

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 27 July 2011

Public Authority: The Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Summary

The complainant requested information from the UK Border Agency (UKBA) concerning its scheme (or pilot scheme) to expel European Economic Area nationals on the basis that they are not exercising Treaty rights. The public authority disclosed some information but withheld the remainder citing the exemption in section 35(1)(a) (formulation of government policy). The Commissioner's decision is that the exemption is engaged and the public interest favours the maintenance of the exemption. The Commissioner did however identify a number of procedural breaches.

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. EEA (European Economic Area) nationals have rights of free movement and residence within the EEA States, subject to certain limitations and conditions.
3. The Secretary of State has the power to remove EEA nationals who are not exercising a Treaty right in the UK or where their lifestyle and/or behaviour suggests that they are not exercising a Treaty right (for example, persistently coming to the attention of the authorities for

frequently committing low-level crime). A person is exercising a Treaty right if they are self-employed, self-sufficient, a student or working.

The Request

4. 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, which has responsibility for it. However, for the sake of clarity, this Decision Notice refers to UKBA as if it were the public authority.
5. The complainant wrote to UKBA on 14 May 2010 to make the following request for information:

"I am requesting all information that you have about the UKBA's [UK Border Agency] scheme (or pilot scheme) to expel EEA nationals on the basis that they are not exercising Treaty rights. I believe this scheme or pilot scheme is being carried out in exercise of the UKBA's powers under Regulation 19(3)(a) of the Immigration (European Economic Area) Regulations 2006. If there is any confusion about the scheme or pilot scheme I am referring to, it is the one discussed in the press article in the Daily Mail from 7 April 2010

Please provide me with all documentation about this scheme or pilot scheme including, but not limited, to:

- *correspondence within the UKBA or between the UKBA and other Government departments or agencies (including within and beyond the Home Office and local authorities);*
 - *data about the numbers of EEA nationals whose expulsion has been attempted and/or carried out under this scheme;*
 - *documents related to the scheme (including assessment of the risk of litigation arising from the scheme);*
 - *correspondence with foreign Government agencies (including embassies);*
 - *any policy documents (eg enforcement or caseworker guidelines);*
 - *any monitoring of the scheme, including monitoring of people who have been returned in this way."*
6. UKBA responded on 17 June 2010 disclosing some of the requested information, but withholding the rest under section 35 of the Act 2000.

Some information was also withheld under section 40(2). In relation to point 4 of his request (referred to by UKBA as (3)), UKBA told the complainant that it did not hold any information.

7. On 23 July 2010 the complainant requested an internal review with respect to UKBA's decision to withhold information within the scope of parts (1) and (3) of the request.
8. The Home Office upheld UKBA's decision in an internal review which was sent to the complainant on 26 October 2010. In this correspondence, the Home Office clarified it was citing section 35(1)(a) in relation to some of the information. It also clarified that section 40(2) did not apply to some of the withheld information as this information had in fact been disclosed.

The Investigation

Scope of the case

9. The complainant contacted the Commissioner on 15 November 2010 to complain about the way his request for information had been handled. The complainant referred the Commissioner to points he had raised at the internal review stage with respect to parts (1) and (3) of his request, namely:
 - whether the withheld information falls within the scope of section 35(1)(a) of the Act; and
 - that, in his view, the public interest in disclosing this information outweighed the public interest in maintaining the exemption.
10. The Commissioner considers the scope of his investigation to be with respect to parts (1) and (3) of the request.

Chronology

11. The Commissioner wrote to the Home Office on 3 February 2011 asking for further explanation of its reasons for citing section 35 in relation to parts (1) and (3) of the request, including its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information requested.
12. The Home Office provided its substantive response on 4 April 2011. It told the Commissioner that, in addition to citing section 35(1)(a), it also wished to rely on section 42(1) (legal professional privilege). It confirmed that it was applying section 40(2) where the names of junior staff were concerned.

