

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2013

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

Decision (including any steps ordered)

1. The complainant has requested information from the UK Border Agency (UKBA) of the Home Office (HO) about visits made by officials from the Democratic Republic of the Congo (DRC) to the UKBA's Brook House Immigration Centre ("Brook House"). UKBA disclosed some of the requested information to the complainant both before and during the Commissioner's investigation. UKBA withheld some other information, principally that contained within a report by the DRC officials of the outcome of their visit, relying on the section 27(1)(a), section 38(1) and section 40(2) FOIA exemptions.
2. The Commissioner's decision is that, for all of the withheld information in the DRC officials' report, UKBA correctly relied on the section 27(1)(a) exemption; he further decided that the balance of the public interest favoured maintaining the exemption. He did not therefore proceed to consider the application of the other exemptions claimed.
3. The Commissioner does not require HO to take any further steps.

Request and response

4. On 24 July 2012 the complainant wrote to UKBA saying, in the context of visits by DRC officials to Brook House:

I would like to request:

- *the name, job description and title of each of the DRC government representatives;*
- *full details of the employer of the DRC officials that visited Brook House;*

- *communication between UKBA and the DRC government officials before, during and after the visit to Brook House in May 2012;*
- *the number of times the DRC officials visited Brook House or any other UKBA removal centre in 2012, 2011 and 2010;*
- *the purpose of the DRC officials' visit to UKBA immigration removal centres;*
- *the length of time spent with detainees;*
- *the final result of the visit by the DRC officials to the removal centres.*

I would be interested in any information held by the Home Office or UKBA regarding my request.

5. UKBA responded on 17 August 2012 saying that DRC officials had visited Brook House twice in 2012 but not at all in 2010 and 2011. UKBA said that it held additional information but that it was withholding it relying on the personal information and international relations exemptions at section 40(2) and 27(1)(a) FOIA respectively.
6. Following an internal review UKBA wrote to the complainant on 27 September 2012 about her request for the names, job titles and job descriptions of the DRC officials who had visited Brook House in May 2012 and records of communications between UKBA and DRC officials in connection with those visits. UKBA said that it continued to withhold relevant information and to rely on the section 40(2) FOIA exemption in doing so. However UKBA added that, instead of relying on the section 27(1) exemption, it now relied on the section 31(1)(a) exemption (in fact, section 31(1)(e) may have been intended - 'prejudice to the operation of immigration controls').

Scope of the case

7. On 5 October 2012 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
8. On 20 November 2012, during the Commissioner's investigation, UKBA disclosed, in redacted form, a letter that a UKBA official had sent to a DRC official. UKBA continued to withhold the details of the DRC officials along with a further letter and a report and additionally relied upon the health and safety exemption in section 38(1) FOIA in respect of some of the withheld information.
9. On 3 December 2012 HO additionally disclosed to the complainant, in redacted form, a translation of a letter of 21 April 2012 from DRC officials to UKBA.

10. On 3 and 4 December 2012 HO told the Commissioner that it continued to rely variously on the sections 27(1), 31(1)(e) and 38(1) FOIA exemptions in withholding the remaining information. HO additionally said that it saw a case for withholding all of the remaining withheld information relying on the section 27(1) FOIA exemption.
11. The Commissioner invited the parties to accept informal resolution of the matter but on 18 December 2012 the complainant declined, saying that she was not content because HO was still withholding from her the final report of the DRC officials' visit ("the report").
12. Accordingly, the Commissioner considered the application by HO to the report of the FOIA exemptions relied upon, starting with the section 27(1)(a) FOIA exemption.

Reasons for decision

13. Section 27(1) of FOIA states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

*(a) relations between the United Kingdom and any other State,
(b) relations between the United Kingdom and any international organisation or international court,*

(c) the interests of the United Kingdom abroad, or

(d) the promotion or protection by the United Kingdom of its interests abroad.'

14. In order for a prejudice-based exemption, such as section 27(1), to be engaged the Commissioner believes that three criteria must be met.

- First, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the exemption.
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure would, or would be likely to, prejudice international

relations. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.

