

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 July 2013

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

#### Decision (including any steps ordered)

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1. The complainant requested a record of a meeting that took place between the former Head of the UK Border Force and the Chief Executive of the UK Border Agency about the relaxation of some border controls. The Home Office refused to disclose this information, citing the exemptions provided by sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views) of the FOIA.
2. The Commissioner's decision is that these exemptions were cited correctly and so the Home Office was not required to disclose this information.

#### Background

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3. The meeting referred to in the request related to the following events, described in the "*Inquiry into the provision of UK Border Controls*" by the Home Affairs Committee<sup>1</sup>:

*"On Friday 4 November 2011, it was reported that Brodie Clark, the Head of the UK Border Force, had been suspended along with two other Border Force officials while claims that he had authorised the*

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<sup>1</sup>

<http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/1647/164703.htm>

*relaxation of border checks without ministerial approval were investigated. The Home Secretary made a statement to the House on Monday 7 November in which she suggested that Mr Clark had exceeded the terms of an agreed trial of a risk-based approach to entry controls. The Home Secretary stated:*

*'On Wednesday, the head of the UK border force, Brodie Clark, confirmed to Mr [Rob] Whiteman [Chief Executive of UK Border Agency] that border controls had been relaxed without ministerial approval. First, biometric checks on EEA nationals and warnings index checks on EEA national children were abandoned on a regular basis, without ministerial approval. Biometric tests on non-EEA nationals are also thought to have been abandoned on occasions, again without ministerial approval. Secondly, adults were not checked against the warnings index at Calais, without ministerial approval. Thirdly, the verification of the fingerprints of non-EEA nationals from countries that require a visa was stopped, without ministerial approval. I did not give my consent or authorisation for any of these decisions. Indeed, I told officials explicitly that the pilot was to go no further than we had agreed.'*

*She announced the establishment of three inquiries into the issue, two led by civil servants and one by the Chief Inspector of the UK Border Agency. The following day, Mr Clark left the Home Office and announced that he would be pursuing a claim for constructive dismissal."*

4. Brodie Clark disputed the version of events presented by the Home Secretary. It was later reported that he had reached an out-of-court settlement with the Home Office.

## **Request and response**

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5. On 18 November 2011, the complainant wrote to the Home Office and requested information in the following terms:

*"I would be grateful if you would disclose a copy of the minutes of the meeting between Brodie Clark and Rob Whiteman on 2 November [2011], and a copy of the notes taken at the meeting by the note-takers present, and a copy of all other documents which record what was said at the meeting."*

6. After an extremely lengthy delay, the Home Office responded substantively on 12 September 2012. It stated that the request was refused and cited the exemption provided by section 40(2) (personal information) of the FOIA. It was also clarified at this stage that the only

information held by the Home Office of relevance to the request was minutes of the meeting in question.

7. The complainant responded and requested an internal review on 13 September 2012. After a further long delay, the Home Office responded with the outcome of the internal review on 1 March 2013. The conclusion of this was that the refusal under section 40(2) was upheld.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 5 March 2013 to complain about the refusal of her information request. The complainant raised specifically the extremely lengthy delay to the response to her request, as well as the refusal to disclose the information requested.
9. During the investigation of this case by the ICO the Home Office introduced the exemption provided by section 36 of the FOIA and relied on this, as well as section 40(2). Whilst the Commissioner is bound to consider exemptions cited for the first time during his investigation, the late introduction of section 36 is commented on below in the "Other matters" section, as are the delays in the responses provided to the complainant by the Home Office.

## **Reasons for decision**

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### **Section 17**

10. Section 17(1) requires that a notice stating why an information request is refused must be provided within 20 working days of receipt of a request. In this case the Home Office failed to respond substantively until approximately 10 months after the date of the request. In so doing, the Home Office breached the requirement of section 17(1) of the FOIA.

### **Section 36**

11. The Home Office has cited the exemptions provided by subsections 36(2)(b)(i) and (2)(b)(ii). These subsections apply where disclosure of the requested information would, or would be likely to, have the following results:

36(2)(b)(i) – inhibition to the free and frank provision of advice.

36(2)(b)(ii) – inhibition to the free and frank exchange of views for the purposes of deliberation.

