

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 January 2019

**Public Authority:** The 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 employment compliance reports compiled by the Civil Service Commission.
2. The Commissioner's decision is that the Civil Service Commission has correctly relied on sections 36(2)(b)(ii) and 21 to withhold requested information.
3. No steps are required.

#### **Background**

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4. The Civil Service Commission was set up and given its responsibilities in the Constitutional Reform and Governance Act 2010.
5. The Civil Service Commission (CSC) regulates recruitment to the Civil Service, it aims to provide assurance that appointments are on merit

after fair and open competition as required by section 10 of the Constitutional Reform and Governance Act 2010 (the legal requirement). The CSC is independent of Government and the Civil Service<sup>1</sup>.

## Request and response

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6. On 25 November 2017, the complainant requested information of the CSC by saying as follows;

"Para 50, the CSRPs<sup>2</sup> states:

"The Commission may require the Head of Department to produce an annual statement of compliance. It may also audit the Department's compliance. Departments must retain, for a minimum of two years, sufficient information on their recruitment to provide evidence that they have complied and must provide the Commission with any information it reasonably requires."

Could you tell me a little bit more about how this this requirement works in practice? In particular, is there an automatic annual statement of compliance that Heads of Departments submit, or does the Commission choose particular Departments from time to time? If the latter, could you tell me how the Commission makes its decision?

Are all the annual statements published online anywhere; and if so, could you provide me with a link to the most recent ones?

If the annual statements are not published then could you please tell me whether you hold annual statements submitted by the heads of each of the following Department's over the past 5 years; and if so, could you please disclose them to me?

Ministry of Justice (MoJ)

Department for Work and Pensions (DWP)

Department for Communities and Local Government (DCLG)

With regards to the MoJ, could you tell me whether this includes Her Majesty's Courts and Tribunals Service (HMCTS), or would the CEO of

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<sup>1</sup> <https://civilservicecommission.independent.gov.uk/>

<sup>2</sup> Civil Service Recruitment Principles

HMCTS be regarded as a separate head of department for the purpose of para 50 compliance? If HMCTS is a separate body from MoJ, then could you also provide the annual statement(s) of compliance for HMCTS?

Could you tell me when the last audits were undertaken of these departments, and if so, could you provide these?"

7. On 23 January 2018, CSC responded. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions as its basis for doing so:
  - Section 21 (information accessible by other means)
  - Section 36 (prejudice to the effective conduct of public affairs)
  - Section 40 (personal data)
8. The complainant requested an internal review. CSC sent him the outcome of its internal review on 4 May 2018. It upheld its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 25 May 2018 to complain about the way his request for information had been handled.
10. Upon request, CSC provided the Commissioner with a copy of the withheld information in scope of the request, marked with the exemptions on which it was relying. The withheld information consists of compliance statements and visit reports to the departments named in the request (MOJ, DCLG and the DWP), held by CSC.
11. During the course of the Commissioner's investigation CSC informed her and the complainant that it now also relied on sections 31 and 41 to withhold the information in question.

### **Reasons for decision**

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12. Section 36(2)(b) and (c) states that:

'(2) 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.'
13. Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority.
14. However, if section 36(2)(c) is used in conjunction with any another exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b). The Information Tribunal made this point in *Evans v Information Commissioner and the Ministry of Defence (EA/2006/0064, 26 October 2007)*; they said, at paragraph 53, in relation to a claim of section 36(2)(c):
- "The principle arguments in favour of this exemption advanced by the MoD and IC were similar to those put forward for section 36(2)(b)(i): that those attending such meetings would be inhibited from expressing themselves freely and frankly if there were a real possibility of disclosure under the Act; and likewise for those who recorded the meeting. However, if the same arguments are to be advanced, then the prejudice feared is not 'otherwise'. Some prejudice other than that to the free and frank expression of advice (or views, as far as section 36(2)(b)(ii) is concerned) has to be shown for section 36(2)(c) to be engaged."
15. In this instance, the CSC have not segregated the passages of information into the specific subsections of section 36. As a result, the Commissioner has had to extrapolate the most likely, relevant limb to which the Qualified Person's opinion is aligned to.

