Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 15 August 2011

Public Authority: **Home Office**
Address: **Seacole Building**
2 Marsham Street
London
SW1P 4DF

Summary

The complainant requested information from the UK Border Agency (the UKBA) relating to the Statement of Changes in the Immigration Rules HC 367. The UKBA confirmed information was held but refused to disclose it by reference to sections 35(1)(a) (formulation and development of government policy) and 42(1) (legal professional privilege). The Commissioner investigated and finds that, in relation to the majority of the requested information, sections 35(1)(a) and 42(1) are engaged and that the balance of the public interest weighs in favour of maintaining the exemptions. However, in relation to the content of part of this information the Commissioner finds that none of the exemptions cited are engaged and that the UKBA breached sections 1(1)(b) and 10(1) in refusing to disclose this information. The UKBA is now required to disclose this information to the complainant.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

Background

2. The complainant requested information in relation to the Statement of Changes in Immigration Rules HC 367. Following completion of the

review of Tier 4, the student route of the Points Based System (PBS), the former Home Secretary announced a number of changes to Tier 4 during the course of his appearance on the Andrew Marr television show on 7 February 2010. On 10 February 2010, the Statement of Changes in Immigration Rules HC 367, along with the Explanatory Memorandum, was laid before Parliament. HC 367 covers the following changes to Immigration Rules:

- the reduction from 20 to 10 hours' work permitted during term time for students studying below degree level (excluding those on foundation degree courses);
- restrictions on dependants from coming to the UK where the student is coming for a course that is 6 months or less in duration; and
- preventing family members of students on courses below degree level (except for those on foundation degree courses) from taking employment in the UK, except where they qualify in their own right under Tier 1 (General) or Tier 2.

The Request

3. The Commissioner notes that under the Act the UK Border Agency (UKBA) is not a public authority itself, but is actually an executive agency of the Home Office. The Home Office is responsible for the UKBA and, therefore, the public authority in this case is actually the Home Office not the UKBA. However, for the sake of clarity, this Decision Notice refers to the UKBA as if it were the public authority.

4. On 15 February 2010 the complainant wrote to UKBA and requested the following information:

> *"Please provide information as to when the* [Home Secretary] *was briefed about the changes contained in HC367.*
>
> *Please provide copies of minutes of meetings, emails and other exchanges regarding this rule change and how it was decided to announce the change through a TV show rather than in parliament."*

5. On 20 April 2010 the UKBA provided a substantive response to the complainant after issuing two public interest test extension letters on 15 March 2010 and 12 April 2010. Each public interest test extension letter was issued within a 20 working day time period and indicated when a substantive response could be expected.

6. The UKBA confirmed that information pertaining to the majority of the request was held. However, it withheld the information under two substantive exemptions, section 35(1)(a) – information relating to the formulation and development of government policy – and section 42(1) – legal professional privilege.

7. On 10 May 2010 the complainant requested an internal review of the UKBA's decision to withhold the information. He stated: *"…I believe this information is in the public interest in order to enable a healthy debate on this subject".*

8. On 12 August 2010 the UKBA completed the internal review. It upheld its original decision to withhold the information on the grounds that it engaged sections 35(1)(a) and 42(1) of the Act and that the relevant public interest tests favoured maintaining the exemptions. The UKBA also stated that information pertaining to the second part of the request (how it was decided to announce the change on television rather than in Parliament) was not held.

The Investigation

Scope of the case

9. On 27 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the fact that the UKBA had refused to disclose the information. The complainant argued:

> *"I consider that the refusal to supply information is against the spirit of the Freedom of Information Act and against the public interest.*
>
> *I disagree that it is in the public interest to withhold this information. Withholding this information has to be weighed against the public's right to know whether the UKBA is accountable for its decisions and it also fosters an atmosphere of secrecy over openness. I do not believe that the reasons given by the UKBA outweigh these principals* [sic] *in this case."*

Chronology

10. On 2 December 2010 the Commissioner wrote to the UKBA. He asked it to provide a copy of the withheld information along with detailed and specific reasoning as to why it considered the cited exemptions applied to the information. The Commissioner also asked the UKBA to provide

any further reasoning as to why it believed the public interest in maintaining the exemptions outweighed the public interest in disclosure.

