

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 August 2011

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

Summary

The complainant asked the UK Border Agency (the “public authority”) to provide information relating to comprehensive sickness insurance of EEA nationals. The public provided some information but withheld the remainder using the exemptions in sections 35(1)(a), 40(2) and 42(1) of the Freedom of Information Act (the “Act”). The Commissioner’s decision is that the information was properly withheld by reference to section 35(1) and the complaint is not upheld. The public authority’s handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

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 public authority has provided the following useful background information:

“Under the Immigration (European Economic Area) Regulations 2006 (the Regulations), which were created in response to EU Directive 2004/38/EC, if an individual is an EEA or Swiss national, they can apply for a registration certificate. This is a document which confirms right of residence in the UK under European law.”

When individuals have lived in the UK for a continuous period of 5 years, in accordance with the Regulations, they can apply for a document certifying permanent residence. Under the Regulations, EEA nationals may travel to any other Member State and remain there for up to 3 months without any conditions. If the individual wants to stay longer than the initial 3 months they must be classified as a qualified person exercising a Treaty Right. In order to be viewed as such they must be: a jobseeker, in employment, in self-employment, self-sufficient or a student.

Under the Regulations, regulation 4(c)(ii) which discusses what is meant by "self-sufficient" and regulation 4(d)(ii) which discusses what is meant by a "student", states that the individual must have comprehensive sickness insurance. The issue of what is meant by, and covered by, the definition of "comprehensive sickness insurance" is an area in need of clarification, particularly following both EC and domestic case law regarding the scope of the concept of CSI [comprehensive sickness insurance].

The European Casework Instructions (ECIs) at the date the FOI request was answered stated that 'Evidence of CSI should take the form of a full policy document which confirms that the EEA national has had comprehensive medical insurance from the point of their entry to the UK in exercise of free movement rights to the date of application.' There has been confusion by students and other classes of individuals about what role, if any, access to the National Health Service as a student or under a student visa and/or the European Health Insurance Card (EHIC) has in being considered as CSI".

The request

3. The Commissioner notes that under the Act the UK Border Agency is not a public authority itself but an executive agency of the Home Office, which is responsible for it. Therefore, the public authority in this case is the Home Office rather than the UKBA. However, for the sake of clarity, this Decision Notice refers to the UKBA as if it were the public authority.
4. On 18 October 2011 the complainant made the following information request:

"I am writing to request access to all documents held by the UK Border Agency which relate to 'comprehensive sickness

insurance' in the context of EEA nationals. In particular, I am interested in any guidance produced by the European Policy Directorate for caseworkers and the UKBA contact centre. I would also like to access any emails or other communications or memos produced by officials which are relevant to the Agency's policy in this area, including any archived communications. This request is made under the Freedom of Information Act."

5. On 23 November 2010 the public authority sent its response. It provided some information but withheld the remainder under the exemptions in sections 35(1)(a), 40(2) and 42(1) of the Act.
6. On 3 February 2011 the complainant sought an internal review.
7. On 24 February 2011 the public authority provided an internal review. This upheld its previous position.

The investigation

Scope of the case

8. On 24 February 2011 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 application of all of the exemptions.

Chronology

9. On 26 April 2011 the Commissioner commenced his investigation. He wrote to the complainant to clarify the scope of his complaint and also to confirm that he still wished to have his case investigated.
10. On the same day, the complainant agreed with the scope of the investigation and confirmed that he still wished the Commissioner to consider his complaint.
11. On 28 April 2011 the Commissioner commenced his enquiries with the public authority. On 11 May 2011 the public authority acknowledged receipt of this correspondence.
12. The Commissioner chased a response on 1 and 14 June 2011.
13. On 14 June 2011 the public authority sent a partial response. Within this response it identified some information which it stated was already

in the public domain and should therefore have been provided to the complainant; it advised that it would release this to him.

14. On 24 June 2011 the public authority sent through a further response.
15. During the investigation the public authority also located a document which it believed was already accessible to the complainant, although it had not advised him accordingly. It provided this to him directly so the Commissioner has not further considered this item in the scope of the complaint.

Analysis

Exemptions

A. Previously disclosed information

Section 40 – personal information

16. The public authority has previously released some information to the complainant. However, within this released information it has redacted some names of staff which the complainant has challenged.
17. The Commissioner has previously issued a Decision Notice to this public authority concerning its release of staff names¹. In this Notice, at paragraph 52, the Commissioner advised:

"... it is the Commissioner's policy to release the names of those staff in his own structure from level D and above. It is the Commissioner's view that a Level D position within his own structure either involves some level of managerial responsibility and therefore seniority over other members of staff or a role that involves decision making for which the employee has accountability. He would equate this level with the grade of Higher Executive Officer (HEO) and above within this public authority's grading structure".

