

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 October 2013

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

Decision (including any steps ordered)

1. The complainant requested a copy of the memorandum on the Common Travel Area signed between Ireland and the UK. The Home Office refused to disclose the memorandum, citing sections 27 (international relations) and 31 (law enforcement) of the FOIA.
2. The Commissioner's decision is that the Home Office correctly withheld the memorandum. He requires no steps to be taken.

Request and response

3. Following earlier correspondence, the complainant wrote to the Home Office on 4 December 2012 making a request for information of the following description:

"I am trying to obtain a copy of the agreement and memorandum on the Common Travel Area signed on the 20.11.2011 between Eire and the UK".

4. The Home Office treated this as a new request for information, responding on 2 January 2013. It confirmed that the Home Office holds information relevant to the request. It provided a link to some information that was already in the public domain – the Joint Statement between Damian Green (the then Minister of State for Immigration) and Alan Shatter (the Irish Minister for Justice, Equality and Defence) regarding co-operation on measures to secure the external Common Travel Area border.

5. However, it refused to provide the remaining information within the scope of the request, citing the section 27 exemption (international relations) as its basis for doing so.
6. The complainant requested an internal review on 18 January 2013. The Home Office sent him the outcome of its internal review on 15 February 2013. It revised its original position, citing the section 31 exemption (law enforcement) in place of section 27. Specifically it cited section 31(1)(e), the sub-section designed to protect the operation of the immigration controls.

Background

7. According to the Home Office website¹:

"The Common Travel Area (CTA) comprises the UK, the Republic of Ireland, the Bailiwick of Guernsey, the Bailiwick of Jersey and the Isle of Man.

*The CTA is an immigration arrangement, and it does **not** regulate the movement of goods".*

Scope of the case

8. The complainant contacted the Commissioner on 3 May 2013 to complain about the way his request for information had been handled.
9. The complainant confirmed in subsequent correspondence:

"... for the sake of clarity the 'agreement' is publicly available and I have a copy of this document, my application refers to the 'memorandum'".
10. As is his practice, when the Commissioner wrote to advise the Home Office that he was investigating the complaint into the way it had handled this request for information, he asked the Home Office to revisit the request.

¹ <http://www.ukba.homeoffice.gov.uk/customs-travel/Enteringtheuk/arrivingatukborder/travellingtocommontravelarea/>

11. Having conducted that review, the Home Office identified some information which it considered may be of interest to the complainant, namely an internal media briefing. That briefing provides additional background information on the Joint Statement, a link to which the Home Office had already provided to him. The Home Office provided the complainant with a copy of the media briefing.
12. Following receipt of that briefing, the complainant contacted the Commissioner. He confirmed his wish to pursue his complaint, telling the Commissioner:

"I applied for release of the memorandum, the Home Office refused release, I gave reasons as to why I considered the memorandum did not fall under any of the permitted exemptions to freedom of information".

13. He described the briefing as *"an inadequate response to my original application and complaint"*.
14. Following its review, as well as confirming its application of section 31, the Home Office told the Commissioner that it considered that section 27 was also engaged. In that correspondence the Home Office explained its decision to apply both sections 27 and 31 to the withheld Memorandum. It told the Commissioner:

"It may seem superfluous to apply both exemptions when the prejudice is essentially the same in each case, but it is potentially misleading to imply that the prejudice only relates to international relations or only to immigration control".

15. The Commissioner considers the scope of his investigation to be the Home Office's application of sections 27 and 31 to the withheld memorandum.

Reasons for decision

16. The Commissioner has first considered the Home Office's application of section 27. In that respect, having considered the complainant's submissions, the Commissioner notes that the complainant does not appear to dispute the Home Office's view that section 27 is engaged; rather his complaint is with respect to the Home Office's consideration of the public interest test.

Section 27 international relations

17. Section 27(1) (international relations) focuses on the effect of disclosure and provides that information is exempt if its disclosure 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 other international organisation or international court;
 - (c) the interests of the United Kingdom abroad; and
 - (d) the promotion or protection by the United Kingdom of its interests abroad.
18. The Home Office is citing section 27(1)(a) in this case. In other words, it considers that disclosure of the withheld information would, or would be likely to, prejudice relations between the United Kingdom and another state.
19. The Commissioner has issued guidance on the section 27 exemption². That guidance states:
- "The exemption does not necessarily focus on the scale or importance of the issue or on the subject or type of the information, but on whether UK interests abroad, or the international relations of the UK, would be prejudiced through the disclosure of the information relating to the issue".*
20. In order for section 27(1)(a) to be engaged, the Home Office must show that the disclosure would, or would be likely to, prejudice the stated interests – in this case relations between the UK and Ireland. In assessing the likelihood of the prejudice that a disclosure of information might cause it is necessary to identify the particular harm that may arise.
21. In this case, the Commissioner considers that the Home Office failed to explain to the complainant why it considered the exemption applied. However, having considered its submissions to the Commissioner during

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[http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/awareness_guidance_14_-_international_relations.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/awareness_guidance_14_-_international_relations.ashx)

the course of his investigation, the Commissioner accepts that the Home Office has now explained its application of the exemption. He is satisfied that the Home Office explained why it considers that the prejudice relates to the specific subsection it considers is engaged: namely 27(1)(a) in respect of relations between the UK and Ireland.

22. He is also satisfied that the disclosure of the information at issue in this case is at least capable of harming the interest in some way and that there is a causal link between the disclosure and the prejudice claimed.

23. With respect to the likelihood of the prejudice occurring, the Home Office told the complainant:

"... if the information is disclosed, there may be a risk that this could inhibit the exchange and sharing of information with other states".

24. In correspondence with the Commissioner, the Home Office said that, having re-assessed its decision to withhold the information at issue, disclosure:

"could have a serious effect on our relationship with the Irish".

25. It also stated its view that disclosure of the memorandum would – as opposed to would be likely to – prejudice relations between the UK and Ireland.

26. In the Commissioner's view, if an authority claims that prejudice would occur they need to establish that either:

- the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice would occur on only one occasion or affect one person or situation; or
- given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not.

27. During the course of his investigation, the Home Office explained to the Commissioner the basis on which it considers that prejudice is clearly more likely than not to arise. In that respect, the Commissioner also notes that the Home Office told the complainant that the Irish government had requested that the memorandum remain confidential.

28. Based on his assessment of the nature and content of the withheld information and his appreciation of the sensitivities, the Commissioner is

satisfied that the higher likelihood threshold ('would' prejudice) is met in this case

29. Accordingly, the Commissioner finds the exemption engaged and has carried the higher level of 'likelihood' through to the public interest test.

The public interest

30. Although the Commissioner is satisfied that the exemption is engaged, the public interest test must be applied to determine whether or not the withheld information should be disclosed.

Public interest arguments in favour of disclosing the requested information

31. The complainant told the Home Office:

"the UK's relationship with Ireland under the Common Travel Area .. has been clearly stated, defined and made public..."

32. In the complainant's view:

"disclosure of work with other countries is in the public interest".

33. The Home Office acknowledges that disclosure would be in the general interests of transparency. It told the complainant:

"There is a public interest in ensuring transparency and promoting disclosure of work which may affect other countries".

Public interest arguments in favour of maintaining the exemption

34. In favour of maintaining the exemption, the Home Office told the complainant:

"There is also a public interest in not releasing the information concerned as it could lead to some of our international colleagues failing to share information with the UK and also withholding information from the UK in other areas of international relations as well as in respect of the Common Travel Area".

35. With respect to the risk that disclosure of the memorandum could inhibit the exchange and sharing of information with other states, the Home Office told the complainant:

"This risk is compounded by the fact that the Irish government has requested that the memorandum remain confidential".

36. In correspondence with the complainant, the Home Office also described other considerations in favour of withholding the information -

considerations which the complainant did not consider were relevant. In correspondence with the Commissioner, the Home Office accepted the complainant's criticism that some of the factors cited in the public interest test were not relevant in this case.

37. In favour of maintaining the exemption, the Home Office told the Commissioner:

"... disclosure has the potential to harm the relations that the UK Government has with Ireland and hence damage the very processes which the Memorandum is designed to secure".

38. In that respect, it considers:

"There is an overriding need for the UK to be able to continue to have a good working relationship at a number of levels with Ireland".

Balance of the public interest arguments

39. When balancing the opposing public interests in a case, the Commissioner is weighing the harm that is identified in a particular exemption against the wider public interest that may be served by disclosure. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed. The test must be applied on a case-by-case basis.
40. The Commissioner considers that there is a strong public interest in transparency in the workings of government, particularly with regard to its relations with other countries, to further public understanding of decisions taken which stem from the international relationships.
41. The Commissioner also recognises the strength of the public interest in the UK enjoying effective relations with foreign states, including Ireland, particularly where cooperation is required in order to deliver effective immigration controls. The public interest would obviously be harmed if these relationships were negatively impacted.
42. The Commissioner has also taken into account that he has accepted that the prejudice that would occur from disclosing the memorandum has been assessed by the Home Office as being at the higher threshold level - 'would' occur. This in itself is a factor which favours maintaining the exemption and withholding the information in the memorandum.
43. In reaching his decision in this case, the Commissioner is mindful of the fact that immigration control is an issue of concern and interest to the public. Nevertheless, having considered the information and the

opposing arguments in this case, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption at section 27(1)(a) outweighs the public interest in disclosing the information.

44. As he has found that the information was correctly withheld under section 27, the Commissioner has not gone on to consider the Home Office's application of section 31 to the same information.

Other matters

45. In requesting an internal review, the complainant disputed the applicability of some of the Home Office's public interest arguments in this case. The Home Office told the Commissioner:

"Incidentally, we accept [the complainant]'s criticism that some of the factors cited in the public interest arguments as set out in the original response are not relevant".

46. The Commissioner would take the opportunity to remind public authorities of the following points from his guidance³ on the public interest test:

"Public interest arguments for the exemption must relate specifically to that exemption"; and

"The authority must consider the balance of public interest in the circumstances of the request".

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[http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_public_interest_test.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_public_interest_test.ashx)

Right of appeal

47. 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

48. 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.
49. 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
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