11. The Commissioner also sought further explanation regarding whether information pertaining to the final part of the request was held by the UKBA.

12. On 7 January 2011 the UKBA contacted the Commissioner to explain it needed to make further enquiries in relation to the 'information not held' part of the request.

13. On 31 January 2011 the UKBA provided a substantive response to the Commissioner along with a copy of the withheld information. There are six parts to the withheld information. The UKBA applied section 35(1)(a) to parts two to six. It applied section 42(1) to parts one, two, three and five.

Analysis

Substantive Procedural Matters

Section 1 – information not held

14. Section 1 of the Act states that any person making a request for information to a public authority is entitled to be told in writing whether the public authority holds the information. If information is held, pending any exemptions that may apply, the applicant is entitled to have the information communicated to him.

15. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the Commissioner must decide whether on the balance of probabilities a public authority held any information which falls within the scope of the request at the time of the request.

16. In response to the complainant's request for information relating to *"how it was decided to announce the change through a TV show rather than in parliament",* the UKBA stated in its internal review that no recorded information was held.

17. The UKBA confirmed in correspondence to the Commissioner that its position that no information was held only related to the latter part of the request. It confirmed that this part of the request had been *"treated*

as a separate and third question and interpreted to mean a request for any recorded information about the reasons [emphasis added by the UKBA] *for doing so".*

18. The UKBA explained to the Commissioner that:

"decisions for Ministers to appear on shows such as the Andrew Marr Show are political. These discussions are likely not to have been recorded and are expected to have been between the Home Secretary and his political advisors. The non-political staff in Private Office would not have been involved in the decision, nor would have the policy officials in UKBA. For these reasons, no recorded information is held by UKBA about this matter."

19. The UKBA went on to say that:

"it is standard practice to provide 'briefings' to Ministers prior to any television appearance. This would include background information and up to date information about what is happening at the time. It wouldn't include any 'instructions' as such and how that information is used is then up to the Minister. I have looked at the briefings for the Andrew Marr Show in detail and they refer to the package of changes only and not the reasons for announcing the change via the show."

20. The Commissioner understands that the confirmation of the above was a result of the searches carried out within the UKBA including the Private Offices of the Home Secretary and Chief Executive Officer. The UKBA provided the Commissioner with further details regarding the searches undertaken and clarified that there was no business need for information of the nature requested to be held by the UKBA. After considering the UKBA's arguments and details of the searches undertaken, the Commissioner finds on the balance of probabilities that the UKBA does not hold any recorded information in relation to the third part of the request.

Exemptions

Section 35(1)(a)

21. Consideration of this exemption, which is set out in full in the attached legal annex, as are all other sections of the Act referred in this Notice, is a twofold process. First, for the exemption to be engaged the information must relate to the formulation or development of government policy. Secondly, this exemption is qualified by the public interest, which means that the information in question must be disclosed if the public interest in maintaining the exemption does not outweigh the public interest in disclosure, even though the exemption is engaged.

22. UKBA identified information pertaining to the request including an Explanatory Memorandum of Statement of Changes in Immigration Rules, emails related to HC 367 and a submission from the then Chief Executive of the UKBA to the Home Secretary. This information – parts two to six of the withheld information – was provided to the Commissioner.

23. In reaching a decision on whether the exemption is engaged, the Commissioner has considered first whether policy on the Immigration Rules constitutes government policy, such that information recording the formulation and development of this policy would fall within the class specified in section 35(1)(a). On this point the Commissioner notes that the UKBA has stated that the information in question relates to key recommendations of the Tier 4 review. On the basis that the information is linked to changes to immigration legislation, the Commissioner concludes that this is government policy.

24. Turning to whether the information in question relates to the formulation or development of this government policy, the Commissioner's approach to the term 'relates to' as it is used in this exemption is that this can safely be interpreted broadly. This is in line with the approach taken by the Information Tribunal in *DfES v the Information Commissioner & the Evening Standard* (EA/2006/0006) where it stated:

> *"If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable." (paragraph 58)*

25. As the wording of the request suggests, the information in question consists of submissions prepared by officials for ministers and explanatory notes and email chains regarding the changes in the Immigration Rules. These submissions cover various aspects of the issue of immigration policy and include proposed amendments made to the Immigration Rules in the course of the policy formulation and development process.

