

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 November 2012

**Public Authority:** Department for Business, Innovation and Skills  
**Address:** 1 Victoria Street  
London  
SW1H 0ET

### Decision

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1. The complainant made a request to the Department for Business, Innovation and Skills (BIS) for copies of information related to a complaint that had been made against an employment agency and which had been investigated by the Employment Agency Standards Inspectorate, a part of BIS. BIS refused the request under the exemption in section 44 (prohibitions on disclosure) of FOIA by virtue of section 9(4)(a) of the Employment Agencies Act 1973. The section 30 (investigations) exemption was also applied.
2. The Commissioner has investigated the complaint and found that section 44 is engaged for only some of the withheld information. Where section 44 does not apply the Commissioner found that the section 30 exemption was engaged but that the public interest in maintaining the exemption did not outweigh the public interest in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - BIS shall disclose to the complainant redacted copies of the information falling within the scope of the request as described in the attached confidential annex.
4. The public authority 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 Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 3 November 2011 the complainant made a freedom of information request to the Employment Agency Standards Inspectorate (EASI), part of the Department for Business, Innovation and Skills (BIS), for copies of its inspection or investigation into complaints made against Michael Page International, a recruitment firm.
6. BIS responded to the request on 1 December 2011 when it confirmed that the requested information was held in the form of a report of its investigation. However, it said that it was withholding this information under the exemptions in section 44 (prohibitions on disclosure) and section 30 (investigations) of FOIA.
7. On 13 February 2012 the complainant asked BIS to carry out an internal review of its handling of the request.
8. BIS presented the findings of its internal review on 24 April 2012 at which point it upheld its initial decision to refuse the request and also said that it was now applying the section 40 (personal information) exemption to some of the information contained within the report.

## **Scope of the case**

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9. The complainant contacted the Commissioner to complain about BIS' decision to refuse to disclose the information it requested although the complainant informed the Commissioner that it did not wish to challenge BIS' application of section 40.
10. BIS has identified a letter sent to Michael Page International and an associated report as information falling within the scope of the request. During the course of the investigation BIS took the decision to disclose heavily redacted versions of these two documents to the complainant. The majority of the information contained within the documents continued to be withheld and it is this remaining undisclosed information which the Commissioner has considered in this Decision Notice.

## **Reasons for decision**

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11. As noted above BIS has withheld a letter and a report related to the complaint against Michael Page Limited. The section 44 exemption has been applied to all of the withheld information and the section 30

exemption has also been applied to some of the information in the alternative. The Commissioner has first considered the application of section 44.

#### Section 44 – prohibitions on disclosure

12. Section 44(1)(a) provides that information is exempt if its disclosure is prohibited by or under any enactment. In this case BIS has claimed that the relevant statutory prohibition is section 9(4)(a) of the Employment Agencies Act 1973 ("the EEA") which provides that no information obtained in the course of an inspection carried out under that legislation shall be disclosed.
13. In order for the statutory prohibition to apply it is necessary to establish that the information was obtained in the course of an inspection. The complainant had raised this issue with BIS at the time of the request and argued that it had applied the statutory prohibition too broadly. Whilst it accepted that some information would be likely to fall under the statutory prohibition, certain information, including the results of any investigation, would not be information that was 'obtained' and should be disclosed. It referred to the *Employment Agency Standards Inspectorate – General enforcement and procedural guidance* which provides an example of a report which should be produced as a result of an inspection of an employment agency carried out under the EEA. It noted that any report based on this guidance would include "details such as the nature of any infringements, attitude of the agency, the action taken and any recommendation for a further inspection to be carried out within a specified interval" and therefore "sections of the Report clearly contain the opinion/assessment of the EASI inspector, for example in relation to any infringements found". It said that, in its view, such details could not be considered information that had been obtained.
14. For its part BIS argued that the complainant's interpretation was incorrect and that in its view the statutory prohibition would extend not only to information that was obtained but also any information that would reveal what information was obtained. It said that section 9(4)(a) of the EEA clearly covered information obtained during the exercise of statutory powers such as documents, standard terms and conditions and answers to questions. However, it also said that the statutory prohibition would also cover any information that was not so obtained but the disclosure of which would show what was actually found or inspected. By way of an example, BIS said that the opinion of an EASI inspector was clearly not 'obtained' during the course of the investigation but if that opinion refers to or reveals what was actually found during the investigation then the opinion is also covered by the prohibition.