Analysis

Exemptions

Section 35 Formulation of government policy

13. The Commissioner has first considered the information withheld by virtue of section 35. Section 35 is a class-based exemption, requiring no evidence of prejudice. As the Home Office is citing section 35(1)(a) in this case, in order for the exemption to be engaged the withheld information must, as a matter of fact, relate to the formulation or development of government policy.

Does the information relate to the formulation or development of government policy?

14. In its internal review correspondence of 26 October 2010, the Home Office told the complainant that the requested information:

"centres around various proposals, strategies and operational activities which are still developing and have not been confirmed".

15. It described the withheld information as including:

"documents such as submissions to ministers, correspondence with other department and public bodies in connection with policy development, minutes and proceedings of both ministerial and officials' committees and internal department correspondence".

16. In correspondence with the Commissioner, the Home Office said:

"Discussions and correspondence relating to the development of the pilot, the operation of the pilot, and the evaluation of its results, are all important elements of formulating policy on how the UK deals with EEA nationals who do not have a right to reside in the UK or who are involved in criminality".

17. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that government policy is about the development of options and priorities for Ministers, who determine which options should be translated into political action.

18. In this respect, the Home Office told the complainant:

“UKBA [UK Border Agency] clarified that as a matter of policy, it does not routinely remove EEA nationals from the UK under the powers being exercised in the EEA Removals Pilot. The objective of the EEA removals pilot is to test this new policy and further develop it. Additionally, ministers will be considering the results of the pilot as part of the decision-making process around whether to implement the policy fully, and whether it requires further development”.

19. Having viewed the withheld information, the Commissioner is satisfied that it relates, in its broadest sense, to the formulation or development of government policy in relation to EEA nationals who are not exercising a Treaty right. He therefore finds the exemption engaged.

Public interest arguments in favour of disclosing the requested information

20. The Home Office acknowledged the public interest in disclosure in this case with respect to:

- transparency in policy decision-making;
- a fully informed background to decision-taking;
- promoting accountability of government decision-making; and
- allowing greater participation in decision-making.

21. Arguing in favour of disclosure when requesting the Home Office to conduct an internal review of its decision to withhold some of the requested information, the complainant said:

“Press reports suggest that the pilot is targeting EEA nationals from central and eastern Europe. This raises concerns that the decisions being taken in the course of this pilot may be discriminatory. It is always in the public interest to disclose State action which may violate anti-discrimination norms.

The public also has a strong interest in ensuring that State authorities are acting lawfully.....this information will permit public scrutiny of whether the Secretary of State’s decisions Regulation 19(3)(a) are lawful.”

22. In the Commissioner’s view, the public interest in transparency is likely to apply in all cases, since any disclosure of information held by a public authority is likely to provide some insight into the operation of that

authority. In this respect, he notes that information on the pilot, such as its terms, aims and the legal powers exercised, has been disclosed.

Public interest arguments in favour of maintaining the exemption

The chilling effect argument

23. The Commissioner takes the view that the public interest test can only be carried out in relation to a particular qualified exemption, and the factors against disclosure must be derived from the interests which the exemption is designed to protect. Therefore, in this case, he has only considered as relevant those public interest arguments concerned with the formulation or development of government policy.
24. The Home Office argued that there is a public interest in protecting the deliberative policy making process. In this respect, it cited the fact that the pilot, at the time of the request, was ongoing and had yet to be evaluated. In its view, disclosure at that stage "*could lead to less candid and robust decisions about policy and harm the quality of policy making on this issue*".
25. The Commissioner accepts that, in principle, the possibility of disclosure of information may have a 'chilling effect' on discussions.
26. When considering the 'chilling effect', the Commissioner would expect public authorities to provide convincing arguments for each kind of impact being argued with reference to the particular disclosure being considered. Although the Home Office added to its arguments in this case, overall the Commissioner considers its arguments to have been general in nature and lacking specific evidence. Accordingly, he has only accorded limited weight to the 'chilling effect' arguments, but he accepts that they have some weight as the policy development process was ongoing at the time of the request.