18. He further stated:

"... for those other members of staff where the grade is known, the Commissioner considers that staff of the grade of HEO or above hold positions of sufficient seniority to warrant the further

¹http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50308752.ashx

transparency and public scrutiny such roles attract, even where the involvement in the particular decision making is limited or indirect”.

19. For the same reasons as cited in that Notice (at paragraphs 35 to 62) the Commissioner concludes that disclosure of the names of staff at the level of HEO or above would, in this case, be fair and that condition 6 of Schedule 2 of the DPA is met. The public authority should therefore disclose that information.

B. Previously withheld information

Section 35 – formulation of government policy

20. Section 35(1)(a) states that:

“Information held by a government department ... is exempt information if it relates to the formulation or development of government policy”.

21. As this is a class-based exemption, if the information relates to the formulation or development of government policy it falls within this exemption. (The full text of section 35 can be found in the Legal Annex at the end of this Notice.)

22. Regarding this exemption the complainant states the following:

“... in particular, the Information Commissioner should investigate whether Cabinet ministers have in fact been involved in all the documents where this exemption is the sole exemption relied on. This is because ... it might be that documents produced by policy officials without ministerial involvement do not result in this section being engaged.”

23. In the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information which is concerned with the formulation or development of the policy in question. It does not have to be information specifically on the formulation or development of that policy and it does not require the personal involvement of ministers.

24. The public authority has explained that, at the time of the request, the withheld information, i.e. information concerning the formulation of policy regarding comprehensive sickness insurance (CSI), was still subject to change. It advised the complainant that:

“The information was created relatively recently and is regarding current policy discussions as UKBA work to formulate a policy on

this matter. None of the information relates to 'archived' material...";

and

"UKBA has confirmed that the policy relating to comprehensive sickness insurance and European Economic Area (EEA) immigration is by no means settled and is still very much a matter of ongoing consideration. To that important extent, the information relates to a subject which remains a live policy issue. The Agency is currently involved in ongoing discussions with other Government departments as it works towards establishing a policy on comprehensive sickness insurance and EEA immigration".

25. Having viewed the information the Commissioner accepts that the information all relates to CSI policy development and he therefore finds that section 35(1)(a) can be applied to the information. He also accepts that, at the time of the request, the policy-making was still ongoing.
26. Furthermore, the Commissioner notes that the public authority only applied this exemption to some of the withheld information. However, it is the Commissioner's view that the information in its entirety relates to the formulation of the policy in question because it all concerns issues which relate to its development.

Public interest arguments in favour of disclosing the requested information

27. The public authority has put forward the following arguments in favour of disclosure:

"The Home Office recognises that there is a general public interest in openness and transparency in all aspects of government. Such openness increases public trust and confidence in government and promotes the accountability of government decision-making. Further, there is a considerable public interest specifically around matters relating to immigration and its impact on the UK. The release of information around policy development can potentially lead to greater engagement in political debate and policy discussions, as the public would become better informed on all aspects of the work of government. It would also potentially give interested parties an opportunity to contribute to the policy making process.

Release of the information, in this specific context, would enable

interested parties to put into context any subsequent decision making made by the UKBA on comprehensive sickness insurance and European Economic Area (EEA) immigration.

Disclosure would also enhance knowledge of the way policy was developed, enabling those with a particular interest in this subject to understand more clearly the policy making decisions behind comprehensive sickness insurance and EEA immigration. It would also demonstrate the effectiveness of the Home Office's liaison with other government departments in the development of this policy".

28. The complainant offered the following arguments to support disclosure:

"First, it is clear that the number of EEA national migrants in the UK who are affected by the Home Office's policy regarding comprehensive sickness insurance is substantial. UKCISA statistics from 2008/2009 show that there were 117660 non-UK domiciled students from other EU member states alone studying in the UK in that academic year. This does not include self-sufficient EU nationals who are also affected by this policy nor does it include students from EEA states. It seems clear to me that the number of people affected by this policy is clearly significant.

Second, it is reasonable to suspect that the Home Office may not be acting lawfully regarding this matter. For example, the guidance which the Home Office refers to in its response states that the European Health Insurance Card is not acceptable as evidence of comprehensive sickness insurance cover in the UK. This contradicts the European Commission's position promulgated in a document under reference COM(2009)313 (paragraph 2.3.2)".

