

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2024

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking a range of information about how assessors at the Army Officer Selection Board (AOSB) assess and mark candidates. The MOD withheld the information falling within the scope of this request on the basis of section 26(1)(b) (defence) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 26(1)(b) of FOIA and that in all the circumstances of the request the public interest favours maintaining the exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the MOD on 20 June 2023:

'Please provide the documents/templates that assessors and directing staff use during AOSB main board to assess and mark candidates at each phase of the assessment cycle.'

This include the Planning Exercise, Interviews, Group Discussion, Command tasks (both leader-led and leaderless), Opening and Closing Races, physical tests (obstacle course and MSFT test) and the Psychometric tests. Similarly,

Please disclose any handbooks or other guides which as given to assessing officers on how they should grade or mark candidates, and how scores are to be given.'

5. The MOD responded on 19 July 2023 and confirmed that it held information falling within the scope of the request but considered it to be exempt from disclosure on the basis of section 26 of FOIA and that it needed additional time to consider the balance of the public interest test.
6. The MOD provided a substantive response to this request on 15 August 2023. It explained that it had concluded that the public interest favoured withholding the information on the basis of section 26(1)(b) of FOIA.
7. The complainant contacted the MOD on the same day and asked it to conduct an internal review of this response.
8. The MOD informed him of the outcome of the internal review on 29 November 2023. The internal review upheld the application of section 26(1)(b).

Scope of the case

9. The complainant contacted the Commissioner on 10 October 2023 to complain about the MOD's decision to withhold the information falling within the scope of his request and its failure to complete the internal review. Following the completion of the internal review the complainant confirmed that he wished to challenge the MOD's reliance on section 26(1)(b) of FOIA.

Reasons for decision

Section 26(1)(b) – defence

10. Section 26(1)(b) of FOIA states that:

"Information is exempt information if its disclosure under this Act would or would be likely to prejudice-...

...(b) the capability, effectiveness or security of any relevant forces."

11. In order for a prejudice based exemption, such as section 26, to be engaged the Commissioner believes that three criteria must be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

The MOD's position

12. In its internal review response, the MOD explained that disclosure of the withheld information would reveal specific elements of the selection process at AOSB. In the MOD's view this would undermine the recruitment process including potentially lowering the standard of recruits into Royal Military Academy Sandhurst (RMAS), who without the advantage of this insight might not be successful. Fundamentally, the MOD explained that the AOSB relies on ensuring that behaviours are authentic and not adjusted by candidates to what they believe will help them pass. The MOD argued that this would have a negative effect on both the success rate through RMAS and overall recruitment into the Armed Forces, which could negatively affect the overall success rate of the Main Board and subsequently the number of appropriate candidates reaching RMAS. In turn this would impact on the capability and effectiveness of the Armed Forces. The MOD argued that disclosure of the information "would" result in prejudice rather than just being "likely to".

13. The MOD elaborated on these points in a meeting with the Commissioner's office regarding this request.

The complainant's position

14. The complainant argued that the MOD had not provided any evidence to support its position that disclosure of the information would have the prejudicial impact that it had identified. He also argued that there would be measures or safeguards that would be in place to mitigate any potential risks to the information being disclosed so that the assessment

process was not undermined. He also suggested that similar documentation had been released without detrimental consequences in other cases, eg other public sector graduate schemes.

The Commissioner's position

15. With regard to the first criterion, the Commissioner accepts that the type of harm that the MOD believes would occur if the information was disclosed is applicable to the interests protected by section 26(1)(b) of FOIA.
16. With regard to the second criterion, the Commissioner accepts that there is a logical connection between the disclosure of the withheld information and an impact on the effectiveness of the ASOB recruitment process. This is because disclosure of the information would provide candidates with a detailed and genuine insight into the assessment process, and in particular how their performance across all aspects of this would be scored. In turn, the Commissioner accepts that it is plausible to argue that such an outcome could have a wider detrimental impact on the effectiveness of the Armed Forces if it interferes with the recruitment process.
17. With regard to the third limb, the Commissioner is satisfied that the likelihood of such prejudice occurring is clearly one that is more than hypothetical. Moreover, he is satisfied that the higher level of likelihood, ie "would" prejudice, is met. He has reached this conclusion given the detailed nature of the information that has been withheld and the ways in which prejudice would occur. It is clear to the Commissioner that candidates to the AOSB process who had access to this material, prior to the assessment process, could use this to change their behaviour during the assessment process. This could result in candidates being able to use such material to their advantage. Although disclosure of information under FOIA is disclosure to the world, and therefore in theory all candidates would have access to such material, the Commissioner accepts that on a practical level only a small number of candidates may, at least initially, take advantage of a disclosure in response to this request.
18. Conversely, access to the material may result in them changing their behaviour to the extent that they perform worse than they may have done without sight of this material and therefore fail to provide a full or natural representation of themselves or their potential. In either scenario, the Commissioner is satisfied that the effectiveness of the assessment process would be materially undermined. Whilst the Commissioner acknowledges the complainant's point that similar information has been disclosed by other public bodies, the circumstances of each case must be considered on its own merits. For

the reasons set out above the Commissioner is satisfied that the disclosure of information in this case would be prejudicial and therefore he accepts that section 26(1)(b) is therefore engaged.

Public interest test

19. Section 26 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 26(1)(b) outweighs the public interest in disclosing the information.
20. The complainant identified a number of factors which meant that in his view the public interest favoured disclosure of the information. Firstly, the release of the AOSB Main Board Marking Templates is paramount in addressing public concerns regarding the effectiveness and safety of the British Army. In the aftermath of events such as the Olivia Perks inquest, transparency in the assessment process becomes crucial.¹ By providing insight into the thoroughness of the assessment process for candidates, the Army can dispel concerns and reinforce public confidence in its operations. Secondly, a detailed understanding of the rationale and evaluation process used by AOSB assessors is essential for promoting government accountability and transparency. He argued that disclosure of the information would also reinforce public trust in the responsible allocation of resources for training future officers. Thirdly, he argued that disclosure of the information would enhance public confidence that the officers are recruited using fair and robust standards.
21. The MOD acknowledged that disclosure of the information would contribute to its commitment to openness and transparency, but furthermore would also provide greater insight into how the Army selects recruits for officer training at the RMAS. The MOD recognised that there is a public interest in how the organisation is run, including the British Army's recruiting processes.
22. However, the MOD argued that there was a clear public interest in ensuring that the effectiveness of the AOSB selection process was not undermined as this would impact on overall recruitment into the Armed Forces.
23. The Commissioner accepts that there is a public interest in the MOD being open and transparent about its recruitment processes. Disclosure of the withheld information would provide a direct, and detailed, insight

¹ <https://www.bbc.co.uk/news/uk-england-berkshire-65719345>

into how candidates at AOSB are assessed. This could, as the complainant suggests, meet a range of public interest factors in disclosure. However, the Commissioner agrees with the MOD that the benefits of such a disclosure have to be balanced against the need to ensure that the assessment processes remains effective. In the Commissioner's view given the significant risk to the effectiveness of the selection process that disclosure would result in, the public interest favours withholding this information.

Other Matters

24. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe.² The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.³ In this case, as noted above, the MOD failed to meet these timescales.

² <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: 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.

Jonathan Slee
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