

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 March 2012

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

Decision (including any steps ordered)

1. The complainant requested information concerning guidance on the acceptable use of force and constraint given by UK Border Agency to contractors escorting deportations. The Home Office disclosed a redacted copy of a manual setting out what force could be used, and cited the exemptions provided by the following sections of the FOIA in relation to the redactions:
 - 31(1)(f) (maintenance of security and good order in prisons)
 - 38(1)(a) (endangerment to health)
 - 38(1)(b) (endangerment to safety)
2. The Information Commissioner's decision is that the Home Office has withheld some of the information requested incorrectly. It also breached section 16(1) of the FOIA in that it did not advise the complainant of where information falling within the scope of her request was publicly available.
3. The Information Commissioner (the Commissioner) requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information, described in annex A and identified in the confidential Annex B at the end of this notice, from the Use of Force Manual 2006 to the complainant. As confidential annex B identifies disputed information this is provided to the Home Office only.

- Contact the complainant and advise where information recording techniques for use with minors is available.
4. The Home Office must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 9 December 2010, the complainant wrote to the Home Office and requested information in the following terms:

"I write to request a full, unredacted copy of the current guidance covering the use of force and restraint provided to UK Border Agency escorting contractors.

If the current guidance has been in operation for less than a year I also request that you provide a full, unredacted copy of the guidance in use immediately before the current version."

6. The Home Office responded substantively on 7 February 2011. A redacted version of a document it referred to as *"Use of Force Manual 2006"* was disclosed at this stage. In relation to the redactions from this document, the exemptions provided by the following sections of the FOIA were cited: 31(1)(f) (prejudice to the maintenance of security and good order in prisons) and 38 (endangerment to health and safety).
7. Following an internal review the Home Office wrote to the complainant on 10 May 2011. It stated that the refusal of the request was upheld, under the exemptions cited previously. It now confirmed that both subsections from section 38 were cited: 38(1)(a) (endangerment to health) and 38(1)(b) (endangerment to safety).
8. When requesting an internal review, the complainant made the point that the scope of her request was not restricted only to the manual, rather it was for any current guidance on the use of force and restraint by UK Border Agency contractors, and asked the Home Office to consider whether it had identified all information falling within the scope of the request. In response to this the Home Office stated that it had read the request as having been for a copy of the manual only, but that it had ascertained that, in any event, it held no further relevant information.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way her request for information had been handled on 28 September 2011 on the grounds that she did not agree with the decision to redact part of the content of the Use of Force Manual. The complainant later clarified that she wished the scope of this case to also cover the issue of whether the Home Office held any further information falling within the scope of her request.
10. The complainant made reference at this stage to a previous decision notice issued by the Information Commissioner to the Youth Justice Board for England and Wales (ICO reference FS50173181). In that notice the Commissioner ordered the disclosure of a manual setting out restraint techniques used by that public authority.
11. In a letter to the Commissioner dated 18 November 2011, the Home Office referred to another case being investigated by the Commissioner (FS50371302) where a request had been made for the Use of Force Manual to the Ministry of Justice (MoJ). The Home Office stated that it relied on the same arguments as those advanced by the MoJ. The arguments advanced by the MoJ in the related case have, therefore, been considered in this case and the Commissioner's analysis here is largely the same as that set out in the decision notice issued in the other case.
12. The Commissioner has taken the arguments advanced by the MoJ in the linked case as having also been advanced in this case, on the behalf of the Home Office. Whilst the analysis below refers to arguments advanced by the Home Office, these were for the most part stated in correspondence sent to the Commissioner by the MoJ.
13. In addition, during the Commissioner's investigation the MoJ released a further version of the Use of Force training manual with more information unredacted. This latest version can be viewed at: -

<http://www.justice.gov.uk/downloads/global/foi-requests/moj-disclosure-log/november/use-of-force-training-manual.pdf>

These further disclosures have, therefore, not been considered within this notice.

Reasons for decision

Section 1 / section 16

14. Section 1(1)(a) of the FOIA requires that a public authority should confirm or deny whether it holds the information requested. In this case the Home Office confirmed that it held the manual and was specific at internal review stage that it did not hold any further information falling within the scope of the request. The complainant believes that the Home Office may hold further information falling within the scope of the request. The task for the Commissioner here is to consider if the Home Office has identified all information that it holds that falls within the scope of the request. If it is the case that further relevant information was held, the Home Office will be in breach of the requirement of section 1(1)(a) through stating otherwise.
15. During the investigation the complainant provided reasoning as to why it was possible that the Home Office held further relevant information in addition to the manual. The complainant referred to evidence given at the Home Affairs Select Committee that, following the death of a deportee, the authority for contractors to use physical control and restraint was suspended for a short period. The complainant believed it likely that information relating to this temporary suspension of authority would be held by the Home Office and that this would fall within the scope of the request for the authority immediately preceding that current at the time of the request if the current authority had been in place for less than a year.
16. The complainant also referred to evidence to this Select Committee that stated that different techniques were authorised for use with minors. The complainant believed that the Home Office had only considered information recording techniques for use with adults.
17. The Commissioner's office contacted the Home office in relation to these points made by the complainant and asked that it respond describing in as much detail as possible the searches carried out for further relevant information. If it maintained that no further relevant information was held, it was asked to address why no information was held relating to the suspension of the use of physical restraint, or to the separate techniques for use with minors.
18. In response to this the Home Office did not provide a description of the searches carried out. Instead, it stated that the "Head and Deputy Head of UKBA's Security and Intelligence Team" had advised that no relevant information aside from the manual was held. It also stated that the

