

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 June 2019

**Public Authority:** Civil Service Commission  
**Address:** Room G8  
1, Horse Guards Road  
London  
SW1A 2HQ

#### Decision (including any steps ordered)

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1. The complainant has requested information on the Foreign and Commonwealth Office's ('FCO') compliance with the Recruitment Principles monitored by the Civil Service Commission.
2. The Commissioner's decision is that the Civil Service Commission ('CSC') has appropriately applied section 36(2)(b)(i) & (ii), 36(2)(c) and section 40(2) to withhold the requested information in points 1-4 of the request
3. The Commissioner does not require the CSC to take any steps to ensure compliance with the legislation.

#### Request and response

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4. On 5 June 2018 the complainant wrote to the CSC and requested information in the following terms:
  - "1. Has the Commission ever requested that the Foreign and Commonwealth Office provide a Statement of Compliance with the Recruitment Principles provided for in s.11(1) of the Constitutional Reform & Governance Act 2010, as envisaged by Paragraph 65 of the recruitment Principles (April 2018)?
  2. If the answer is 'Yes', can you please provide copies of the FCO's Statement of Compliance?
  3. Has the Commission ever undertaken an audit to establish whether the Foreign and Commonwealth Office is in fact complying with the

Recruitment Principles provided for in s. 11(1) of the Constitutional Reform & Governance Act 2010, as envisaged by Paragraph 65 of the recruitment Principles (April 2018)?

4. If the answer to (3) is 'Yes', can you please provide copies of any reports which flowed from that audit process?

5. Has the Commission ever conducted an investigation in response to a complaint that the Foreign and Commonwealth Office has not, in its application of and selection for its 'Final Selection Board' element of the Civil Service Fast Stream recruitment competition, complied with the Recruitment Principles provided for in s.11(1) of the Constitutional Reform & Governance Act 2010?

6. If the answer to (5) is 'Yes', can you please disclose how many investigations you have conducted, and what the findings were?"

5. The CSC responded on 29 June 2018. It issued a refusal notice in respect of points 1- 4 of the request relying on sections 21, 40(2) and 36(2)(b)(i) & (ii) & (c). Regarding points 5 & 6 of the request CSC stated that no information was held. It confirmed that it had not investigated any complaints as specified in the request.

6. In requesting an internal review the complainant focussed only on the application of section 36. He advised the CSC:

"You cannot maintain that it would be prejudicial to the conduct of public affairs to disclose the information sought, when Civil Service management authorities are required by law to provide it to you. Put another way, it is never going to be the case that, if you disclose, they will be less frank. Section 14(2) of the Constitutional Reform and Governance Act states:

'For this purpose, civil service management authorities must provide the Commission with any information it reasonably requires.'"

7. Following an internal review the CSC wrote to the complainant dated 'August 2018'. It stated that it was upholding the initial response in response to the information held and in addition relying on sections 41 & 31 FOIA to refuse points 1-4 of the request. It also reiterated that no information is held in relation to the FCO's Civil Service Fast Stream recruitment.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 21 September 2018 to complain about the way his request for information had been handled.

9. The Commissioner considers the focus of her investigation is to determine whether the Commission handled the request in accordance with the FOIA and whether the application of the exemptions cited in respect of points 1-4 of the request are appropriate.

## Background

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10. The Civil Service Commission ('CSC') is an executive Non-Departmental Public Body sponsored by the Cabinet Office. It was established by section 2 of the Constitutional Reform and Governance Act 2010. Section 10(2) of that Act requires that a person's selection for appointment to the civil service "must be on merit on the basis of fair and open competition". Section 11 of that Act requires the CSC to "publish a set of principles to be applied for the purposes of the [fair and open competition] requirement in section 10(2)". As referenced by the complainant section 14 of the Act requires the CSC, where it considers necessary, to review recruitment policies and practices, to establish whether the requirement in section 10 and the recruitment principles are being upheld and not undermined. For these purposes the CSC may require a civil service management authority to provide it with information if the Commission reasonably requires that information.
11. KPMG carried out some compliance visits for the CSC over the last 5 years and collected, collated and analysed recruitment data required from all Civil Service organisations, but from 2018-19 these functions have been taken in house. CSC changed its compliance process, as noted in the 2017-18 annual report, and for 2017-18 and going forward, it has changed the risk ratings themselves and the process to decide on these. It has continued to produce visit reports and asked organisations for compliance statements for 2017-18.