The safe space argument

27. Another possible public interest factor concerns the 'safe space' argument, that is, the need for a 'safe space' to formulate policy, debate 'live' issues, and reach decisions without being hindered by external comment and/or media involvement.
28. In the Commissioner's view, the safe space argument exists separately to, and regardless of, any potential effect on the frankness and candour of policy debate that might result from disclosure of information under the Act (the 'chilling effect'). Even if there were no suggestion that those involved in policy development and formulation might be less frank and candid in putting forward their views, in his view there would still be a

need for a 'safe space' for them to debate policy, evaluate options and reach decisions without being hindered by external comment.

29. The Commissioner considers that a crucial determining factor in relation to the 'safe space' argument will be whether a request for such information is received whilst a 'safe space' in relation to that particular policy-making process is still required.
30. In this case, the Home Office explained that, at the time of the request, the pilot was ongoing and yet to be evaluated and, as the policy was still being formulated and approaches being tested, internal discussions were highly sensitive.
31. The Commissioner notes that while information relating to policy development may retain a high level of sensitivity at the time that policy is being formulated, the sensitivity of that information may decline over time, but that in this case the request was made at a time of high sensitivity whilst internal deliberation was still taking place.
32. Accordingly, the Commissioner considers that the argument in relation to the importance of preserving safe space for government and civil servants to formulate and debate issues away from public scrutiny is of relevance in this case.

Balance of the public interest arguments

33. The thinking behind this exemption is that it is intended to prevent harm to the internal deliberative process of policy-making. In this case, having considered all the factors, the Commissioner takes the view that there are strong public interest arguments both in favour of maintaining the section 35(1) exemption and in disclosing the information at issue.
34. In the Commissioner's view, the weight given to arguments in favour of disclosure will depend both on the need for greater transparency, and any other arguments in favour of disclosure, and also the extent to which the information in question will meet those needs.
35. In coming to a conclusion on this matter, the Commissioner has taken account of the content and context of the withheld information, and considered whether its release would contribute to the general public interest in openness and transparency. More particularly, he has considered whether it would contribute to debate on a matter of public interest. Whilst the Commissioner accepts that release could contribute to public debate, he is also of the opinion (given the nature of the withheld information, in the context of deliberation on the formulation of a policy which, at the time of the request, was under active consideration and whilst internal deliberation was still taking place) that

in this particular case there is a stronger public interest in maintaining the exemption.

36. The Commissioner therefore finds, in all the circumstances of this case, that the public interest in maintaining the exemption in section 35(1)(a) outweighs the public interest in disclosure of the withheld information, and consequently upholds the Home Office's decision to withhold the information under that section.

Other exemptions

37. As the Commissioner has concluded that the Home Office correctly applied section 35, he has not gone on to consider the other exemptions cited by the Home Office in this case.

Procedural Requirements

38. In this case, the complainant's request was received by the Home Office on 14 May 2010 but the Home Office did not issue its refusal letter until 17 June 2010. It therefore took the Home Office 23 working days to respond to the information request. Accordingly the Commissioner finds that, in failing to confirm or deny within 20 working days whether it held the requested information, the Home Office breached the requirements of section 10(1), and that it also breached section 17(1) by failing to provide the details required by that section within 20 working days.

The Decision

39. 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:

- it correctly applied section 35(1)(a) with respect to the withheld information.

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

- the public authority breached section 10(1) by failing to inform the complainant whether it held the requested information within 20 working days of the request;
- it breached section 17(1) by failing to issue the refusal notice within the statutory time limit.

Steps Required

41. The Commissioner requires no steps to be taken.

Other matters

42. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
43. 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 over 65 working days for an internal review to be conducted, despite the publication of his guidance on the matter.

Right of Appeal

44. 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: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

45. 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.

46. 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 27th day of July 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
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Wilmslow
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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."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

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-

- (a) the formulation or development of government policy,
- (a) Ministerial communications,
- (b) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (c) the operation of any Ministerial private office.”