request had initially been interpreted as a request for the manual alone, but that it had *"no current information to suggest that other [relevant] information was available at the time [of the request]"*. The issue of whether further relevant information was held was also commented on in the internal review response, which again referred to an assurance from UKBA that no further relevant information was held.

19. The evidence available to the Commissioner here is on the one hand the complainant's reference to comments at the Select Committee which the Commissioner agrees raise the possibility that information may be held, and on the other the assertions by the Home Office that it does not hold any further relevant information. The requirement for the Commissioner here is to reach a decision on the balance of probabilities.
20. The conclusion of the Commissioner here is that, on the balance of probabilities, the Home Office did not hold further information falling within the scope of the request. Whilst the Commissioner recognises that the points raised by the complainant suggesting that further information may have been held were valid, his view is that the points made by the complainant are not so persuasive that they tip the balance of probabilities against the assertion from the Home Office that no further information is held. The conclusion is, therefore, that the Home Office complied with section 1(1)(a) of the FOIA when stating that no further information falling within the scope of the request was held.
21. On the issue of techniques for use with minors, the Home Office has stated that whilst it did not hold information relating to these techniques, this information was held by the Ministry of Justice (MoJ) and was publicly available on the MoJ website. The Home Office has stated that had this point been considered at the time of the request, it would have advised the complainant of where this information was available.
22. The Commissioner agrees that it would have been appropriate for the Home Office to advise the complainant of where information falling within the scope of her request was available elsewhere. In failing to do this, the Home Office breached the requirement of section 16(1) of the FOIA to provide advice and assistance to any person making a request. At paragraph 3 above the Home Office is required to now contact the complainant and provide appropriate advice.

Section 31

23. Section 31(1)(f) provides that information is exempt if its disclosure *would, or would be likely to, prejudice the maintenance of security and*

good order in prisons or in other institutions where persons are lawfully detained. This exemption is qualified by the public interest, meaning that the information should be disclosed if the public interest does not favour maintenance of the exemption despite the prejudice that this would, or would be likely to, cause.

Prejudice to the maintenance of security and good order?

24. The Home Office has specified that its stance is that prejudice *would be likely to* result through disclosure, rather than that it *would* result. The test that the Commissioner applies where a public authority has stated that prejudice would be likely to result is that the risk of prejudice must be real and significant, and certainly more than hypothetical or remote.
25. The complainant has argued that the exemption is not engaged on the basis that similar information to that requested in this case was disclosed following the Commissioner's decision in case FS50173181 and that this disclosure has not caused prejudice to security and good order in prisons.
26. The basis for the stance of the Home Office is that prisoners who may be subject to the techniques for physical restraint detailed within the manual could learn the details of these techniques. This could, in turn, enable these prisoners to counteract these techniques. If it were not possible to effectively restrain disruptive prisoners through the use of these techniques, this would be likely to prejudice security and good order.
27. The argument of the Home Office is supported by the content of the manual, which includes great detail about authorised physical restraint techniques and how to become competent in performing these. The Home Office has also informed the Commissioner that there have been several instances where prisoners exposed to the control and restraint techniques have been able to memorise and counteract these methods and that therefore having the requested information available in the public domain would increase the opportunity to do this.
28. Whilst unable to give an expert opinion on the possibility of being capable of counteracting these techniques as a result of familiarity with the manual, the Commissioner having carefully considered the remaining withheld information accepts that there is a causal link between the disclosure of some of the requested information and the prejudice argued and given the level of detail within the manual, the possibility is sufficient to meet the prejudice test. However, in relation to the information described in annex A and identified in the confidential

annex B, for the reasons specified in the annex, the Commissioner does not accept that the test has been met.