15. First of all the Commissioner would say that in reaching a decision on whether information was obtained it is important to focus on the content of the information rather than the form in which it was recorded. Just because a document was not physically obtained does not necessarily mean that the statutory prohibition will not apply. Section 9(4)(a) of the EEA will extend to information that was generated by BIS such as the report, if it contains information that was itself obtained from a third party such as an employment agency.
16. The Commissioner has reviewed the withheld information and found that some information is indeed information that was obtained from Michael Page Ltd. This includes details of discussions with staff of the agency, answers to questions as well as information contained within the agency's records which were inspected. The Commissioner is satisfied that this information is covered by the statutory prohibition. The Commissioner also found that some information, whilst being the opinions or conclusions of the Inspector, could not be disclosed without also revealing information which was obtained from the agency in the course of the inspection or else the process of redacting the information would render any remaining information meaningless. In these cases the Commissioner has erred on the side of caution and found that the statutory prohibition would apply.
17. However, the Commissioner also finds that for some information BIS has applied the statutory prohibition too broadly. In reviewing the two documents the Commissioner found that some information which reflected the views and conclusions of the EASI and the Inspector could be disclosed without revealing information obtained from Michael Page International including details of any possible infringements of the EEA which may or may not have occurred. The Commissioner does not accept BIS's suggestion that this type of information should be exempt because it is 'based' on information obtained during an inspection. In the Commissioner's view this is stretching the definition of 'obtained' beyond its natural meaning, to in effect apply the statutory prohibition to any information related to a complaint. A finding or conclusion involves the EASI inspector exercising their judgement and whilst it may be based on information obtained during the course of an investigation it will not necessarily reflect the content of the information that was actually received. For the statutory prohibition to apply the disclosure must actually reveal that information, not just hint at it.
18. The Commissioner has found that some of the information which has been redacted by BIS is not information that was 'obtained' and therefore section 9(4)(a) of the EEA does not apply. Consequently the Commissioner finds that the section 44 exemption is not engaged in respect of this information.

Section 30(1)(a) – Law enforcement

19. Where the Commissioner has found that information is not exempt on the basis of the section 44 exemption, he has gone on to consider whether section 30 would apply in the alternative.
20. Section 30(1)(a) provides that information is exempt if it has at any time been held for the purposes of any investigation which the public authority has a duty to conduct with a view to it being ascertained whether a person should be charged with an offence or whether a person charged with an offence is guilty of it.
21. In applying the exemption BIS explained that its investigators are empowered by the EEA to conduct investigations, one possible outcome of which is that where suspected criminal conduct is uncovered the matter will be referred to its own in-house prosecutors for proceedings to be commenced. It said that the exemption was engaged due to the prospect of criminal proceedings arising from the investigation.
22. Section 30(1)(a) is a class based exemption. This means that in order for the exemption to apply it is only necessary to show that the requested information falls within the class of information described in the exemption. It is not necessary to demonstrate any kind of prejudice arising from disclosure for the exemption to apply. In this case the Commissioner is satisfied that the information was held for the purposes of a particular investigation which BIS had the power to conduct under the EAA. Since section 30 is a qualified exemption the Commissioner has gone on to consider the public interest test.

