



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2019/0028**

**Before**  
Judge Stephen Cragg Q.C.

**Tribunal Members**  
Ms Jean Nelson  
and  
Mr Andrew Whetnall

**Determined, by consent, on written evidence and submissions.  
Considered on the papers on 11 December 2019 and 11 March 2020**

**Between**

Matthew Gewan

Appellant

-and-

The Information Commissioner  
Civil Service Commission

Respondents

**DECISION**

1. The Civil Service Commission (CSC) was set up and given its

responsibilities in the Constitutional Reform and Governance Act 2010 (the 2010 Act). The 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 2010 Act. The CSC is independent of Government and the Civil Service

2. On 25 November 2017, the Appellant requested information of the CSC about annual compliance statements that are submitted by or required from central government departments in relation to fair recruitment to the civil service, by saying as follows;

“Para 50, the [Civil Service Recruitment Principles] 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 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?"

3. 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:

(a) Section 21 FOIA (information accessible by other means

(b) Section 36 FOIA (prejudice to the effective conduct of public affairs)

(c) Section 40 FOIA (personal data)

4. The Appellant requested an internal review. CSC sent him the outcome of its internal review on 4 May 2018. It upheld its original position. The CSC provided a qualified person's opinion when relying upon the exemption in s36 FOIA (prejudice to the effective conduct of public affairs) to justify withholding information.

5. The Appellant contacted the Commissioner on 25 May 2018 to complain about the way his request for information had been handled. During the Commissioner's investigation the CSC also stated that it relied on the exemptions in s31 FOIA and s41 FOIA.

6. In the decision notice of 9 January 2019, the Commissioner noted at paragraph 10 of the decision notice that, by that time: -

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.

7. The exemption under s36 FOIA was the only exemption dealt with in the Commissioner's decision notice, which upheld the non-disclosure of information. The Commissioner stated that: -

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.

#### THE APPEAL AND SUBSEQUENT EVENTS

8. The Appellant appealed against the decision notice. Not only did he argue that reliance on the s36 FOIA exemption should not be upheld, but also that names of civil servants (which had been redacted on information he had received) should be disclosed.
9. This is an appeal on the papers. The Tribunal initially convened on 11 December 2019 and noted that although the CSC had been joined as a party, it had not submitted any witness evidence to support its case. The Tribunal was left with assertions that the exemptions in s36(2) FOIA apply, together with other exemptions in s41 FOIA and s31 FOIA, with no real way of understanding how it is said that the claimed prejudice is likely, or of the real level of the public interest in not disclosing the material, or how it is said that the information is confidential. The CSC's only formal response to the appeal has been to say: -

We are relying on the ICO's submission in relation to the decision on the use of section 36 and section 21 and on the arguments set out in our submission to the ICO. Release of these documents would in all likelihood undermine our current process and impede our ability to regulate Civil Service recruitment effectively in line with our responsibilities under the Constitutional Reform and Governance Act 2010.

If the ICO's decision is not upheld, we assume the other exemptions cited but not yet considered, would be considered.

10. The Tribunal noted that the published CMC annual reports (for example, the annual report for which there is a link in the decision notice) set out details of complaints which identify specific named departments, and also identify types and numbers of breaches also in relation to specific named departments. It appeared to the Tribunal that government departments can already expect detailed information to be published about their failings in the employment field as identified by the CSC either in relation to complaints or compliance visits

11. At paragraph 22 the decision notice stated that: -

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 takes these matters into account when deciding on a risk rating for organisations.

12. The structure of compliance statements (which can be seen from the blank compliance statement form disclosed to the Appellant), consists of a statement of the risk and a description of the action taken or planned to mitigate that risk. As indicated by paragraph 12 of the decision notice, the withheld material does not include (see paragraph 22 of the decision notice) details of the discussion of the 'issues both within the CSC and with the organisation' subsequent to the production of a compliance statement or a visit report, or of the process

of taking 'these matters into account when deciding on a risk rating for organisations'.

13. We also noted that the CSC's visits and the production of compliance statements take place in the context that the government departments have a statutory duty to provide the CSC with any information it reasonably requires.

14. In this context the Tribunal requested a witness statement from an appropriate senior officer at the CSC to assist it in understanding the basis upon which it is said the various exemptions apply in this case, and why it is said that the balance of public interest favours non-disclosure, and we made directions to that effect on 11 December 2019.