29. As to the regularity with which this possibility might actually occur, the MoJ stated in its response to the Information Commissioner that physical restraint was used on 19,000 occasions in prison establishments between 1 April 2010 and 31 March 2011. This suggests that physical restraint is used regularly. This also suggests that any prejudice likely to result through the inability to use physical restraint effectively would occur relatively frequently.
30. The conclusion of the Commissioner is that prejudice to the maintenance of security and good order in prisons resulting from disclosure of the withheld information, other than that described in annex A and identified in the confidential annex B, would be likely. The exemption provided by section 31(1)(f) is, therefore, engaged. He is not aware that previous disclosures have, to date, dramatically increased the prejudice to security and good order in prisons. However, the Commissioner notes that the disclosure in the YJB case related to young people in Secure Training Centres and is reluctant to disengage the exemption due to the nature of the information requested and the fact that he has been informed prisoners have more recently demonstrated being able to learn techniques by experience alone. The conclusion that the exemption is engaged in relation to some of the information is based on the level of detail included within the content of the information withheld and on the statistic suggesting that physical restraint is used relatively frequently.

The public interest

31. Having concluded that the exemption is engaged in relation to some of the withheld information, it is necessary for the Commissioner to go on to consider whether the public interest in the maintenance of this exemption outweighs the public interest in disclosure. When considering where the balance of the public interest lies, the Commissioner will take into account those factors that relate to this specific information, as well as the general public interest in improving the transparency of the Home Office and the public interest inherent in the exemption; this being the public interest in avoiding prejudice to the maintenance of security and good order in prisons.

Arguments in favour of maintaining the exemption

32. As noted above there is a public interest inherent in the exemption in that the maintenance of security and good order in prisons is in the public interest. Whilst the Commissioner has not commented on the

severity of the prejudice he has accepted is likely to occur, he has accepted that this would be relatively frequent given the regularity with which evidence indicates physical restraint is used. The Commissioner accepts that this is a valid factor in favour of maintenance of the exemption.

33. In the related case the MOJ argued that it has a duty of care to prison staff and prisoners and to release the withheld information would put this at risk. It asserted security in prisons could be jeopardised if the 'Use of Force' manual was freely available in the public domain. In this case it could be argued that the Home Office has a similar duty of care to contractors and deportees and that the security and safety of deportation operations, which would be counter to the public interest, could be jeopardised through disclosure.

Arguments in favour of disclosure

34. Turning to those arguments that favour disclosure of the information, both the complainant and the Commissioner have acknowledged there are similarities between this case and the previous YJB case. The arguments in favour of disclosure in that case are similar to those in this case.
35. Disclosure of the requested information and, therefore, the manual in full would improve transparency in relation to how good order and security in prisons is maintained. The Home Office noted the importance of public confidence in the operation of the prison service and in the restraint techniques that it uses. The public expect that control and restraint methods used in prisons both work – in that they assist with the maintenance of security and good order – and are safe, in that they treat prisoners humanely and comply with formal standards and procedures.
36. The complainant highlighted that the issue of control in prisons and in particular the 'Use of Force' manual was a frequently debated topic by the press, public and MPs. Disclosure of the requested information would significantly contribute to this debate. The Commissioner acknowledges that there is some level of debate on this issue but not to the degree that was associated with the use of distraction techniques on young people highlighted in the YJB case.
37. With regard to the previous arguments put forward by the Home Office that the frequency with which the control and restraint methods are used increases the need for the information to be withheld, the Commissioner considers that this can also in fact add weight to the

public interest in disclosure. If these methods are widely used in the prison estate then it increases the importance of transparency and public debate.

38. The Commissioner ordered the disclosure of the information in the related YJB case, the 'Physical Control in Care' (PCC) manual, and this is now in the public domain. The Commissioner notes the complainant's arguments that this information being in the public domain has not led to a breakdown of security and good order in the prison service and has been provided with no evidence that this is not the case, and he also agrees that disclosure has enabled more informed debate.

Balance of the public interest

39. The Commissioner notes that there is a distinction between the use of distraction techniques on young people in Secure Training Centres and restraint techniques used by prison officers in prisons. He concludes that the public interest in maintaining the exemption outweighs the public interest in disclosure. Whilst the Commissioner acknowledges the public interest in full disclosure of information about the use of control and restraint techniques in prisons in order to inform debate about concerns around this issue he considers, in the particular circumstances of this case, the public interest in the maintenance of security and good order in prisons significantly outweighed this.

Section 38

40. Sections 38(1)(a) and (b) provide that information is exempt if its disclosure *would, or would be likely to*, endanger the physical or mental health of any individual (38(1)(a)) and / or the safety (38(1)(b)) of any individual. This exemption is qualified by the public interest, meaning that the information should be disclosed if the public interest favours this despite the endangerment that this would, or would be likely to, cause.

Endangerment to health and / or safety?

41. The Home Office identified two parties in relation to whom it believes the endangerment would be likely to occur. First, the public in general. The Home Office believes that disclosure would be likely to lead to individuals outside prisons attempting the techniques outlined in the manual. The Home Office further believes that attempting these techniques without appropriate training would be likely to endanger the physical health and safety of those individuals.