Public interest test

23. Section 2(2)(b) provides that where a qualified exemption like section 30 is engaged, information shall only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure.
24. BIS advanced the following arguments in favour of maintaining the exemption:

*"...the process of gathering information during an investigation is facilitated by the cooperation of all parties involved. Such cooperation is based on the knowledge that any information that is obtained during the investigation will not be disclosed. The full and frank disclosure of information is important for the proper and efficient exercise of EAS's statutory powers. Given that the provision of such information forms the*

*basis of an investigation, the removal of such a protection could lead to information being withheld that could have a detrimental affect on EAS' ability to enforce the legislation and protect vulnerable work seekers. There is also the potential that complaints will no longer be made as protection of the complainant's identity could no longer be guaranteed."*

25. As regards the public interest in disclosure the complainant said that in its view disclosure would enhance the quality of discussions and decision making. The complainant also argued that the withheld information was three years old at the time of the request and therefore any public interest in maintaining the exemption is reduced due to the passage of time. Since no action was taken against the employment agency disclosure would not, it said, prejudice any investigation.
26. BIS also acknowledged that there is a public interest in ensuring that investigations and complaints under the EEA are pursued effectively and in an accountable manner. It said that public confidence can be served by increasing their transparency.
27. It appears to the Commissioner that BIS's argument for maintaining the exemption is essentially that agencies which were the subject of an investigation would be less likely to co-operate with EASI and its inspectors if they felt that information relating to the investigation would be disclosed. However, the Commissioner is not satisfied that there is a real or significant risk that agencies would withhold co-operation were the information to be disclosed. This is because the role of the EASI as an industry regulator means that it would be in the interest of an agency to be seen to co-operate with an investigation. Moreover, engaging with an investigation is likely to cause the least disruption to a business than forcing the EASI to rely on its formal powers.
28. This brings the Commissioner on to his second point. Even if in any particular case an agency were to refuse to engage with an investigation or withhold cooperation this would have very little impact on the ability of EASI to carry out an investigation or effectively enforce the legislation. This is because EASI has powers under the EEA to compel an agency to co-operate with an investigation and supply relevant information. Indeed, the Commissioner notes that it is an offence to obstruct an inspection or fail to supply information requested as part of an investigation. The Commissioner's view is that disclosure would not in any real sense prejudice the ability of EASI to carry out an effective investigation and so he has attributed limited weight to BIS' arguments. The passage of time since the investigation was conducted also means that the public interest in maintaining the exemption is diminished.

29. In reaching this view the Commissioner is also mindful of the fact that those being investigated, knowing that one of the possible outcomes of an investigation is a criminal prosecution, would at least have some expectation that information on the results of an investigation could potentially be disclosed. Indeed EASI itself makes clear on its website that it will seek press coverage and other publicity for successful prosecutions and major investigations to help encourage higher levels of compliance. It is this information which the Commissioner intends to disclose, i.e. information relating to the findings of the investigation rather than information passed to EASI by the employment agency.
30. BIS had also suggested that releasing the information could deter people from making complaints as protection of the complainant's identity could not be guaranteed. On this point the Commissioner would simply say that he is not proposing to release the name of the complainant but in any event he thinks it highly unlikely that a person would be deterred from submitting a complaint for fear that information about their complaint could be disclosed under FOIA.
31. In the Commissioner's view the public interest in maintaining the exemption in respect of information related to the findings of an investigation which has been concluded some time previously are not very strong. On the other hand, there is a clear public interest in releasing the findings of an investigation as this increases public confidence in the organisation through the knowledge that complaints are acted upon and where justified, appropriate action is taken. BIS has not previously revealed what action was taken as a result of this investigation and therefore the Commissioner finds that the public interest in greater transparency and accountability carry particular weight in this case.
32. In light of this the Commissioner has found that in all the circumstances of the case the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
33. The Commissioner has identified exactly which pieces of information are not exempt under section 44 and for which the public interest in maintaining the section 30(1)(a) exemption does not outweigh the public interest in disclosure, in an annex to be supplied to BIS only.

## Right of appeal

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34. 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: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

35. 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.
36. 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  
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