## Reasons for decision

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### Section 21 – Information accessible to applicant by other means

12. Section 21 of FOIA states:

"(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)-

(a) Information may be reasonably accessible to the applicant even though it is accessible only on payment, and

- (b) Information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.
13. Section 21 provides an absolute exemption and as such is not subject to the public interest test.
14. The CSC provided the complainant with links to its website<sup>1</sup> which it considers provided relevant information in respect of the complainant's request. It explained to the Commissioner that information on breaches is published in the CSC's annual reports and provided the following example:
- "For example, information in the reports about breaches is published in our annual reports and the 2015-16 and 2016-17 reports both name FCO as having breached the Recruitment Principles. The reports also set out FCO's risk ratings for those years."
- The Commissioner notes the CSC's comment in its internal review regarding the information on its website;
- "I consider this information is sufficient to meet the public interest in the Civil Service Commission's approach to compliance of the Recruitment Principles; and with regard recording of breaches of the *Recruitment Principles* in each department."
15. The Commissioner accepts that information on the Recruitment Principles and compliance is already publicly accessible on the CSC's website. In general terms she understands that the information may be relevant to the complainant. However, the complainant's request states his requirements specifically and the requested information is not included on the website.
16. Notwithstanding this, the Commissioner notes that breaches referenced in paragraph 15 are mentioned within documents comprising the withheld information.

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<sup>1</sup> <https://civilservicecommission.independent.gov.uk/civil-service-recruitment/compliance/>  
<https://civilservicecommission.independent.gov.uk/?s=Annual+reports>

17. The Commissioner therefore considers that in the circumstances of this case there was no requirement for the CSC to cite section 21.

### **Section 40 – Personal information**

18. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3) or 40(4) is satisfied.
19. In this case the relevant condition is contained in section 40(3)(A)(a)<sup>2</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') ('the DP principles').
20. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 FOIA cannot apply.
21. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the information personal data?

22. Section 2(2) of the DPA defines personal data as:-

*"any information relating to an identified or identifiable living individual"*.

23. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
24. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus. In this case the information comprises names and personal data of individuals recruited to the Civil Service and the names of those in attendance at compliance visits.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) of the Data Protection Act 2018

25. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles.
26. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to identifiable living individuals. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 2 DPA.
27. The Commissioner considers that the first data protection principle is most relevant in this case.

Would disclosure contravene the first data protection principle?

28. The first data protection principle under Article 5(1)(a) GDPR states that:-

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"*

29. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful (i.e. would meet one of the conditions of lawful processing listed in Article 6(1) GDPR), fair, and transparent.
30. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.
31. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) GDPR which provides as follows:-  
  
*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"*.
32. In considering the application of Article 6(1)(f) GDPR in the context of a request for information under FOIA it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
33. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

*Legitimate interests*

34. In considering any legitimate interest(s) in the disclosure of the requested information public under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
35. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. In the circumstances of this case the Commissioner notes that the complainant is not specifically requesting information identifying individuals. His request concerns compliance statements and reports, which by their content also contain personal information. Disclosure of this information does not appear to be at the heart of this request. Consequently the disclosure of the information would not assist the complainant. Disclosure of the information would provide details of posts recruited given in exception records and staff in attendance at compliance visits. In such circumstances, the Commissioner nevertheless accepts that there is some legitimate interest in ensuring that the CSC operates with appropriate accountability and transparency in relation recruitment compliance.
37. The Commissioner therefore considers that there is some legitimate interest in disclosure of this information.

*Is disclosure necessary?*

38. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved



by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.

39. In the circumstances of this case the Commissioner is not convinced that there is a reasonable necessity as she considers that the complainant's legitimate interest is in the FCO's performance in relation to the statutory compliance on recruitment. The Commissioner considers that the complainant's legitimate aim is not principally addressed by disclosure of the information withheld in reliance of section 40 and that there is therefore limited necessity in disclosure.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

40. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
41. In the circumstances of this case, the Commissioner has identified that whilst there is a legitimate interest in ensuring accountability and transparency on the part of the CSC, there is limited necessity in the disclosure of the information.
42. The Commissioner considers that the data subjects in this case are unlikely to have the expectation of their personal data being disclosed under the FOIA. Both the Civil Service staff and those recruited would have no expectation in the circumstances that their names and recruitment details would be disclosed in response to an FOIA request.
43. The Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that the disclosure of the information therefore would not be lawful.
44. Given the conclusion reached above on lawfulness, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair.
45. The Commissioner therefore upholds the application of section 40(2).