15. In response to these directions, by letter dated 14 February 2020, the CMC has chosen to release all the requested information it holds to the Appellant without giving reasons for its change of mind, and has not produced a witness statement (but has asked for that direction to now be varied) The only information withheld is personal information in the form of some of the officials who have authored or contributed to reports.

16. By email dated 17 February 2020, the CSC's head of compliance says: -

I intend to redact, under Section 40, names of civil servants believed to be below Senior Civil Service in grade, as I do not believe they would expect their details to be given here. I am also redacting details of former civil servants and former Commissioners, as well as names and "he/she" in relation to Exception appointments and other roles mentioned.

17. By email dated 21 February 2020 the Appellant has set out his views on the matter. Essentially, he wants the names and job titles disclosed

of those who are signatories of annual compliance statements, and the names and job titles of civil servants and staff of the CSC involved in the reports and compliance visits. He is content for the names of civil Servants and ex-civil servants spot checked without knowledge not to be disclosed but does want job titles disclosed.

18. The Appellant refers to submissions he has made previously in relation to the legitimate interest in publishing personal information and about naming high profile civil servants involved in the preparation of reports and information. He notes the CSC's position that those who are not senior civil servants should not be named. The Appellant does not accept that more junior civil servants involved in the audit reports will have a reasonable expectation that their personal information will not be disclosed.

19. The Tribunal reconvened to further consider this case on the papers by way of a telephone conference on 11 March 2020.

20. We have been provided with a copy of the information that has been provided to the Appellant with the same redactions.

21. We can see from this that only the names of more junior civil servants have been redacted and that job titles and grades have been disclosed. There appears to be no redaction of any aspect of the disclosed document such as opinions or conclusions. It can be seen that the permanent secretaries that have signed off the reports have been named.

## LEGAL FRAMEWORK AND APPLICATION

22. Section 40 FOIA reads, materially, as follows: -

### **40. – Personal information.**

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if –
  - (a) it constitutes personal data which do not fall within subsection (1), and
  - (b) either the first or the second condition below is satisfied.
- (3) The first condition is –
  - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene –
    - (i) any of the data protection principles, or
    - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
  - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

23. The Appellant has not disputed that the names of civil servants withheld are ‘personal information’. Consideration has to be given under s40(3)(a)(i) and (ii) as to whether that personal data can be disclosed without contravention of data protection principles.

24. Materially, for the purposes of s40(3)(a)(i), the first data protection principle requires that personal data is processed (which includes disclosure) fairly. Section 10 of the DPA 1998 (as referred to in s40(3)(a)(ii)) refers to damage or distress caused by disclosure.

25. In relation to interpreting the first principle, the disclosure must also not breach the material conditions in Sch 2 to the DPA 1998 ‘relevant for



purposes of the first principle'. Processing is permitted if the data subject has consented to it (Sch 2, first condition), but if not then for the purposes of the sixth condition in Sch 2 it must be established that the disclosure is necessary in order to meet the legitimate interests of the appellant.

26. Further for the purposes of the sixth condition, there is an exception to disclosure even where disclosure has been established as for the purposes of an appellant's legitimate interests. Thus, the exception covers a situation where the processing (disclosure) is unwarranted by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

## DISCUSSION

27. Now that the withheld information has been disclosed to the Appellant, it is not necessary for us to consider whether any of the exemptions previously claimed were correctly applied by the CSC or not. It would not be right for us to speculate about the reasons for the CSC's change of mind in relation to this information.

28. However, there are very limited redactions of personal information in the disclosed information which we need to consider.

29. In our view the disclosure of personal data of less senior civil servants would not be fair. Those civil servants do not have public facing roles and have no expectation that their names will be disclosed as part of a FOIA request. If disclosure is made then that would amount to an adverse effect as an interference with the privacy of those civil servants. That is especially true of those civil servants who are referred to in the departments where investigations were being carried out.

30. We accept that there is a legitimate interest in transparency in civil servants of all levels being named, as the Appellant argues. However, the

Appellant now has the information he has sought and it can be seen that providing also the few names redacted will not add anything to the value of the information the Appellant has received. Therefore, disclosure of this nature would, in our view, could constitute a disproportionate and unwarranted level of interference with the rights and freedoms of the civil servants concerned.

### CONCLUSION

31. For the reasons set out above we are satisfied that that CSC was entitled to rely on s40(2) FOIA to withhold the information on the documents otherwise disclosed and the appeal, on the only part of the case we need now to consider, is dismissed.

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: 31 March 2020