26. The Commissioner would expect the provision of advice from officials to ministers to be a standard and central part of the policy formulation and development process. Given this and that the content of the information does concern proposed changes within HC 367, the Commissioner accepts that the information in question does relate to the formulation and development of policy on changes to the Immigration Rules, which the Commissioner has concluded constitutes government policy. The overall conclusion of the Commissioner is that parts two, three and four of the information relate to the formulation and development of

government policy and that the exemption provided by section 35(1)(a) is, therefore, engaged.

27. With regard to the remainder of the information, parts five and six, the Commissioner considers that this information relates to the physical implementation of the policy and not its formulation or development. He has therefore concluded that the exemption provided by section 35(1)(a) is not engaged with respect to this information, and it should therefore be disclosed.

The public interest

28. Since section 35(1)(a) is engaged by parts two, three and four of the requested information, the Commissioner must go on to consider the public interest test in relation to this information. In reaching a conclusion on the balance of the public interest, the Commissioner has taken into account those factors that relate to the specific information in question here, including what harm to policy making may result through disclosure of the information in question, and whether disclosure of information relating to the changes to the Immigration Rules would serve the public interest. This is in addition to the general public interest in transparency and openness in relation to the process of government policy formulation and development.

29. That the information is within the class specified in the exemption is not, however, of relevance to the balance of the public interest. This is in line with the approach taken by the Information Tribunal in *DfES v the Commissioner & the Evening Standard* (EA/2006/0006), where it stated in connection with section 35(1)(a):

> *"The weighing [of the public interest] exercise begins with both pans empty and therefore level."* (paragraph 65)

Arguments in favour of maintaining the exemption

30. Covering first those factors in favour of maintaining the exemption, the public authority has argued that disclosure would result in harm to the policy formulation and development process.

31. The public authority argued that disclosure could result in harm to the policy formulation and development process, both in connection with policy on the specific issue of changes to HC 367 and, more widely, in connection with any future development or formulation of immigration policy, through participants in this process being inhibited in their contributions.

32. In *DfES v the Commissioner and the Evening Standard* (EA/2006/0006) the Information Tribunal provided a number of guiding principles for

consideration of the balance of the public interest in connection with section 35(1)(a). The arguments of the UKBA about disclosure resulting in inhibition to participants in the policy making process are relevant to the 'chilling effect' factor identified by the Tribunal. In the Commissioner's view the 'safe space' argument considered in a number of Tribunal cases is also relevant in this case.

33. The term 'chilling effect' refers to an adverse effect on the frankness and candour of participants in the policy development process. The term 'safe space' refers to the need for a protected space in which to formulate policy, debate live issues, and reach decisions without being hindered by external comment and/or media involvement. Arguments about safe space are related to chilling effect arguments, but are distinct, as the need for a safe space within which to debate policy away from external involvement exists regardless of any chilling effect that may or may not result through disclosure. The basis of safe space arguments is that an erosion of the safe space for policy making would have a detrimental impact on the quality of the policy making process.

34. The weight that the Commissioner affords to chilling effect and safe space arguments will depend on how closely they relate to the information and policy making process in question. For example, an argument that disclosure would result in a chilling effect to policy making in general would usually carry less weight than an argument that a chilling effect would affect the specific policy area to which the information relates. Also key is the stage reached in the policy making process at the time of the request. Where a public authority argues that harm would result to a specific and ongoing policy making process, this will generally carry more weight than an argument suggesting that harm would result to future policy making in general through disclosure of information relating to policy that was complete at the time of the request.

35. In this case, the argument advanced by the UKBA is closely related both to the information and policy making process in question (in that it relates to the changes to immigration policy) and also to further development and formulation in the future. In terms of the stage reached in the specific policy making process to which the information relates, the UKBA has stated that this was ongoing at the time of the request. Details of the chronology of the HC 367 changes provided by the UKBA to the Commissioner illustrate that the policy making process was ongoing at the time of the request, albeit in its final stage.

