

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 November 2014

Public Authority: Department for Regional Development
Address: Clarence Court
10-18 Adelaide Street
Belfast BT2 8GB

Decision (including any steps ordered)

1. The complainant has requested information relating to a recruitment process he was involved in.
2. The Commissioner's decision is that the Department for Regional Development (DRD) has correctly applied section 36(2)(c) to the withheld information.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 12 June 2014, the complainant wrote to DRD and requested information in the following terms:

"Unfortunately I cannot fully evaluate my performance at interview without a copy of the marking guidance and indicators. I would once again like to request this information under the Freedom of Information (FOI) Act (2000)."
5. DRD responded on 8 July 2014. It refused to provide the requested information citing section 36 of the FOIA as its basis for doing so.
6. Following an internal review DRD wrote to the complainant on 22 August 2014 and maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 3 September 2014 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if DRDNI correctly applied section 36(2)(c) to the withheld information.

Reasons for decision

9. The relevant part of Section 36(2) of the FOIA states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
10. Section 36 is also a qualified exemption and is therefore subject to the public interest test.
11. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable. The qualified person for DRD is Danny Kennedy, Minister for Regional Development.
12. The Commissioner notes that the qualified person's opinion was sought on 3 July 2014 on the basis that he believed that disclosure of the withheld information would have the effects set out in section 36 (2)(c). It should be noted that 'would' provides a much higher evidential burden than 'would be likely' ie that there is more than a 50% chance of the disclosure causing the prejudice even though it is not certain that it would do so. The Commissioner has had sight of the submissions made to the Qualified Person and notes that the Qualified Person was provided with details of the information falling within the scope of the request and provided with the reasons for this exemption being engaged. The Commissioner accepts that the opinion of an appropriate Qualified Person was properly sought in relation to the application of the exemption. The Commissioner has next gone on to consider whether the opinion of the Qualified Person was a reasonable one.

Was the opinion reasonable?

13. In order to engage section 36(2) the qualified person must give an opinion that the prejudice or harm stated in 36(2)(c) would or would be likely to occur. However, that in itself is not enough, and the opinion must also be reasonable. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of the word. The Commissioner has issued guidance on section 36 of the FOIA. It states the following:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. 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 (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

14. DRD stated that in the application of the exemption under Section 36(2)(c) in this case, it is protecting recruitment and selection policies and processes by which staff are promoted, on merit, through fair and open competition.
15. DRD explained that the SPTO Civil Engineering Assistant promotion competition, in common with all others within the Northern Ireland Civil Service (NICS) was subject to NICS policies and procedures. These policies and procedures are overseen by NICS Corporate HR in the Department for Finance and Personnel (see; <https://irecruit-ext.hrconnect.nigov.net/resources/documents/n/i/c/nics-policy-and-procedures-manual-version-14.pdf> - updated to version 14 on 12/09/2014).
16. In addition, promotion competitions must comply with the broad principles of the NI Civil Service Commissioners' Recruitment Code (<http://www.nicscommissioners.org/wp-content/uploads/2013/08/PDF-Recruitment-Code-Revised-July-2013.pdf>).
17. Suitable candidates for promotion are selected through criteria based interviewing. Criteria based interviewing has been identified as the best means of selection of suitable candidates for promotion to all NICS

posts, on merit on the basis of fair and open competition. The criteria for the promotion competition were determined in line with the competencies for the SPTO Civil Engineering Assistant grade. The criteria were designed to ensure the appointment of the best available candidates. The indicators for each criterion were made available to panel members to help determine the relative merits of the candidates within a selection process that was objective, impartial and applied consistently.

18. The indicators identified the specific experience, behaviours and skills considered necessary for candidates to demonstrate sufficient awareness and application of the competences for the SPTO grade.
19. All candidates were advised of the format of the interview process, and are provided with details of the competencies for the grade, and with some indicators of the personal behaviours associated with these competencies. See: [https://irecruit-ext.hrconnect.nigov.net/pages/content.aspx?Page=NICS-Core-Competencies-\(for-competitions-at-Grade-6/7-and-below\)](https://irecruit-ext.hrconnect.nigov.net/pages/content.aspx?Page=NICS-Core-Competencies-(for-competitions-at-Grade-6/7-and-below)).
20. NICS policy makes clear that, where questions and associated indicators will be used in future competitions, these will not be made available to candidates seeking feedback of their performance. The non-specialist criteria and indicators for the SPTO Civil Engineering Assistant competition are the same as for grades analogous to SPTO (Deputy Principal, etc.).
21. DRD stated it is cautious of alleging a “floodgate” argument, however it is clear that if the indicators were to be released to the individual making the request for information this would set a precedent for all other promotion competitions across DRD and wider NICS. If the indicators were released for this promotion board, it is logical that the indicators for all other promotion boards in the NICS should also be made available to the public. There is no provision within the legislation to allow release of such information on a restricted basis. Even if the legislation allowed for limited release, this would serve to undermine criteria based interviewing in the Department, and the wider principles of fair and open competition, and promotion based solely on merit, across the NICS.
22. The indicators used in the SPTO Civil Engineering Assistant competition reflect agreed competencies used across the NICS. As the NICS uses criteria based interviewing to fill posts across the all Civil Service Departments in Northern Ireland, the same indicators are used in many competitions in relation to the same criteria.

