

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 July 2014

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

Decision (including any steps ordered)

1. The complainant requested the Free Movement of Persons Report, which was created as part of the Government's review of the EU's competences. The Home Office refused to disclose this information and cited the exemption provided by section 22(1) (information intended for future publication) of the FOIA.
2. The Commissioner's decision is that section 22(1) is engaged, but that the public interest in the maintenance of this exemption does not outweigh the public interest in disclosure. The Home Office is, therefore, required to disclose this report.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose the Free Movement of Persons Report.
4. 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 FOIA and may be dealt with as a contempt of court.

Background

5. The report requested by the complainant is part of the "Review of the balance of competences", which is described on gov.uk as follows:

"The government is carrying out a review of the EU's competences, which the Foreign Secretary launched in July 2012. This is an audit of what the EU does and how it affects the UK."¹

Request and response

6. On 14 January 2014, the complainant wrote to the Home Office and requested information in the following terms:

"I would like to request the report on the freedom of movement in the European Union (written, as far as I know, as part of the Balance of Competences study) under the Freedom of Information Act."

7. After sending an earlier holding response, the Home Office responded substantively on 4 March 2014. It stated that the request was refused under section 22(1) of the FOIA (information intended for future publication).
8. The complainant responded on 5 March 2014 and requested an internal review. The Home Office responded on 2 April 2014 with the outcome of the internal review and stated that the refusal to disclose under section 22(1) of the FOIA was upheld.

Scope of the case

9. The complainant contacted the Commissioner on 2 April 2014 to complain about the refusal of his information request. The complainant stated at this stage that he did not agree that the balance of the public interests favoured the maintenance of section 22(1) of the FOIA.

¹ <https://www.gov.uk/review-of-the-balance-of-competences>

Reasons for decision

Section 22

10. Section 22(1) of the FOIA provides that information is exempt from disclosure if it is to be published in future. For this exemption to be engaged, the information must have been held with a view to its future publication at the time that the request was made and it must be reasonable in all the circumstances for the information to be withheld until the publication date. This exemption is also qualified by the public interest, which means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
11. As to whether the exemption is engaged, the first question here is whether there was at the time the request was made a settled intention to publish the requested information. On this point the Home Office described the information it holds within the scope of the request as the "*Free Movement of Persons Report*" and stated that there had "*always*" been an intention to publish it.
12. During the investigation of this case the Home Office supplied to the Commissioner a copy of the report. This report appears to be complete, other than some final presentational touches. This is the information that the Home Office has identified as being within the scope of the complainant's request and the Commissioner accepts that all of the information in the copy of the report supplied to his office will be disclosed when the report is published.
13. This report forms part of the review described above at paragraph 5 and the Home Office referred to a published timetable for the publication of the reports prepared as part of that review². This timetable states that this review is made up of four "semesters", with the publication of relevant documents taking place at the end of each semester. The report in question here was originally due to be published at the end of the second semester: "*Spring 2013 to Winter 2013*". The other reports from that semester were published on 13 February 2014.
14. Clearly the originally stated timescale was not met in relation to the report in question here. However, the Commissioner accepts that there was nonetheless a settled intention at the time that the request was made to publish this report, on the basis of the clearly stated intention

² www.gov.uk/review-of-the-balance-of-competences

to publish and the evidence of this intention provided by the publication of the other reports. That this publication has been indefinitely delayed is relevant to the issue of whether it is reasonable to continue to withhold the report; it does not, however, alter the fact that there was a settled intention that this report would be published.

15. Turning to whether it was reasonable in the circumstances to withhold the information prior to publication, that the publication of this report has been delayed, so far indefinitely, is relevant here. The Home Office provided an explanation for the delay, stating that the report "*is presently undergoing the rigorous scrutiny process that all reports being produced as part of the review need to go through before publication*".
16. The Home Office was asked to state when the publication was expected to take place. Initially it stated only that the process of preparing this report for publication was "*further ahead*" than it had been at the time of the request. When pressed on this issue, the Home Office stated that it would be published in "*summer [2014]*" at the same time as the publication of several other reports that also form part of the process referred to above at paragraph 5. It was not able to be more specific about the publication date than this.
17. The Home Office stated that the report had not been finalised as it needed to go through further stages of "*clearance and quality assurance*". It stated that this included review by Ministers and by the European Affairs Committee. The argument of the Home Office was that it was reasonable to withhold the report until that process was complete.
18. The Commissioner's view is that the reasonableness of continuing to withhold the report is undermined by the previous date given for publication having not been met and by the failure of the Home Office to publicise a new publication date. Arguably, having missed the original publication date, the most reasonable course would have been for the Home Office to publish the report at the earliest possible subsequent date, rather than waiting to publish it with another batch of reports.
19. However, on balance the Commissioner is prepared to accept that it was reasonable to withhold the report until publication in reliance on section 22(1). Having missed the original publication date, it was not wholly unreasonable to plan for publication with the next batch of reports due as part of the same review. His conclusion is, therefore, that the exemption provided by section 22(1) is engaged.
20. The next step is to consider the balance of the public interest. The question here is whether the public interest favoured immediate disclosure of the report at the time of the request rather than delaying this until the date of publication. In forming a conclusion on this point

the Commissioner has taken into account the content of the withheld information and the arguments made by the complainant and the Home Office

21. The complainant's argument concerned the relevance of the report in the context of the then forthcoming elections to the European Parliament ("the European election"). He argued that it was necessary for the report to be disclosed immediately in order that the electorate could be fully informed about its content prior to the European election.
22. The Commissioner agrees with the complainant that this is a valid argument in favour of disclosure. The Commissioner also considers there to be a strong wider public interest in prompt disclosure of the report irrespective of the European election. The issue of immigration and the UK's membership of and relationship with the EU is currently of great public interest, being at the top of the political agenda. Having reviewed the content of the report, the view of the Commissioner is that this public interest clearly applies to the report in question and that there is a very strong public interest in the disclosure of that information.
23. The response of the Home Office to this point would be that it agrees that there is a very strong public interest in the disclosure of this report, but that this public interest would be satisfied by the disclosure of this report at the future date of the Government's choosing. It would maintain that this public interest is not so strong it requires the immediate disclosure of this report.
24. Had the Home Office given a clear and imminent publication date, the Commissioner might have been able to agree that the public interest would be satisfied by publication at that time. The Home Office was unable, however, to give a clear publication date; "summer" is vague. Given that the initial commitment to publish this report with the others in the second semester was not met, the Commissioner is unable to accept with confidence that the publication of this report is imminent. At the earliest the publication will take place several months on from the date of the request. The European election is a relevant milestone that has already been missed.
25. In conclusion, the Commissioner finds that there is very high level of public interest in the disclosure of this information and his view is that it would not be in the public interest to delay publication for an uncertain further period of time. The Commissioner finds, therefore, that the public interest in the maintenance of section 22(1) does not outweigh the public interest in disclosure of the report. At paragraph 3 above the Home Office is now required to disclose the report.

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: 0116 249 4253

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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
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