12. Consideration of these exemptions is a two-stage process. First, the exemptions must be engaged, and secondly, these exemptions are qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.
13. Covering first whether these exemptions are engaged, the exemptions provided by section 36 can be cited only on the basis of the reasonable opinion of a specified qualified person (QP). Reaching a conclusion as to whether these exemptions are engaged involves establishing whether an individual authorised to act as QP has given an opinion and, if such an opinion was given, whether that opinion was reasonable. If these conditions are met, the exemption is engaged.
14. Section 36(5)(a) provides that the QP for a government department is any Minister of the Crown. The Home Office has provided evidence that in this case Mark Harper MP, Minister for Immigration acted as QP and that the opinion on the use of this exemption was given on 30 April 2013.
15. The Commissioner accepts, therefore, that these exemptions were cited on the basis of the opinion of an authorised QP. The next step is to consider whether the opinion of the QP was reasonable. In forming a conclusion on this point the Commissioner has considered the explanation provided to the QP in a submission prepared to assist him in the formation of his opinion, a copy of which was supplied to the ICO, as well as the content of the information in question.
16. The view of the QP related to an inhibitory effect from disclosure of this information only a short time after the meeting recorded within the information took place (the request was made 16 days after the date of that meeting). The submission advised the QP that disclosure of this information would have an inhibiting effect upon officials in future similar situations as they would be concerned that the record of their contributions could be disclosed a short time later.
17. As to whether the advice provided in the submission appears to be relevant to the content of the withheld information, the Commissioner notes first that the discussion recorded within the withheld information was on an issue of considerable sensitivity. He also accepts that this information reflects that the discussion was free and frank and, therefore, it was relevant for the QP to take into account that disclosure might discourage a similar level of openness by officials in future.
18. The Commissioner agrees that it is significant that the information request in this case was made only shortly after the date of the relevant

meeting. This meant that matters arising from that meeting were still ongoing at the time of the request.

19. On the basis of the advice provided to the QP in the submission and the content of the withheld information, the Commissioner finds that the opinion of the QP was reasonable. The exemptions provided by sections 36(2)(b)(i) and (ii) of the FOIA are, therefore, engaged.
20. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs the concerns identified by the QP. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the QP, but will also consider the severity, extent and frequency of the inhibition that he has accepted would result through disclosure.
21. As to the frequency of this inhibition, the Commissioner accepts that the provision of advice and exchange of views between officials plays an important role in the functioning of the Home Office. It follows, therefore, that such advice and exchanges of views take place frequently. However, the Commissioner has taken into account only the frequency of relevant meetings, that is, those involving issues of similar importance and sensitivity as here.
22. On the issue of the severity and extent of the inhibition, the Commissioner accepts that it is important for the Home Office to be able to manage effectively events that arise within its remit and that free and frank exchanges between officials would be a necessary part of this. Given this, the Commissioner finds that the inhibition arising from disclosure would be of a considerable severity and extent and overall that the severity, extent and frequency of the inhibition identified by the QP contributes significant weight in favour of maintenance of the exemptions.
23. Turning to those factors that favour disclosure, the Commissioner recognises that there is a public interest in the disclosure of all information relating to the events described at paragraph 3 above. Whether or not the relaxation of the border checks was carried out with Ministerial approval was disputed. The wider issue of immigration is of perennial importance and the security of border controls is part of that. The Commissioner considers that the public interest in these matters, including information which might clarify what took place at the meeting between Mr Whiteman and Mr Clark on 2 November 2011 is a factor of considerable weight in favour of disclosure.
24. In conclusion, the Commissioner has recognised strong public interest in favour of disclosure of this information on the basis of its subject

matter. However, having accepted the view of the QP that inhibition would occur as a result of disclosure and having found that the severity, extent and frequency of that inhibition would be considerable, the Commissioner must also recognise the weight of the public interest in avoiding that outcome and the harm to the work of the Home Office which would result. Taking all these matters into account, the Commissioner finds that the public interest in the maintenance of the exemptions outweighs that in favour of disclosure. The Home Office is not, therefore, required to disclose this information.

25. As this conclusion has been reached on section 36, it has not been necessary to go on to also consider section 40(2).

### **Other matters**

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26. The delays in the response provided to the complainant meant that more than 15 months passed between the request and the response giving the outcome of the internal review. As well as the finding above that the Home Office breached section 17 of the FOIA, the Commissioner would also note here his view that this delay was grossly excessive and not reasonable in any circumstances. A record has been made of this delay and this may form evidence in enforcement action against the Home Office.
27. As noted above, the Commissioner is bound to consider exemptions that are cited for the first time during his investigation and hence the analysis in this notice covers section 36. He would, however, record his view that citing an exemption for the first time more than 17 months after the date of the request is an example of particularly poor practice. The Home Office should take appropriate steps to avoid similar situations in relation to future information requests.
28. The complainant may regard it as regrettable that this decision has to be made on the basis of the circumstances that applied at the time of the request, given the delay caused by the Home Office. The Commissioner would find this view understandable and, were the complainant to now make a fresh request for this information, would expect the Home Office to give careful consideration to any change in the circumstances applying at the time of that fresh request.

## Right of appeal

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29. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

30. 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.
31. 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**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**