16. In order to determine whether sections 36(2)(b)(i) and (ii), and section 36(2)(c) can be used to withhold requested information, the Commissioner will firstly need to determine whether a qualified person has provided a reasonable opinion that disclosure would cause the prejudice(s) cited. Then, as section 36 is a qualified exemption, the Commissioner shall go on to consider the balance of the public interest test should she believe that the exemption is engaged.
17. In this case, Ian Watmore, the First Civil Service Commissioner, provided the opinion (given on 11 December 2017) in relation to the application of the exemptions contained at section 36. The Commissioner is satisfied that he is a qualified person for the purposes of section 36.
18. The Commissioner must next determine whether the qualified person's opinion was a reasonable one. In doing so, she has considered all of the relevant factors including:
  - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
  - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
  - The qualified person's knowledge of, or involvement in, the issue.
19. In determining whether the opinion is a reasonable one, the approach taken is that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different reasonable conclusion.
20. The Commissioner is satisfied that the qualified person's opinion (given on 11 December 2017) is reasonable under the circumstances and it is reasonable to have the opinion that the disclosure of the withheld information would impede on staff's willingness to provide free and frank advice, and the CSC's stakeholders desire to engage in a free and frank exchange of views as per section 36(2)(b)(i) and (ii). In the absence of specific identification and separation of the three limbs to specific passages by the CSC, the Commissioner will assume this to be an

application of section 36(2)(b)(ii) to the withheld statements and reports. As described previously, the structure of section 36 precludes all three sub sections being applied simultaneously as a result of the same prejudice being claimed.

21. Nonetheless, having found that the opinion was a reasonable one the Commissioner next must consider the public interest test. That is, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
22. In both compliance statements and visit reports, organisations give a candid assessment of their position and can give advice on the steps that may be necessary to ensure compliance. CSC take these matters into consideration in deciding on each organisation's end of year risk rating for recruitment. Compliance visits and the compliance statement are a means for organisations to share with the CSC, in confidence, any problems or issues that may have arisen. It can then discuss the issues both within the CSC and with the organisation. It take these matters into account when deciding on a risk rating for organisations

#### Arguments in favour of maintaining the exemption

23. There is a public interest in how the CSC fulfils its statutory responsibility to ensure that recruitment to the Civil Service is on merit following a fair and open. As a statutory body, it should be accountable and transparent to the public. There is a public interest in knowing that Civil Service employers are complying with the legal requirements and in knowing that the CSC has inspected organisations' records to ensure that this is the case. There is a public interest in knowing about information that the CSC 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 it with information to show compliance.

#### Arguments in favour of disclosing the withheld information

24. CSC publishes information in its annual report and also on its 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). It also publishes information in its annual report about breaches found for organisations. Breaches may be identified at visits

and the breach will be noted in the visit report and it then reports on the number of breaches identified for organisations in its annual report. The total number of breaches reported may include other breaches identified over the year but not at visits. For 2017-18, it has changed the format of reporting on breaches and risk ratings in its annual report. These are now set out as a table. It also publishes information about recruitment complaints that it has investigated. All of these are published on its website and some are published in its annual reports<sup>3</sup>. Complaint outcomes also feed into the risk rating decision. It considers that this information is sufficient to inform the public of its compliance regime and the results of its annual process whilst maintaining transparency and accountability.

25. The Commissioner has also taken into account the complainant's submissions including the following
- The prejudice which Mr Watmore (the Qualified Person) believes could or would occur, could only occur if all the civil servants in the Ministry of Justice; Department for Communities and Local Government; and the Department for Work and Pensions i) actually committed breaches of these provisions in the Code when dealing with the CSC in reporting on compliance; and, ii) that the staff of the CSC are aware that these breaches of the Code have been committed.

#### Balance of the public interest test

26. The Commissioner notes that compliance statements and visit reports are part of CSC relationship of trust with the Departments in question, as they may note issues to resolve or risks that have been identified, together with suggestions for action to be taken – not simply details of breaches. Publishing these documents will likely put at risk the confidential and collaborative working relationships with organisations and may restrict the information it gathers to check on compliance as departments may feel constrained from talking to it about potential issues or even from seeking advice on best practice.
27. Although, as a statutory regulator, organisations should supply it with the information it asks for to enable its compliance process, and they are required to report quarterly to the CSC, providing all their relevant data on recruitment carried out, this is not sufficient for it to establish that the legal requirement is being maintained and not undermined.

