

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 February 2018

**Public Authority:** HM Revenue and Customs  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the public authority for copies of communications and minutes of meetings between the Chief Executive of the public authority and the Chief Executive of the Government Digital Service in relation to a recently introduced identity authentication service known as Verify. The public authority withheld the information held on the basis of the exemptions at section 36(2)(b)(ii) and section 36(2)(c) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on section 36(2)(b)(ii) FOIA.
3. No steps required.

## Request and response

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4. The complainant submitted a request for information to the public authority on 27 April 2017 in the following terms:

“Please provide communications and the minutes of meetings between the chief executive of the Government Digital Service and the chief executive of HMRC regarding Verify identity verification platform. Please provide information from 1st April 2016 to date.”
5. The public authority provided its response on 26 May 2017. It confirmed that it held the requested information which it considered exempt on the basis of section 35(1)(a) FOIA.
6. The complainant requested an internal review of the public authority's decision on 26 May 2017.
7. On 30 August 2017 the public authority wrote to the complainant with details of the outcome of the internal review. The review upheld the original decision.

## Scope of the case

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8. The complainant contacted the Commissioner on 1 September 2017 in order to complain about the public authority's handling of his request. The Commissioner has referred to his submission at the relevant parts of her analysis below.
9. The public authority provided the Commissioner with its submission (including the withheld information) in support of the application of section 35 (1)(a) on 15 November 2017.
10. In response to further enquiries by the Commissioner, the public authority wrote to the complainant on 2 February 2018 and clarified that the only information held within the scope of his request consists of emails between the Chief Executive of the Government Digital Service (GDS) and the Chief Executive of HMRC (the public authority). It explained that it does not hold minutes of meetings within the scope of the request.
11. The public authority also informed the complainant on 2 February 2018 that it had withdrawn its reliance on section 35(1)(a) and was relying instead on the exemptions at section 36(2)(b)(ii) and section 36(2)(c) FOIA as the basis for withholding the information held within the scope of his request.

12. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exemptions at sections 36(2)(b)(ii) and (c) FOIA.

## Reasons for decision

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### Background

13. The request was submitted against the backdrop of a reported disagreement between GDS and the public authority over the Verify identity verification platform.
14. Verify identity verification platform is a government owned service for verifying a person's identity online. The GDS describes it as "a secure way to prove who you are online."<sup>1</sup> Verify can be used to prove identity for a number of services including; filing for self assessment tax returns, renewing driving licences, applying for universal credit and checking your state pension.
15. Although Verify is being rolled out to government departments and to certified private organisations, there has been uncertainty as to whether the public authority will use Verify as its identity service or design a bespoke identity verification platform modelled on the "Government Gateway" service, the identity verification service which has been in use for some time but is going to be phased out this year to make way for Verify.
16. Verify it seems was primarily designed to identify individuals, not businesses or accountants and the public authority needs to do that too, and currently does through the Government Gateway service. There has therefore been some uncertainty regarding the public authority's position with respect to fully implementing Verify. For example, in February 2017, its Programme Director stated in a blog that the public authority was going to provide a new set of services to replace the Government Gateway service and that the new set of services would be restricted to business and agent-facing services because of the requirement for all departments to use Verify.<sup>2</sup> In response to enquiries to the public authority following this blog, it

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<sup>1</sup> <https://www.gov.uk/government/publications/introducing-govuk-verify/introducing-govuk-verify#govuk-verify-overview>

<sup>2</sup> <https://hmrcdigital.blog.gov.uk/2017/02/13/green-light-for-government-gateway-transformation/>

issued the following statement: "HMRC is committed to Verify as the single identification service for individuals and is fully focused on delivering this. The authentication service that HMRC is developing to replace the Government Gateway will complement the existing Verify service for business representatives."<sup>3</sup>

17. Consequently, there have been media reports of an ongoing disagreement between GDS/the Cabinet Office and the public authority over which identity verification platform the public authority is going to use going forward.<sup>4</sup>

### **Application of exemptions**

18. The public authority has withheld the emails in scope on the basis of the exemption at section 36(2)(b)(ii). It has additionally withheld the contact details of the officials contained within the emails on the basis of the exemption at section 36(2)(c).

19. The Commissioner has first considered whether the public authority was entitled to rely on section 36(2)(b)(ii).

20. The exemptions at section 36 state:

"(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—

a) would, or would be likely to, prejudice-

- i. the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
- ii. the work of the Executive Committee of the Northern Ireland Assembly, or
- iii. the work of the Cabinet of the Welsh Assembly Government.

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.

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<sup>3</sup> <http://www.bbc.co.uk/news/technology-38979144>

<sup>4</sup> For example, as reported by the BBC: <http://www.bbc.co.uk/news/technology-38979144>

- c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”
21. As can be seen from the above, the exemptions at section 36 can generally only be engaged on the basis of the reasonable opinion of a qualified person. Given that the exemptions at section 36(2)(b)(ii) and (c) were first introduced by the public authority during the course of the Commissioner's investigation, the opinion of the qualified person was not sought by officials until 30 January 2018, a lengthy interval following the request in April 2017. Nevertheless, concerns with respect to the likely effect of disclosing the information held remained as pertinent as they were at the time of the request.
  22. Officials sought the opinion of Jon Thompson, First Permanent Secretary and Chief Executive of HMRC. The Chief Executive gave his opinion that the exemptions were engaged on 1 February 2018.
  23. The Commissioner is satisfied that the First Permanent Secretary and Chief Executive of HMRC was the qualified person for the public authority by virtue of section 36(5)(c) FOIA.<sup>5</sup>

Was the qualified person's opinion reasonable?