42. Secondly, the Home Office argued that endangerment would be likely to result to prison staff and prisoners. As argued in connection with section 31(1)(f), the Home Office believes that disclosure of the contents of the manual would be likely to enable prisoners to counteract the techniques and thus it may not be possible for a violent, disruptive prisoner to be effectively restrained. The Home Office further argued that this lack of effective restraint of a violent prisoner would be likely to endanger the physical health and safety of both prison staff and prisoners, including both the prisoner who cannot be restrained and other prisoners. The Home Office also argued that an uncontrolled violent situation would be likely to endanger the mental health of those present.
43. The Commissioner accepts the argument of the Home Office in relation to the likely endangerment of the physical health and safety of prison staff and prisoners within prisons as a result of disclosure of the manual in full. Similarly to the conclusion reached in connection with section 31(1)(f), the Commissioner accepts the possibility that, given the level of detail within the manual, learning how to counteract the techniques detailed within is a possible outcome of disclosure, and that the evidence of the frequency with which physical restraint techniques are utilised means that the likelihood of this outcome is real and significant. The exemption provided by section 38(1)(a) is, therefore, engaged.
44. However, the Information Commissioner does not accept the arguments provided by the Home Office in relation to the mental health of those within prisons or in relation to the physical health and safety of the general public aside from individuals within prisons. On the basis of the arguments provided by the Home Office the Commissioner does not believe that the likelihood of endangerment occurring in either of these ways is real and significant. Had these arguments alone been advanced, the conclusion of the Information Commissioner would have been that this exemption is not engaged.

The public interest

45. When considering the public interest in connection with this exemption, the public interest inherent in the exemption is an important factor. There is a clear public interest in avoiding endangerment to health and safety.

Arguments in favour of maintaining the exemption

46. In this case the Commissioner has accepted as a likely consequence of disclosure endangerment to the health and safety of prison staff and

prisoners. There is a public interest in avoiding this endangerment and this is a valid factor in favour of maintenance of the exemption.

47. The frequency of the likely endangerment is relevant when considering what weight this factor carries in favour of maintenance of the exemption. On this point the Commissioner refers to the evidence of the frequency with which physical restraint methods are used. As noted above at paragraph 29, the MoJ stated that in the period between 1 April 2010 and 31 March 2011, physical restraint was used on 19,000 occasions. Given this evidence that physical restraint is used relatively regularly, the frequency of the likely endangerment would be relatively high. The weight of the public interest in favour of maintenance of the exemption in order to avoid frequent endangerment to health and safety is significant.

Arguments in favour of disclosure

48. That disclosure may actually also serve to protect the health and safety of prisoners runs directly counter to the argument above. The Commissioner appreciates that unacceptable or unchecked physical restraint methods could lead to significant physical harm to prisoners. The likelihood of this harm occurring is increased due to the relative frequency that control and restraint methods are used.
49. The Commissioner notes that a death occurred during a deportation operation, on 12 October 2010, following the deportee having been physically restrained by deportation contractors. That this restraint related death occurred is in contrast to the argument that endangerment to prisoner officers would be likely to result through disclosure.
50. Without repeating the wording of the section 31(1)(f) public interest consideration, the Information Commissioner considers that the evidence of the frequency with which physical restraint is used and the possibility of physical harm to prisoners caused by ineffective or excessive restraint methods, to also be relevant when considering the balance of the public interest in connection with sections 38(1)(a) and (b). That disclosure would reveal the detail of physical restraint techniques that evidence suggests can lead to endangerment to health and safety, with the result that these techniques would be subject to public scrutiny that may result in changes to these techniques with the aim of protecting health and safety, is a valid public interest factor in favour of disclosure that carries some weight.

51. That disclosure in this case would increase the transparency and accountability of the Home Office in an area of some debate is also a valid factor in favour of disclosure. The comments made in the section 31(1)(f) public interest consideration about the nature of the debate about the issues regarding the 'Use of Force' manual within prisons are also relevant here.
52. The conclusion of the Commissioner, in the particular circumstances of this case, is that the public interest in maintenance of the exemption outweighs the public interest in disclosure. This conclusion is based on the benefit to the health and safety of prison staff and prisoners that may result through withholding the additional information from the public domain and conversely, the harm that may result to both through disclosure of the information. Whilst the Commissioner recognises the public interest in overall transparency and the value to the public debate the information would add if disclosed, he does not consider this factor to carry sufficient weight to tip the balance of the public interest in favour of disclosure.
53. Given this conclusion and the conclusion above on section 31(1)(f), the Home Office is now required to disclose the information described in annex A and identified in the confidential annex B from the Use of Force Manual 2006.

Right of appeal

54. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

55. 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.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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