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<sup>3</sup> <https://civilservicecommission.independent.gov.uk/publications/annual-reports/>

28. The Commissioner considers that CSC (rightly) expects candour and honesty about potential risks and steps taken in mitigation, both at visits and in compliance statements. Engagement with departments is carried out by their "link" Civil Service Commissioner as well as the Commission Secretariat. This is part of the open and honest relationship that enables organisations to tell it about any challenging or changing circumstances and how they are dealing, or could, deal, with these.
29. Disclosure of the information would be likely to make organisations reluctant to share information and risk assessments as freely and openly with CSC. This would compromise its ability to provide public assurance that the legal requirement was being upheld, as prejudice to the CSC ability to ascertain whether circumstances would justify regulatory action is likely to prejudice the ability of the Commission to carry out a core function and this likely prejudice is contrary to the public interest.
30. The compliance statements and visit reports are part of this relationship of trust as they may note issues to resolve or risks that have been identified, together with suggestions for action to be taken – not simply details of breaches. Releasing the withheld information will put at risk the confidential and collaborative working relationships with organisations and may restrict the information CSC gathers to check on compliance as departments may feel constrained from talking to it about potential issues or even from seeking advice on best practice.
31. The Commissioner has concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information. Accordingly she finds that it correctly relied on section 36(2)(b)(ii) to withhold the information that is the subject of the Decision Notice.
32. As the Commissioner has found the information to be appropriately withheld under this exemption, she has not gone on to consider the application of sections 31, 40 and 41.

## **Section 21**

33. (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.

34. Section 21 provides an absolute exemption. This means that if requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.

35. CSC ,in its internal review, stated to the complainant as follows:

"Specifically as regards information considered exempt under s.21, some information from the last audit report from the Ministry of Justice is included in the Commission's Annual Report and Accounts 2016-17, on page 29. This information is available to you as the Commission's Annual Reports are published on the Commission's website. I conclude that this exemption has been properly applied to this information."

36. The complainant has said<sup>4</sup> to the Commissioner as follows

"... (CSC) interpretation (of section 21) conflicts with the Information Tribunal in *The London Borough of Bexley and Colin P England v Information Commissioner (EA/2006/0060 & 0066, 10 May 2007)* on partially available information and states:

"We do not interpret the section [s.21, FOIA 2000] as stating that a public authority has no obligation to provide information where a reasonable amount of that information is available elsewhere. If that were the case, public authorities would be able to provide incomplete information to applicants and it is likely that there would be arguments over what percentage of available information is considered to be reasonable. It also runs the risk of attempts to avoid the impact of the legislation by making non-contentious information in a particular class available and then seeking to claim section 21 in order to avoid disclosing contentious information, by arguing that a substantial amount of material is already available to the applicant."

Therefore, in applying the Information Tribunal's decision to my request, it is clearly irrelevant that summaries of the audit reports are available in the CSC's annual reports published online. It does not constitute the full audit reports and is therefore not the information that I actually requested. For this reason, and the original reason I set out in my

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<sup>4</sup> Letter dated 17 May 2018

request for an internal review, I would like you to determine that the CSC's exemption under s.21 FOIA 2000 has been incorrectly applied".

37. As stated in her guidance, the Commissioner's view is that, if only part of the requested information is in the public domain, section 21 can only apply to that part of the request (subject to the circumstances of the individual applicant). This view accords with the opinion expressed by the tribunal in paragraph 36 above. The tribunal stated that merely because some requested information is available elsewhere, that does not allow a public authority to refuse provide all the requested information. This is not the situation as found in this case, as the CSC didn't refuse to supply all of the information simply because some of it was alternatively available, but choose to apply alternative exemptions to other parts of the withheld information.
38. The Commissioner readily accessed<sup>5</sup> the requested information referred to in paragraph 35 above and has no evidence that the complainant himself could not do likewise. Indeed the complainant does not allege he was, or would be, unable to access the information himself.
39. Accordingly, for the reasons above, the Commissioner finds that the public authority rightly refused (by relying on section 21) to provide such requested information that was reasonably available to the complainant elsewhere.

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<sup>5</sup> <http://civilservicecommission.independent.gov.uk/wp-content/uploads/2017/07/Report-v5-WEB-1.pdf>

## Right of appeal

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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: 0116 249 4253

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)

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** .....

**[Name of signatory]**

**[Job title of signatory]**

**Information Commissioner's Office**

**Wycliffe House**

**Water Lane**

**Wilmslow**

**Cheshire**

**SK9 5AF**