36. As to what the content of the information suggests about the likelihood of a chilling effect, the Commissioner notes that this does include details of proposed changes to current immigration policy. As this information

records contributions from officials given with frankness and candour, the chilling effect argument is relevant to the content of this information.

37. The Commissioner accepts that harm resulting to the policy making process in the area of immigration through a chilling effect and through the erosion of a safe space in which to develop policy are valid arguments in favour of maintenance of the exemption. Although the policy making process was at a very late stage at the time of the request, it was still ongoing at that time. Given this fact, the Commissioner considers that a safe space was still required at the date of the request in this case and thus affords this factor some weight. However, in accordance with the Information Tribunal decision in *DBERR v the Information Commissioner and Friends of the Earth* (EA/2007/0072) the Commissioner gives less weight to this factor than he would have had the formulation and development of the policy still been in its earliest stages. The Tribunal in DBERR commented in relation to the need for a private thinking space that:

> *"This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public."* (para 114)

In relation to the chilling effect, given that the policy making process was ongoing at the date of the request the Commissioner accepts that a chilling effect is a real possibility and, therefore, this is a public interest factor in favour of maintenance of the exemption to which the Commissioner affords significant weight.

38. As noted above, the UKBA has also argued that disclosure could harm the formulation of immigration policy in the future through inhibition to officials involved in this process. This argument is wider than that made specifically in connection with policy relating to the changes to HC 367, but the UKBA has linked this with the information in question by arguing that this information includes changes that had not been taken by the time of the request, but could form part of future policy. The Commissioner accepts the validity of this argument, since the information could influence future government's immigration legislation, but affords this less weight as a public interest factor than the previous argument given that it relates less closely to the information in question and to the policy making process recorded in the information.

Arguments in favour of disclosure

39. Turning to those factors that favour disclosure, the Commissioner has taken into account arguments advanced by the complainant, as well as what the content of the information suggests about the balance of the

public interest. The complainant has criticised the refusal of the UKBA, stating that the harm it has predicted would not result through disclosure. The Commissioner appreciates that the arguments it has advanced could be seen to have been applied in a blanket fashion, rather than relating to the specific information requested.

40. On the issue of the harm that the UKBA predicted, the Commissioner's analysis of these arguments is given above. In terms of whether the UKBA applied exemptions in a blanket fashion, the Commissioner notes that this would not be good practice on the part of the public authority, and that blanket arguments would not be as convincing as arguments that relate to the specific information in question. However, in its correspondence with the Commissioner the UKBA has related its arguments to the information in question.

41. The complainant argued that disclosure would be in the public interest to promote understanding and debate about the issues covered in the information. This factor is linked to what public interest there is in the content of the information. On this point, the Commissioner notes that immigration policy had been the focus of public debate around the time of the request and continues to be a matter of great public concern. This issue was particularly high on the political agenda following a policy announcement by the Home Secretary about changes to immigration legislation contained within HC 367. Immigration continued to be a much debated topic in the lead up to the General Election in May 2010. The Commissioner also considers there to be a particular public interest in any information that relates to the formulation and development of government policy about immigration, given the universal impact that policy in this area has.

42. The Commissioner believes that the content of this information supports the argument that disclosure would be in the public interest in order to promote understanding of and debate about student immigration policy and, more widely, about government policy making in the area of immigration in general. This is a valid public interest factor in favour of disclosure to which the Commissioner affords significant weight.

Balance of the public interest arguments

43. Having weighed up the arguments in favour of and against disclosure, the conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. Whilst the Commissioner has recognised a significant public interest in disclosure of the information, given the area of policy formulation to which it relates, he believes that this public interest is outweighed by the public interest in avoiding the harm that the UKBA has predicted as a result of disclosure.

44. The key factor here is that the policy making process in question was ongoing at the time of the request. Had it been the case that this process had been complete by the time of the request, the factors in favour of maintenance of the exemption relating to 'chilling effect' and 'safe space' would have carried less weight. However, as this policy making process remained ongoing at the time of this request, these factors outweigh the public interest in disclosure.