24. It is clear from the wording in the exemption that the qualified person's opinion must be one that is reasonable. A copy of the opinion was supplied to the Commissioner in confidence. Parts of the opinion inevitably reveal exempt information. However, although the opinion is summarised below within the confines of these restrictions, the Commissioner has considered it in full before making her decision.
25. The withheld information comprise of a series of frank email exchanges between the Chief Executive of GDS and the Chief Executive of HMRC in relation to Verify. Disclosure of this information would be likely to inhibit similar full and frank exchange of views in future if officials thought that their decisions and views would be published whilst a project or initiative remains current and not fully finalised.
26. The public authority subsequently added that disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation in respect of a major cross-government initiative about authentication services for those engaging

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<sup>5</sup> Which provides that; in relation to information held by any government department other than a government department in the charge of a Minister of the Crown or a Northern Ireland department, the qualified person means “the commissioners or other person in charge of that department.”

with government departments. In addition, disclosure would be likely to prejudice future cross-government initiatives if officials thought that similar frank exchanges could be published before a project is finalised. Officials could become overly cautious in assessing risk and the viability of the options open to them which could have a significant impact on the effective management of major cross government initiatives and consequently the successful delivery of the ongoing project and others in future.

27. The Commissioner has considered whether the opinion is reasonable. 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 withheld 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.
28. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach 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 (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 have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
29. Having inspected the withheld information, the Commissioner is satisfied that it was reasonable for the qualified person to hold the opinion that disclosure of the information would pose a real and significant risk to frank and robust deliberations in relation to the public authority's implementation of Verify and in relation to similar major cross-government projects.
30. The Commissioner has therefore concluded that the public authority was entitled to engage the exemption at section 36(2)(b)(ii).

## **Public interest test**

31. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld emails.
32. The complainant's submission on the public interest in disclosure is summarised below.
33. Given details of the disputes between GDS and the public authority about whether the public authority would be in fact using the system, there is a strong public interest in understanding what has gone wrong.
34. If the public authority decides to develop its own software rather than using Verify, taxpayers could end up with an additional bill for millions of pounds, and they therefore have a strong interest in access to the information that would allow them to hold these departments to account for their decisions.
35. The public authority's submission on the balance of the public interest is summarised below.
36. It acknowledged that there is a strong public interest in ensuring it is accountable for its activities and that it is as transparent as possible about the way it applies its resources and the products it is developing for its customers. Transparency in the decision making process and access to the information upon which decisions have been made can enhance that accountability. It can give the public confidence that decisions are taken on the basis of the best available information, that projects are being interrogated, and that they are fit for purpose.
37. On the other hand it is in the public interest that decisions taken by the public authority and other government departments are based on full and frank exchange of views and that senior leaders are able to engage openly about major policy initiatives within the lifetime of a project without being inhibited by the prospect of their comments becoming public within a short space of time.
38. There is a significant public interest in the most senior official within the department being able to freely make representations to the Cabinet Office about a major policy that is important to the department's ability to deliver digital services to nearly fifteen million customers. This is particularly relevant with regards to the development and implementation of such a large cross government project as each department's requirements and priorities need to be deliberated.



39. It is in the public interest for each department to be able to have a full and open debate away from external scrutiny and to be able to think through all the implications of particular options available for authentication. They also need to be able to undertake a rigorous and candid assessment of the risks to their customers and how to mitigate these. The impact of disclosure would not be limited to this matter alone but could have implications for how other officials engage with the Cabinet Office about Verify.
40. On balance therefore the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld emails.

*Balance of the public interest*

41. If the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur, but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.
42. The Commissioner's determination on the balance of the public interest is set out below.
43. The factors that the complainant has identified in support of the public interest in disclosure should not be underestimated. In particular, given the seemingly conflicting public statements the public authority has issued with regards to the extent of its implementation of Verify, there is a strong case for knowing whether the public authority requires a supplementary identity authentication service at additional cost to taxpayers. It is arguable whether the withheld information answers this question in the Commissioner's view but it does provide some useful insight regarding the issue. There is therefore a strong public interest in disclosing the information.
44. However, this has to be balanced against the stronger public interest in the Commissioner's view in the most senior officials at the public authority and the GDS/Cabinet Office being able to have frank and robust exchanges on the issue. Given that identity authentication and in particular via the Verify platform is a major cross-government project, officials at both departments must be able to freely consider all options, and as the public authority has mentioned, given the impact Verify would have on its fifteen million customers, its most senior officials must be able to have candid exchanges with the Cabinet Office in relation to the department's requirements and priorities. The severity of the impact



that a chilling effect on these deliberations could ultimately have on service delivery should also not be underestimated.

45. The Commissioner also accepts there is a strong public interest in preventing a chilling effect on deliberations between other departments and the GDS/Cabinet Office in relation to Verify.
46. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
47. In view of her decision she has not considered the applicability of the remaining exemption.

## Right of appeal

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13. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

14. 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.
15. 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** .....

**Terna Waya**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**