**Section 36 – prejudice to the effective conduct of public affairs**

46. Section 36(2) of FOIA states:



“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

b) would, or would be likely to, inhibit-

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation, or

c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

48. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person’s opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure.
49. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.
50. With regard to sections 36(2)(b)(i) and (ii), it is understood that it is the process which may be inhibited rather than what is necessarily contained within the requested information itself. The question is whether disclosure could inhibit the process of providing advice or exchanging views in the future. Section 36(2)(c), refers to the prejudice that may *otherwise* occur through the release of the requested information. If section 36(2)(c) is used in conjunction with any other exemption in section 36(2), the prejudice envisaged must be different to that covered by the other exemption. In previous cases the Information Tribunal has found that the exemption may potentially apply to circumstances where disclosure could disrupt a public authority’s ability to offer an effective public service.
51. In this case Ian Watmore, the First Civil Service Commissioner, was identified as the qualified person. On 26 June 2018 he effectively subscribed to the advice given in the submission put before him in respect of the application of section 36. On 29 June 2018 he again agreed that the applicable subsections were 36(2)(b)(i), (ii) & (c). The

Commissioner was informed that there had also been a verbal discussion with the qualified person. However, the Commissioner has seen no evidence of any distinction made between the separate limbs of the exemption with respect to the content of the withheld information.

52. The Commissioner is satisfied that Mr Watmore as the Head of the Office of Civil Service Commissioners meets the definition of a qualified person set out by section 36(5) of FOIA. She therefore next considered whether the qualified person's opinion with regard to sections 36(2)(b)(i), (ii) and (c) is reasonable.
53. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person *could* hold and not whether it is the *most* reasonable opinion. This will nevertheless require that the opinion not only corresponds with the factors described in the exemption but also corresponds with the withheld information itself.
54. The CSC explained to both the complainant and the Commissioner that the qualified person considered the requested information to fall within the scope of the three limbs of section 36 cited above. As such he considered that in respect of section 36(2)(b)(i) & (ii) disclosure of the information would be likely to inhibit the free and frank provision of advice and exchange of views with government departments who are subject to the 'Recruitment Principles' and in respect of section 36(2)(c) disclosure would be likely to prejudice the effective conduct of public affairs because it would have a negative impact on transparency and accountability in Civil Service recruitment and on the ability of the CSC to discharge its role effectively.
55. The CSC further explained that, whilst it has the legal power to request information, with departments and agencies having a statutory requirement to provide information, the CSC "does not have the power to compel departments to have honest and open conversations". It added:

"Compliance statements and visit reports are part of the relationship of trust the CSC seeks to build with departments/agencies. The information gathered includes information over and above simply recording compliance /breaches. Publishing these documents will likely put at risk the confidential and collaborative working relationships with organisations and may restrict the information we gather..."
56. The Commissioner is satisfied that the arguments presented are ones which relate to the activities described by the exemptions cited. Furthermore, the Commissioner considers the opinion that disclosure of the requested information would be likely to result in the prejudice being claimed is one that a reasonable person could hold. She has therefore

found that sections 36(2)(b)(i) and (ii) and section 36(2)(c) are engaged.

57. Each of the limbs of section 36(2) is a qualified exemption, which means that they are subject to the public interest test. The Commissioner's analysis of the application of this test follows.

### **The public interest**

#### *Public interest arguments in disclosing the information*

58. The CSC explained to the Commissioner:

"The Commission recognises that the public is interested in how the Commission fulfils its statutory responsibility to ensure that recruitment to the Civil Service is on merit following a fair and open competition (the legal requirement) or by way of appointment by an Exception to that legal requirement. As a statutory body, we should be accountable and transparent to the public. There is a public interest in knowing that Civil Service organisations are complying with the legal requirement and in knowing that the Commission has inspected organisations' records to ensure that this is the case. There is a public interest in knowing about information that the Commission has taken into account in deciding on the risk rating to give organisations at year end and in knowing about the variation, if any, in upholding the legal requirement. The public would also expect organisations will supply us with information to show compliance."