Section 42(1)

45. The UKBA cited the exemption provided by section 42(1) in relation to some of the requested information – documents one, two, three and the third paragraph of document five. However, all but a small amount of the information marked as engaging section 42(1) also engaged section 35(1)(a), and since the Commissioner has concluded that this should be withheld by reference to that exemption, it has not been necessary to consider further the application of section 42(1) to that exempt information.

46. The remaining information being withheld under section 42(1) which it is necessary for the Commissioner to consider is document one and the third paragraph of document five. These concern emails between a lawyer and the policy department at the UKBA. The UKBA confirmed to the Commissioner:

> *"The information consists of a number of emails between UKBA and a lawyer in the Legal Advisors Branch (LAB). These emails were sent to a LAB for the purpose of obtaining legal advice and as such, is therefore covered by 'advice privilege'… I can confirm that the legal advice was not circulated widely within UKBA. It was only seen by members if the Immigration Policy Team."*

The UKBA applied both sections 35(1)(a) and 42(1) to a specific paragraph contained within document five. As the Commissioner has found section 35(1)(a) not to be engaged with regard to the information containing the relevant paragraph, he has gone on to consider whether section 42(1) applies to the marked information.

47. Section 42(1) provides an exemption for information that is subject to legal professional privilege. This exemption is also subject to the public interest, meaning that the information should be disclosed if the public interest favours this, however clear it is that the information is subject to legal professional privilege.

48. The UKBA claimed advice privilege. For the Commissioner to accept that advice privilege can legitimately be claimed, the communications must

be confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.

49. The UKBA provided the Commissioner with copies of the emails between the UKBA and the relevant Legal Advisors Branch. Therefore, the Commissioner has details of who provided the advice, and when and in what context this advice was provided. This means that the Commissioner has been able to establish that this information comprises confidential communications made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.

50. Therefore, the conclusion of the Commissioner on section 42(1) is that the UKBA has shown how the information in question engages this exemption. The Commissioner has, therefore, gone on to consider the balance of the public interest.

The public interest

51. Section 42(1) is a qualified exemption and therefore subject to the public interest test under section 2(2)(b) of the Act. Section 2(2) states that, for the information not to be disclosable, all the circumstances of the case must be considered and the public interest in maintaining the exemption must outweigh the public interest in disclosing the information. The Commissioner is only able to consider factors that are relevant to and inherent in the exemption being claimed when considering the maintenance of the exemption, but can consider all public interest factors when weighing up the public interest factors that favour disclosure.

52. It should be noted from the outset that the Act's default position favours disclosure. Therefore, in the event that the public interest factors are of equal weight, the information should be disclosed. It is also important to note that just because a large section of the public may be interested in the information, that does not necessarily mean that the release of the information would be in the public interest. The "public interest" signifies something that is in the interests of the public as distinct from matters which are of interest to the public (a point made by the First-tier Tribunal (Information Rights) (formerly the Information Tribunal) in *Department of Trade and Industry v Information Commissioner* [EA/2006/0007] at paragraph 50).

Arguments in favour of maintaining the exemption

53. The UKBA argued that:

"the disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests – both directly by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour."

The UKBA argued that neither of these scenarios is in the public interest. It stated that there is a *"substantial public interest in maintaining the confidentiality of legally professionally privileged material"* and therefore concluded that the balance of the public interest test should find in favour of maintaining the exemption.

54. The UKBA strengthened its arguments relating to the importance of the confidentiality of the legal advice in question, linking it to the fact that the advice sought concerned the formulation and development of government policy. The UKBA stated that, *"as legal advice may be sought early on in the policy development, disclosing it would undermine the effectiveness of the policy position that was finally reached."*

55. The Commissioner acknowledges that government departments need high quality, comprehensive legal advice for the effective conduct of their business. This advice needs to be given in context and with the full appreciation of the facts. Legal advice provided may well include arguments in support of the final conclusion as well as counter-arguments, and as a consequence legal advice may well set out the perceived weaknesses of the Department's position. Without such comprehensive advice, the Commissioner considers that the effectiveness of the Government's decision-making process would be reduced because it would not be fully informed, and this would be contrary to the public interest.