23. For DRD to be able to effectively carry out its function, as a public authority, it needs to be able to promote its staff in an efficient, effective, fair and consistent manner. Criteria based interviewing has been employed across the Northern Ireland Civil Service as the best means by which to achieve this requirement. The indicators for each of the criteria provide promotion board panel members with agreed identifiers by which to gauge the suitability of candidates for promotion, and are essential for ensuring fairness and consistency in the promotion competition.
24. Placing the indicators in the public domain would severely undermine the principle of promotion on merit, as it would remove the capacity for a candidate to demonstrate their innate ability rather than a test of memory. If compelled to release indicators into the public domain, DRD would not be able to promote staff efficiently and effectively; with a dramatic increase in both time and costs associated with every promotion opportunity.
25. If the indicators were released, and criteria based interviewing was to be retained, the Department, and the wider NICS, would be obliged to identify significantly different additional criteria and/or indicators for all future competitions. This would require the allocation of significant additional resources to this process, and would impact on the ability of the NICS to provide services to the wider public. DRD believes that there would be a negative impact on policy development in relation to internal promotion and the operation of Promotion Competitions in the longer term.
26. DRD is concerned that to release the indicators, as requested, would require the generation of a bank of significantly different indicators for all future promotion competitions. DRD believes that this would make promotion competitions based on criteria based interviewing impossible, would undermine promotion on merit through fair and open competition, and would incur a significant additional expense on the public purse.
27. The Commissioner has inspected the withheld information and the information on which the qualified person made his opinion. The Commissioner accepts that the opinion was reasonable and therefore the exemption is engaged.
28. Section 36(2)(c) is however subject to the public interest test. As such the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.
29. Having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental

effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest test.

30. However, in order to form the balancing judgement required by section 2(2)(b) of the FOIA, the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which any such detrimental effect might occur.

Public interest arguments in favour of maintaining the exemption

31. The Commissioner has considered the public interest arguments both for and against maintaining the exemption in this case. When attributing weight to the arguments in favour of maintaining section 36(2)(c) he has considered the frequency, severity and extent of the harm identified by DRD.
32. DRD has argued that it offers applicants the opportunity of personal feedback from the panel members sitting on the promotion board, and it has provided sufficient opportunity for the applicant to evaluate his performance in the interview.
33. It would detract from the competitive element of the interviews for the current competition as release of evaluation criteria may benefit those who have not yet been interviewed.
34. It would produce a negative impact on policy development in relation to internal promotion and the operation of promotion competitions in the longer term.
35. It would require the generation of a bank of significantly different evaluation criteria for future promotion competitions at this grade. This would require a large staff resource and incur a significant expense to the public purse.

Public interest arguments in favour of disclosure

36. DRD acknowledges that there is a general public interest in the openness and transparency of government, and its promotion arrangements and processes.
37. Disclosing the requested information may 'reinforce the Department's policy of providing open and effective communication to candidates'.

Balance of the public interest

38. The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. For example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all and in securing the best use of public resources.
39. As well as the general public interest in transparency, which is always an argument for disclosure, there may also be a legitimate public interest in the subject the information relates to. In the Commissioner's opinion however, that is not a relevant consideration in this case.
40. Section 2(2) of the FOIA refers to the public interest; furthermore, and not merely to the individual requester. So the requester's private interests are not in themselves the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest.
41. The Commissioner has considered the likely impact of disclosure on DRD's ability to assess competence via its recruitment process and the consequent prejudice to the effective conduct of public affairs.
42. By accepting the exemption is engaged, there is an acknowledgement that the disclosure of this information would prejudice the effective conduct of public affairs. In this case, the DRD is required to use the same indicators all the Civil Service Departments in Northern Ireland, the same indicators are used in many competitions in relation to the same criteria.
43. The Commissioner accepts that disclosure of the requested information would prejudice its ability and that of the whole Civil Service in Northern Ireland to be able to promote its staff in an efficient, effective, fair and consistent manner.
44. The Commissioner has also afforded weight to DRD's argument that if this information is disclosed both it, and the wider NICS, would be obliged to identify significantly different additional criteria and/or indicators for all future competitions which would require the allocation of significant additional resources.
45. Taking all of the above into account the Commissioner has concluded that in this case the strong public interest in maintaining the integrity of the recruitment and promotion process for the NICS outweighs the public interest arguments in favour of disclosure.

46. Therefore after due consideration of his comments above he finds that the DRD was correct to apply section 36(2)(c) to the requested information.

Right of appeal

47. 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

48. 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.
49. 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

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