59. The complainant did not provide any arguments in respect of the public interest test.

#### *Public interest in favour of maintaining the exemption*

60. The CSC explained that information relevant to the request is already placed in the public domain:

"We publish information in our annual report and also on our website about the compliance process and its outcome each year. This includes information in the annual report about the factors taken into account in finding that an organisation is "poor" (formerly "red" rated, prior to 2017-18). We also publish information in our annual report about breaches found for organisations. Breaches may be identified at visits and the breach will be noted in the visit report and we then report on the number of breaches identified for organisations in our annual report. The total number of breaches reported may include other breaches identified over the year but not at visits. For 2017-18 we changed the format of reporting on breaches and risk ratings in our annual report. These are now set out as a table. We also publish information about

recruitment complaints that we have investigated. All of these are published on our website and some are published in our annual report. Complaint outcomes also feed into the risk rating decision.”

61. The CSC considers that this information is sufficient to inform the public of its compliance regime and the results of its annual process providing transparency and accountability without disclosure of the requested information.
62. The CSC considers itself to be a modern regulator which seeks to regulate in a collaborative way, by engaging with organisations and encouraging them to ask questions and advise CSC about any issues, rather than sole reliance on the Commission discovering these issues on compliance visits. Consequently it aims to develop relationships of trust, cooperation and confidence with organisations which is important as CSC only samples a selection of documentation during its visits. If there are other issues, it relies on the organisations to proactively report the matters. This can reduce the possibility of a breach or avoid it altogether thereby serving the public interest by providing accurate reports on compliance with the legal requirement.
63. The CSC considers disclosure of the requested information would be likely to result in organisations being reluctant to share information which would, in turn, compromise its ability to provide public assurance that the legal requirement is being upheld. Prejudice to the CSC's ability to ascertain whether regulatory action is required would prejudice its ability to carry out a core function.
64. CSC therefore considers that the arguments in favour of maintaining the exemption outweigh the arguments in favour of disclosing the information.

*Balance of the public interest*

65. In considering complaints regarding the application of the exemptions at sections 36(2)(b) & (c), where the Commissioner finds that the qualified person's opinion was reasonable, she 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. However, she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test favours disclosure.
66. The Commissioner has carefully considered the information which the CSC is seeking to withhold on the basis of sections 36(2)(b)(i) & (ii) and 36(2)(c). In her view this would provide information on the questions numbered 2 & 4 in the complainant's request.

67. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities.
68. The Commissioner accepts that there is a strong public interest in ensuring that recruitment to the Civil Service is achieved on merit following fair and open competition. Following from this is the public interest in the operation of the CSC and its role in monitoring compliance with this objective.
69. With regard to attributing weight to the public interest in maintaining the exemptions, the Commissioner accepts that disclosure of the withheld information poses some risk of having a chilling effect on the future discussions between Departments and the CSC. In reaching this view she accepts that the CSC relies on its relationship of trust with the Departments it monitors such that it can expect free and frank discussion. She understands the complainant's point that Civil Service management authorities have a legal obligation to provide information to the CSC and therefore no prejudice would be created by disclosure of compliance statements and visit reports. However, the CSC has advised the Commissioner that it considers the information provided by the legal obligation is insufficient for its purposes:
- "Although, as we are a statutory regulator, organisations should supply us with the information we ask for to enable our compliance process, and they are required to report quarterly to the Commission, providing all their relevant data on recruitment carried out, this is not sufficient for us to establish that the legal requirement is being maintained and not undermined. We expect candour and honesty about potential risks and steps taken in mitigation."
70. The Commissioner therefore understands this to mean that the CSC is fostering a more constructive relationship with Departments which goes beyond a rigid approach to compliance. Disclosure of the withheld information could negatively impact on this collaborative relationship resulting in Departments becoming reluctant to share information freely and openly with the CSC, thereby compromising its ability to assure the public that the legal requirement is being upheld. This prejudice to the effective operation of the CSC would be contrary to the public interest.
71. The Commissioner notes that the CSC publishes information on its website with respect to Departments' compliance including factors taken into account when 'rating' these Departments, the investigation of recruitment complaints, breaches in compliance and risk ratings. She

accepts that this informs the public of the compliance regime and provides some transparency and accountability.

72. Although finely balanced, the Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemptions outweighs the public interest in disclosure.
73. In making her decision, the Commissioner has accepted the CSC's position that all of the withheld information engages section 36(2). She has therefore not gone on to consider the application of sections 31 and 41.

## Right of appeal

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74. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

75. 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.

76. 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 .....**

**Susan Hughes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**