56. The Commissioner recognises that disclosure of legal advice would produce a significant prejudice to the Government's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge, and indirectly by reducing the reliance it can place on its advice having been fully considered and presented without fear or favour. Neither of these scenarios is in the public interest. The former could result in serious consequential loss or at least a waste of resources in defending unnecessary challenges. The latter may result in poorer decision-making because the decisions themselves may not be taken on a fully informed basis.

57. This could lead to decisions being taken that are legally unsound. Not only would this undermine the Government's decision-making ability, it would also be likely to result in successful legal challenges which could otherwise have been avoided.

58. In addition it may be the case that wider considerations about the consequences in other situations will need to be considered. It is proper that the Government is able to consider the wider picture and potentially rely on its advice in the future (both in this case and others). This is a further public interest factor in maintaining the exemption.

59. As section 42(1) is a qualified exemption, the Commissioner requires that in order to maintain the exemption the counter veiling interests must outweigh the public interest in disclosure. The Commissioner understands that in this case the advice was live at the date of the request, which adds substantial weight to the arguments in favour of maintaining the exemption.

60. The Commissioner acknowledges the strength of the arguments advanced by the UKBA. Indeed, there is a significant body of case law to support the view that there is a strong element of the public interest built into section 42(1). The Information Tribunal in *Bellamy* noted that:

> *'there is a strong public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest. It may well be that, in certain cases …for example, where the legal advice was stale, issues might arise as to whether or not the public interest favouring disclosure should be given particular weight.'* (paragraph 35)

61. The Commissioner does not accept the argument that is often put forward that public officials would be less willing to fully document their requests for legal advice if there were the possibility of disclosure. He does not accept this argument because the Civil Service Code imposes expected standards of professional integrity and he is not convinced that they would be overridden by disclosure. He also agrees with the Tribunal's findings in the case of *Mersey Tunnel Users Association v Information Commissioner and Mersey Travel* [EA/2007/0052] *(the 'Mersey Travel' case)* which stated:

> *'Nor can we see that any professional lawyer would temper their advice for fear of later publication: that would again be self defeating, to both client and lawyer, to say nothing of the lawyer's professional obligations'.* (paragraph 42)

62. The Commissioner believes for the reasons given above that there should be considerable weight given to the inbuilt public interest factor in respecting the concept of legal professional privilege in this case.

Arguments in favour of disclosure

63. The complainant, in correspondence to the Commissioner wrote:

> *"I consider that the refusal to supply information is against the spirit of the Freedom of Information Act and against public interest.*
>
> *I disagree that it is in the public interest to withhold this information. Withholding this information has to be weighed against the public's right to know whether the UKBA is accountable for its decisions and it also fosters an atmosphere of secrecy over openness. I do not believe that the reasons given by the UKBA outweigh these principals* [sic] *in this case."*

64. It is important to remember that the factors in favour of maintaining the exemption are balanced against the arguments in favour of disclosing the legal advice which forms part of the requested information; Parliament did not intend the exemption contained at section 42 of the Act to be used absolutely. Indeed, the Tribunal's decision in the case of *Mersey Travel* underlines this point. In that case the Tribunal concluded that the public interest favoured disclosing legal advice received by Mersey Travel. In particular, the Tribunal placed weight on the fact that the legal advice related to an issue of public administration and therefore to issues which affected a substantial number of people.

65. In the Commissioner's opinion there is a strong public interest in people understanding the reasons for decisions made by public authorities, or in this case the reasoning behind the changes to the immigration policy. Disclosure of the legal advice may assist the public's understanding of why the Home Secretary made the decision he did.

66. Furthermore, disclosure of the various pieces of legal advice would reassure the public that decisions had been made on the basis of good quality legal advice and thus increase public confidence in the changes to the government's immigration policy.

67. The Commissioner accepts that there is a public interest in disclosure of information which aids public debate about and understanding of issues of the day. The Commissioner notes that there has been a very considerable amount of public debate about this issue and there are a lot of people who are interested in the changes to immigration policy. Disclosure of the various pieces of legal advice could allow a more informed public debate on these issues.