Public interest arguments in favour of maintaining the exemption

29. The public authority has put forward the following arguments against disclosure:

"It is vital to the policy development process that Ministers and their officials are able to discuss different policy options in a candid and open way. Such a release may have the effect of constraining the frankness of such discussions in future. The public interest in this instance is best served by Ministers and officials being allowed to formulate and develop policy, in the confidence that their deliberations will not be made public. Prematurely releasing such information could result in less robust

policy discussions of the different options available, resulting in diminished quality of the final policy produced.

Routine release of this type of information could have the effect of discouraging Ministers and their officials from comprehensively discussing different policy options and thereby challenging established ideas which are all important parts of the policy formulation process. In essence, officials need to be given the space to 'think the unthinkable', without fear that such deliberations would be prematurely released and subject to the rigours of public political debate".

30. The public authority added to these arguments in correspondence with the Commissioner.

"In this case the outcome of policy decisions and final decisions taken will also have an impact on the UK defense [sic] of any case decisions taken by the European Commission and, as such will have an impact on relations between the UK and other Member states."

"Discussions across government departments are, in cases such as this, vital so that opposing views or desired outcomes can be aired in an atmosphere of privacy. It is important that officials from across government are not discouraged from providing full and frank opinions and challenging the views of other departments, or indeed, as in this case, the views of other Member states.

The public interest is also best served in this case by allowing officials to discuss the development of a policy as is necessary for transitional arrangements when EC Directives are translated in to UK Regulations. The transitional period in developing policy is likely to be a period of change and it is important that officials are able to discuss any concerns or necessary changes openly in order or get to a point where the policy decisions can be agreed and made public as quickly as possible and with the least amount of confusions for the public. In the case of the ongoing discussions regarding CSI it is obvious that the confusion around CSI has had a negative impact. The negative impact was felt both by members of the public who felt they had sufficient evidence that they could be classified as self-sufficient, and by UKBA who had to provide interim guidance which still left officials with questions about what could be considered as CSI. It was, therefore, all the more important that communication between officials took place in an open and timely manner. Anything

which would have slowed these discussions down would need to be avoided”.

Balance of the public interest arguments

31. In summing up the public interest the public authority advised:

“I have carefully considered the arguments for and against disclosure of the information. The arguments are finely balanced, however I have concluded that the public interest is in favour of non disclosure under section 35(1)(a) of the Act. I have given particular weight to the fact that this particular policy is still in process of development and that disclosure of the requested information at this stage could prejudice that process. There is a greater overall public interest in ensuring that both Ministers and Home Office officials have the necessary space to develop and assess policy to ensure it is robust and effective as possible”.

32. The Commissioner recognises that there is a public interest in openness and transparency in all aspects of government. He also accepts that there may be value in the public knowing about policy issues as they arise as this could further promote participation and encourage wider debate around issues as they develop.

33. In this particular case, the Commissioner accepts that there is a public interest in knowing more about CSI as it potentially affects a large number of people. He further recognises that there is an ongoing interest regarding issues which relate to immigration.

34. The Commissioner also acknowledges that the complainant believes that the public authority is acting ‘unlawfully’, believing that the European Health Insurance Card should be considered as evidence of sufficient health insurance cover. However, this is not an issue which the Commissioner can consider, since it is outside the Commissioner’s remit to make a finding on the legality of a policy over which he has no jurisdiction. The Commissioner’s focus will be on what the information reveals and whether it is in the public interest to reveal the public authority’s actions. He notes, nevertheless, that the policy itself is not completed and the final position could still accord with the complainant’s view.

35. Further, the Commissioner notes the public authority’s arguments regarding both the need for a ‘safe space’ to consider various options and the ‘chilling effect’ of disclosure of the requested information.

36. When considering the ‘safe space’ argument, the Commissioner noted the views of the Information Tribunal in *Department for Education and*

Skills v the ICO & The Evening Standard (EA/2006/ 0006). This case dealt with the importance of the safe space argument and stated:

“The timing of a request is of paramount importance to the decision [...] disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy” (para 75).