15. In his analysis of this matter, the Commissioner has been assisted by the comments of the then Information Tribunal in the CAAT case which said, in the context of section 27(1), that prejudice can be real and of substance *'if it makes [international] relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'* (CAAT v The Information Commissioner and Ministry of Defence (EA/2006/0040)).
16. The Commissioner's staff reviewed the withheld information in the report. He has reviewed the evidence received from both the complainant and HO. He has also had the benefit of seeing some confidential advice provided to HO by officials at the Foreign and Commonwealth Office (FCO) supporting HO's reliance on section 27(1)(a) and indicating that prejudice to international relations would result from disclosure of the withheld information.
17. The Commissioner is satisfied that there is a causal relationship between the potential disclosure of the withheld information and the interests which section 27(1)(a) is designed to protect. He is also satisfied that the resultant prejudice which HO believes would occur is correctly categorised, in light of the Tribunal's comments above, as real and of substance and that disclosing the report would make relations more difficult and demand a diplomatic response.
18. The nature of the prejudice in this case is such that it is very difficult to separate the international relations aspects from the immigration control aspects. The causal relationship can be expressed as: prejudice to relations with the other state prejudices the returns process which, in turn, prejudices immigration controls.
19. In summary, the Commissioner is satisfied that the exemption is engaged and that HO was correct in relying on the higher threshold of likelihood, ie that disclosing the report 'would' prejudice relations between the UK and DRC.

Public interest test

20. The international relations exemption in section 27(1) FOIA is qualified and therefore the Commissioner must consider the public interest test at section 2(2)(b) FOIA and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.

Public interest arguments in favour of disclosing the requested information

21. There is always a public interest in the transparency and accountability of public authorities and therefore with HO and UKBA being as open, transparent and accountable as they can when reporting and explaining their decisions. In this matter there is a public interest in disclosing details of the information about communications between detainees at Brook House and officials of their alleged country of origin so that the public can be assured that migration matters are being dealt with in a fair and effective manner. Disclosure would allow greater public scrutiny of the UK's immigration control processes. This could provide the public with a better understanding of how border and immigration controls function and demonstrate the steps which are taken to remove people who have no right to be in the UK.
22. The Commissioner noted that, in her evidence to him, the complainant said that she had concerns about allegations of mistreatment of Congolese nationals returning to the DRC from the UK. She said that disclosure would make the process of repatriating Congolese detainees more transparent which would both provide assurance that the UK government was acting in accordance with its international human rights obligations and would make it more likely that detainees would cooperate with the process.

Public interest arguments in favour of maintaining the exemption

23. The Commissioner recognises that it is in the public interest for the UK government to maintain effective working relationships with the government of DRC. In the circumstances of this case there is a clear public interest in UKBA having a safe space in which to conduct full and frank communications with DRC officials in private, including the sharing of information such as the contents of the report, without fear of subsequent public disclosure.
24. Closely related to that is the strong public interest in the UK government maintaining its relationship with the DRC on migration issues, for example when seeking to remove from the UK any DRC nationals who no longer have a legal right to remain, something which is a sensitive issue. It follows that disclosure of the report would harm the relationship the UK government has with the DRC and hence the returns process in respect of DRC nationals.

Balance of public interest arguments

25. With regard to attributing weight to the public interest arguments in favour of disclosing the information the Commissioner recognises that promoting accountability, transparency and public trust in government generally favours disclosure. The weight to be applied to them depends upon the facts of the case and in particular the content of the information for which the section 27(1)(a) exemption is engaged. The Commissioner saw that the public interest in disclosure has already been served to a large extent by the two further disclosures of relevant information made by HO during the course of his investigation. The extent to which the public interest would be further served by additional disclosures of information from the report is therefore limited.
26. With regard to the public interest arguments in favour of maintaining the exemption, the Commissioner accepts that it is very strongly in the public interest that the UK enjoys effective relations with foreign governments. The Commissioner also recognises that it is very much in the public interest that the UK's ability to promote and protect its overseas interests, including with DRC, is maintained.
27. In deciding where the balance of the public interest lies, the Commissioner noted that the prejudice that would occur from disclosing the report has been assessed by HO, on advice from FCO, as being at the higher threshold level and 'would' occur. This is itself a factor which favours maintaining the exemption and withholding the information in the report.
28. If the UKBA relationship with DRC were damaged, this would tend to make the full spectrum of bilateral relations more difficult and less effective. The UK's ability to protect and promote its interests with DRC would be compromised if UK officials were not respected and trusted by their DRC counterparts. The Commissioner decided that, for the information in the report, the public interest benefits of increased transparency do not outweigh the possible damage to bilateral relations and international engagement on what are sensitive issues surrounding migration and border security. There is an overriding need for UK officials to be able to have a good working relationship with their DRC counterparts and foster trust between them.
29. In the light of the harm that would result from disclosure, the Commissioner concluded that the public interest in maintaining the section 27(1)(a) FOIA exemption outweighed that in disclosing any of the information in the report.

Other FOIA exemptions

30. In the light of his conclusions in respect of the engagement of section 27(1)(a) FOIA and the associated public interest balancing test, the Commissioner did not proceed to consider whether the information contained in the report is also exempt from disclosure on the basis of other section 27(1) exemptions. Nor did the Commissioner continue to consider the possible application to the information in the report of the section 40(2) and 38(1) exemptions.

Right of appeal

31. 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

32. 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.
33. 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

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
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SK9 5AF**