Balance of the public interest arguments

68. The Information Tribunal in *Calland v Information Commissioner and the Financial Service Authority* [EA/2007/1036] explained the Tribunal's approach when considering the balance of public interest in this exemption (at paragraph 37):

"What is quite plain, from a series of decisions beginning with Bellamy v IC EA/2005/0023, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential."

69. This approach has been developed subsequently and the current approach was confirmed by the High Court in *DBERR v O'Brien & Information Commissioner [2009] EWHC 164*. In *Dr Thornton v Information Commissioner [EA/2009/0071]* (paragraph 15), the Tribunal distilled the High Court's approach into six principles:

- there is a strong element of public interest inbuilt into the exemption;
- there need to be equally strong countervailing factors for the public interest to favour disclosure;
- these countervailing factors do not need to be exceptional, just as or more weighty than those in favour of maintaining the exemption;
- as a general rule the public interest in maintaining an exemption diminishes over time but the fact that the advice is still 'live' is an important factor in the determination of the strength of the inbuilt public interest in the exemption;
- there may be an argument in favour of disclosure where the subject matter of the requested information would affect a significant group of people; and
- the most obvious cases where the public interest is likely to undermine legal professional privilege is where there is reason to believe that the public authority is misrepresenting the advice which it has received, in circumstances in which it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it has obtained.

70. In this case the Commissioner accepts the importance of the strong inbuilt public interest argument concerning the protection of the concept of legal professional privilege. He notes when considering the fourth point that this legal advice was live at the time of the request and this intensifies the strength of protection that is to be expected. He has also been satisfied that the judicial scrutiny this advice has undergone and will undergo adds further weight to the strong inbuilt public interest

argument. He believes that this case represents the circumstances that were envisaged to be covered by the exemption in section 42(1).

71. The Commissioner has had the opportunity of seeing the withheld information. In his view, it does not reveal any of the potential concerns that would add weight to the public interest in disclosure, particularly that the UKBA may have misrepresented the advice which it has received where it is pursuing a policy which appears to be unlawful, or where there are clear indications that it has ignored unequivocal advice which it has obtained.

72. The Commissioner has considered the weight of the public interest factors in disclosure but is not convinced that they come close in this case to being equally strong countervailing factors that would override the public interest factors in maintaining the exemption on the circumstances of this case.

73. For all the reasons above, he is therefore satisfied that the public interest in maintaining the application of the exemption outweighs the public interest in disclosure.

74. He therefore determines that the exemption found in section 42(1) has been applied correctly and does not uphold this part of the complaint.

Procedural Requirements

75. In refusing to disclose information contained in document five (apart from the content of the third paragraph of this document) and document six on the basis of the exemption contained in section 35(1)(a), which the Commissioner now concludes was not engaged, the UKBA failed to comply with the requirements of sections 1(1)(b) and 10(1) to disclose the information requested within 20 working days of receipt of the request.

The Decision

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76. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

    - the UKBA confirmed information was held complying with section 1(1)(a);
    - the UKBA correctly engaged section 35(1)(a) in relation to information contained within documents two, three and four and

found that the balance of the public interest test maintained the exemption; and

- the UKBA correctly engaged section 42(1) in relation to information contained within document one and the third paragraph of document five and found that the balance of the public interest test favoured maintaining the exemption.

77. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- the UKBA incorrectly engaged section 35(1)(a) in relation to information contained within documents five and six;

- the UKBA failed to provide the information contained within document five (apart from information contained within the third paragraph covered by section 42(1)) and document six on the basis of exemptions that were not engaged, and therefore breached section 1(1)(b); and

- the UKBA failed to disclose the information described above within 20 working days from the date of receipt of the request and therefore breached section 10(1).

Steps Required

78. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- disclose the information contained within document five (apart from the information contained within the third paragraph) and document six.

79. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

80. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

81. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took 66 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

82. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

83. 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.

84. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 15th day of August 2011

Signed ……

Gerrard Tracey
Principal Policy Advisor
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Formulation of Government Policy

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(c) the formulation or development of government policy,

(d) Ministerial communications,

(e) the provision of advice by any of the Law Officers or any request or the provision of such advice, or

(f) the operation of any Ministerial private office."

Legal Professional Privilege

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."