37. Therefore, when considering the safe space argument, it is the Commissioner's view that he needs to look at the age of the requested information and whether the formulation and development of the policy in question was still underway at the time of the request.
38. In this case the Commissioner notes that the withheld information was created close to the time of the request – the oldest document is the note of a meeting from July 2009, the most recent are emails created just a few days prior to the request.
39. The Commissioner has considered whether the policy-making process was 'live' and whether the requested information related directly to that policy making. He noted the comments from the Tribunal in *Department for Business, Enterprise and Regulatory Reform v the ICO & Friends of the Earth (EA/2007/0072)* regarding the need for a private 'thinking' space:

“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”.

40. The Commissioner is satisfied that in this case the policy-making process was 'live' as it was still not completed during his investigation of this complaint. He is also satisfied that the requested information relates directly to the formulation and development of policy. The argument that a safe space was still needed to protect the policy-making process is therefore a relevant one.
41. The Commissioner also notes the Tribunal decision in *Department for Education and Skills v the ICO & The Evening Standard (EA/2006/ 0006)*, as discussed above. He notes that the Tribunal acknowledged that the timing of a request was of paramount importance when deciding whether information should be disclosed. The Tribunal also

noted that it was 'highly unlikely' that it would be in the public interest to disclose discussions of policy options during the process of policy formulation unless it would, for example, expose wrongdoing within government. Although the complainant has suggested that the government may be acting unlawfully the Commissioner has viewed the information and does not see that there is very a strong public interest in revealing the public authority's actions

42. It is the Commissioner's view that it is in the public interest for government to be able to share and discuss relevant views and opinions. It should also be able to develop these views and opinions in a safe space, at the time when it is formulating the policy in question.
43. Turning to the 'chilling effect' argument, the Commissioner notes the comments made by the Tribunal in *Department for Education and Skills v ICO & The Evening Standard (EA/2006/0006)* which dealt with this:

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

44. In the present case, the Commissioner is satisfied that the entire information relates to the formulation of policy around the subject of CSI.
45. The Commissioner accepts that there is a strong public interest in matters which could affect a large number of people being open and transparent. However, he also accepts that there is a strong public interest in ensuring that policy formulation and development in relation to any such matters should be effective.
46. The Commissioner will often reject 'chilling effect' arguments if they are deployed in a general manner with little reference to the specifics of the case. However, he notes that in this particular case the policy process was still ongoing. The Commissioner accepts that in order for any such policy to be developed as effectively as possible then all relevant parties have to be able to provide advice in confidence on such matters. The Commissioner also accepts the importance the public authority places on a policy which will underpin the UK's position about CSI in respect of the rest of Europe. Furthermore, the Commissioner believes that the chilling effect would be exacerbated as disclosure would reduce the candour and frankness with which officials would continue to contribute to this particular live policy issue.

47. The Commissioner has considered all of the arguments. Given the timing of the request, the Commissioner accepts the public authority's arguments regarding the need for a safe space and the chilling effect of disclosure at that time and has accorded them significant weight.
48. The Commissioner therefore accepts that, in this case, the public interest in maintaining section 35(1)(a) outweighs the public interest in disclosure.
49. As the Commissioner considers that this exemptions relates to all of the fully withheld information he has not considered the applicability of the other exemptions cited.

Procedural requirements

50. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. Section 10 of the Act states that a public authority must comply with section 1(1) promptly and, in any event, not later than 20 working days after the request has been received.
51. For the reasons set out above the Commissioner is of the view that the names of any staff at grades of HEO or above ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the public authority failed to comply with section 1(1)(b) of the Act. By failing to supply this information within 20 working days the Commissioner finds that the public authority also failed to comply with section 10(1) of the Act.
52. Furthermore the original response was sent out outside the 20 working day limit, which is a breach of section 17(1) and a further breach of section 10(1) in respect of the obligation to confirm whether information is held.

The Decision

53. 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 properly applied section 35(1)(a) to the withheld information.
54. The Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- in failing to respond to the request within the statutory time limit it breached section 17(1);
- in failing to confirm, within the statutory time limit, whether it held information, it breached section 10(1);
- in failing to include the names of staff at the grade of HEO or above within the disclosed information it breached sections 1(1)(b) and 10(1).

Steps required

55. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- it should release the names of staff at the grade of HEO or above which were redacted in the previously disclosed information.
56. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

57. 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.

Right of Appeal

58. 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@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm>

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.

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 9th day of August 2011

Signed

**Steve Wood
Head of Policy Delivery**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal annex

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 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".

Section 40(2) provides that –

"Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied."

Section 40(3) provides that –

"The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

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,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.

Section 35(2) provides that –

Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

Section 35(3) provides that –

The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

Section 35(4) provides that –

In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.