handling of the complainant's request have been recorded separately and will add to the overall picture maintained by the ICO of the Home Office's compliance with the time requirements of the FOIA.
24. The delay at internal review was particularly severe in this case. The Commissioner's approach is that internal reviews should be carried out within a maximum of 40 working days and she regards the more than eight months taken in this case as inexplicable and unjustifiable. The Home Office must ensure that it responds to requests and with internal review outcomes promptly.

Right of appeal

25. 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>

26. 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.
27. 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

Ben Tomes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF