

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 December 2013

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

Decision (including any steps ordered)

1. The complainant requested a copy of a report on healthcare provision at Campsfield House Immigration Removal Centre ("IRC"). The Home Office relied on the exemptions at section 36(2)(c) and section 43(2) of the FOIA to withhold the information. The Information Commissioner's decision is that although both exemptions are engaged, the public interest favours disclosing the information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant a copy of the report of the healthcare inspection that took place at Campsfield House IRC on 17/18 October 2011, ensuring that the personal data which identifies audit team members in the introduction is redacted.
3. The public authority 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

4. In October 2011 an unannounced external audit of healthcare provision at Campsfield House IRC took place, commissioned by the United Kingdom Border Agency ("UKBA"), an agency of the Home Office. The audit was based upon the Detention Services Operating Standards Manual for Immigration Service Removal Centres (2005).
5. The UKBA website describes Campsfield House IRC as a detention centre used to accommodate people who have no legal right to be in the UK but who have refused to leave voluntarily. Detainees are held at the centre pending their case resolutions and subsequent removal from the UK.¹
6. Campsfield House is operated on behalf of the UKBA by an independent contractor, MITIE. Healthcare services for detainees are subcontracted by MITIE to an independent healthcare provider, The Practice Plc.

Request and response

7. On 16 May 2012, the complainant wrote to the Home Office and made the following request for information:

"I would like to request a copy of a report recently commissioned by UKBA on the Healthcare Centre at Campsfield House IRC."
8. The Home Office responded on 12 July 2012. It refused to provide the requested information, citing the exemption at section 43(2) of the FOIA as its basis for doing so.
9. Following an internal review the Home Office wrote to the complainant on 30 May 2013. It upheld its original position and indicated that section 36(2)(c) might also apply to the information.

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<http://www.ukba.homeoffice.gov.uk/aboutus/organisation/immigrationremovalcentres/campsfield>

Scope of the case

10. The complainant initially contacted the Commissioner on 14 February 2013 to complain that she had not received the outcome of the internal review. The Commissioner instructed the Home Office to complete the internal review, which it did, and the complainant contacted the Commissioner again, on 6 June 2013, to challenge the Home Office's application of the exemptions.
11. The Commissioner has considered the Home Office's application of section 36(2)(c) and section 43(2) to withhold the requested information. The Commissioner understands that information in the report about the identities of the auditors is not relevant to the complainant's request and therefore this decision notice does not consider the Home Office's application of section 40 to redact that information.

Reasons for decision

Section 36 – effective conduct of public affairs

12. The Home Office argued that the withheld information was exempt from disclosure on the basis of section 36(2)(c) of the FOIA.
13. Section 36(2)(c) provides that information is exempt if its disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs, otherwise than as set out under sections 36(2)(a) and (b).
14. Section 36(2)(c) may only be cited where it is the reasonable opinion of a specified 'qualified person' that the prejudice envisaged would or would be likely to occur, and that the exemption is therefore engaged.
15. To determine whether section 36 has been correctly applied, the Commissioner must:
 - (i) ascertain who the qualified person is for the public authority;
 - (ii) establish that an opinion was given;
 - (iii) ascertain when the opinion was given; and
 - (iv) consider whether the opinion given was reasonable.

Who was the qualified person

16. The Home Office has explained that the qualified person in this case was the Duty Minister, Jeremy Browne. The Commissioner is satisfied that this is in accordance with the requirements of section 36(5).

Timing of the opinion

17. The opinion was requested on 7 August 2013 and obtained on 19 August 2013. This is considerably later than the date of the initial refusal, which did not cite section 36 as a reason for withholding. The internal review, dated 30 May 2013, did mention that, in addition to section 43(2), it was likely that section 36 was engaged. However, obtaining the qualified person's opinion is fundamental to engaging section 36. Since the qualified person's opinion was not obtained until 19 August 2013, section 36 cannot be considered to have been engaged at the time of the internal review.
18. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to raise a new exemption or exception either before the Commissioner or the First Tier Tribunal and both must consider any such new claims. The Commissioner has therefore treated this as a late claim that section 36 applies.
19. While the Commissioner is concerned that the Home Office has offered no justification for why the qualified person's opinion was obtained so late in the process (particularly in view of the intention to apply the exemption that it signaled in the internal review), he has accepted that an opinion was sought and given by a qualified person, and has gone on to consider whether the opinion given was reasonable.

Was the opinion reasonable?

20. In deciding whether an opinion is reasonable, the Commissioner will consider the plain meaning of the word. The Shorter Oxford English Dictionary defines "reasonable" as, "...in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd (in short, if it is an opinion that a reasonable person could hold) then it is reasonable.
21. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to

be the *most* reasonable opinion that could be held; it only has to be a reasonable opinion.

22. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC*² (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus,

"does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant".

23. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, he is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
24. In this case, when setting out the likelihood of detriment, the Home Office specified the higher threshold of *would* otherwise prejudice the effective conduct of public affairs. *Would* prejudice places a strong evidential burden on a public authority, with the likelihood that the stated prejudice will occur being at least more probable than not.
25. The submission to the qualified person requested his approval for the application of section 36(2)(c) to withhold the inspection report. The submission comprised a copy of the report, an executive summary of its findings and a summary of the public interest arguments the Home Office had considered in favour of disclosing and withholding the information.
26. The submission specified that the prejudice envisaged were the information to be disclosed would be to the efficiency and effectiveness of the detention centre inspection process. In order to accurately assess the strengths and weaknesses of the centres under inspection, inspectors are heavily reliant on the co-operation and frankness of the staff they interview. A key driver in securing maximum engagement is the reassurance offered to interviewees that the information they provide will not be inappropriately disclosed. The Home Office foresees that disclosure would be a significant disincentive to third party contractors and their employees to proactively volunteer information to

² Appeal numbers EA/2006/0011 & EA/2006/0013

inspectors, making the audit process more challenging and a less effective means of assessing service provision.

27. The Home Office also submitted a "safe space" type argument. It stated that the disclosure of such a recent report would undermine the audit inspection process. For an audit to best fulfill its purpose the audited body must be allowed time and space in which to consider and implement any recommendations made. Premature disclosure of this report would interfere with that process.
28. With regard to the reasonableness of the opinion in relation to section 36(2)(c), the Commissioner is not entirely convinced as to the link between disclosure of the report and the suggestion that it will interfere with the audited body's ability to respond properly to it. The inspection in question took place two years ago. The Commissioner does not agree that it has the recency that the Home Office has suggested.
29. However, with regard to the negative impact on co-operation with future audits, the Commissioner accepts that it is not irrational or absurd to suggest that disclosure of the report would have an impact on the level and quality of engagement of third party contractors and their employees. The success of such audits as a means of assessment is reliant upon the interviewees feeling able to speak frankly and openly in a confidential environment, without fear that what they say will be disclosed more widely than is necessary for the purpose of assessing whether service levels are being met. Therefore, the Commissioner accepts that the qualified person's opinion with regard to section 36(2)(c) is a reasonable one and that this exemption is engaged in respect of the withheld information.

Public Interest Test

30. Section 36 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
31. The complainant submitted generic public interest arguments, without making reference to specific exemptions. She argued that it is in the public interest that the report is disclosed because it examines the arrangements for the care and treatment of some of the most vulnerable people in society. Detainees who are held at the centre may have language and cultural barriers and many will have been traumatised, both in their country of origin, and on arrival in the UK. They are unlikely to have established links with the types of networks and community groups capable of providing support and advice to them. Their isolation and lack of access to the means to challenge the quality

and appropriateness of the care they receive means that their care and treatment should be subject to external scrutiny.

32. The Home Office acknowledges the public interest in healthcare provision at IRCs such as Campsfield being subject to public scrutiny, with a view to ensuring that arrangements for detainees are appropriate and humane. However, it points out that such information is already publicly available in the form of reports from HM Inspectorate of Prisons and the Independent Monitoring Boards³.
33. Furthermore, where individuals allege that they have not received appropriate clinical treatment at an IRC, independent oversight is afforded by the complaints mechanism provided by the Parliamentary and Health Service Ombudsman. Therefore, the Home Office believes that the public interest around transparency and accountability is already sufficiently addressed.
34. On this point, the complainant has commented that existing complaints procedures for addressing concerns about clinical issues are confusing for detainees, hard for them to access and might not be completed prior to the detainee being removed from the UK. Additionally, many consider that making such a complaint may be used against them in any assessment of their application to remain in the UK.
35. The Home Office's overarching argument for why the public interest in maintaining the exemption outweighs that in disclosing the information is that it is not in the public interest to undermine the conditions or "status quo" that provide for the most effective completion of the audit process.
36. When assessing healthcare provision it is vital that the audit process captures as detailed a picture of resourcing and standards as possible. Securing the full and frank engagement of interviewees is critical in this respect. Whilst an inspector will record their own observations and pursue lines of enquiry as and how they consider appropriate, they are liable to gain far greater insight into matters if the contractor and its staff proactively engage with the inspection process. A key driver in securing high levels of engagement is the reassurance offered to interviewees that the information they provide to inspectors will not be inappropriately disclosed. Disclosure would alter the dynamic between interviewees and inspectors. It would discourage interviewees from

³ See, for example, Campsfield House 2011 Annual Report <http://www.justice.gov.uk/downloads/publications/corporate-reports/imb/annual-reports-2011/campsfield-house-2011.pdf>

proactively voicing concerns or volunteering unsolicited information, making the inspection process more challenging and less effective. With the care and treatment of vulnerable people at stake, the Home Office argues that it is clearly not in the public interest to weaken the effectiveness of processes for scrutinising service provision in this sensitive area.

37. The Home Office also argued that due to the recency of the report, disclosure would undermine the audit process. For an audit to best fulfill its purpose the audited body must be allowed time and space in which to consider and implement any recommendations made. Premature disclosure of this report would interfere with that process. Again, the Home Office argued that this was not in the public interest.

Balance of the public interest

38. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in the public interest test. This means that while the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur, he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest favours the maintenance of the exemption or the disclosure of the information.
39. The Commissioner is unable to set out his consideration of the Home Office's public interest arguments without disclosing some information which the Home Office maintains is exempt. Therefore, his assessment of those arguments is contained in the confidential annex to this decision notice.
40. Having considered the Home Office's arguments against the complainant's arguments, and his own assessment of the case, the Commissioner's view is that the public interest arguments in favour of maintaining the exemption at section 36(2)(c) do not outweigh the public interest arguments in favour of disclosure. The Commissioner's view is, therefore, that while section 36(2)(c) is engaged, the public interest nevertheless favours the disclosure of the inspection report.

Section 43 – commercial interests

41. The Home Office also argued that the withheld information was exempt from disclosure on the basis of section 43(2). This provides that information is exempt if disclosure would, or would be likely to, prejudice the commercial interests of any person including the person holding it.

42. In this case, the Home Office identified that disclosure would be likely to prejudice its own commercial interests. It also argued that disclosure would prejudice the commercial interests of MITIE, the contractor which operates Campsfield House on behalf of the UKBA.

Prejudice to the Home Office's commercial interests

43. The Home Office explained that disclosure of the report would be likely to impact on the ability of UKBA to secure future commercial relationships with credible suppliers where similar audit processes are a contractual requirement. Potential suppliers would be aware that UKBA, having already disclosed this type of information under the FOIA, would be liable to do so again. Accordingly they would be discouraged from dealing with UKBA in this challenging field, fearing untoward disclosure of information that might damage them commercially. The result of this would be the weakening of UKBA's commercial standing in any future tendering exercise, which would result in poorer value for money for the taxpayer.
44. The Home Office supplied no evidence to support this claim. In the absence of supporting evidence the Commissioner considers that private contractors are unlikely to be deterred from bidding to run prisons and detention centres as easily as the Home Office has suggested. The prison system is a well-established and lucrative area for private investment. According to figures obtained by the Prison Reform Trust, the UK has the most privatised prison system in Europe. In England and Wales there were 12,872 prisoners (15% of the prisoner population) held in private prisons as at 30 September 2012, with five more existing public prisons poised to be privately managed.⁴
45. The Commissioner believes that in view of the capacity for private investment, organisations tendering for contracts to run detention centres will be robust enough to balance negative publicity about their execution of those contracts against potential commercial gains.
46. Furthermore, the FOIA has been in force for over a decade and the Commissioner considers that by now most private sector organisations tendering to supply public services of this nature will do so in the knowledge that information about their execution of any contract will potentially be accessible under that Act and are unlikely to be unduly deterred by this fact.

⁴ <http://www.prisonreformtrust.org.uk/PressPolicy/News/vw/1/ItemID/179>

47. The Commissioner therefore does not accept that the Home Office has demonstrated that the prejudice it envisages to itself (damage to its ability to tender competitively, due to a reduced choice of bidders) would be likely to occur if the information were to be disclosed.

Prejudice to MITIE's commercial interests

48. As set out in paragraph 24, above, *would* prejudice places a strong evidential burden on a public authority, with the likelihood that the stated prejudice will occur being at least more probable than not.
49. The Home Office argued that the report amounted to performance information about MITIE's running of Campsfield, which the Home Office argued was not normally placed into the public domain. It said that MITIE would be disadvantaged by competitors having access to information which they would not otherwise be able to view, about its fulfilment of the contract to run the centre.
50. The Commissioner accepts that aspects of the report reveal operational information which might give competitors a degree of commercial advantage over MITIE when competing against it for similar contracts. The report provides some information about staffing levels and internal arrangements for delivering healthcare services which might be useful to a competitor looking to demonstrate it could meet certain standards when delivering healthcare services.
51. The Commissioner is unable to set out his consideration of the Home Office's remaining arguments that disclosure would prejudice MITIE's commercial interests without disclosing some information which the Home Office maintains is exempt. His assessment of those arguments is therefore contained in a confidential annex to this decision notice.
52. The result of his assessment of the prejudice the Home Office envisages is that he accepts that it would occur if the information were to be disclosed. Therefore, he accepts that section 43(2) is engaged.

Public interest test

53. Section 43 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
54. The complainant's public interest arguments are set out at paragraphs 31 and 34, above. Pertinent to section 43(2) was her argument that there is another four years before the contract for Campsfield House is due for renewal. She also expressed the view that commercial interests should not override the welfare of vulnerable individuals.

55. The Home Office has argued that the harm that would occur to the commercial supplier if the report were to be disclosed would not be in the public interest. It said that the UK is experiencing a sustained period of financial difficulty and the public interest in supporting commercial enterprise is particularly strong at present. There is accordingly a public interest in protecting suppliers and their employees, from disclosures of information that are liable to cause harm to them and threaten job security and prospects.
56. It acknowledged the public interest in disclosure to support transparency and accountability, but as set out in paragraphs 32 and 33, above, it argued that this interest is already sufficiently addressed.

Balance of the public interest

57. Although the Commissioner accepts that if the report were to be disclosed damage would occur to MITIE's commercial interests, he disputes that it would be as severe as the Home Office has sought to portray in its public interest arguments. This is because he considers that there is *already* public concern about healthcare and welfare provisions at Campsfield House.
58. For some years, Campsfield House has had a controversial public profile, and it has frequently been protested by pressure groups seeking its closure⁵. The BBC reported on concerns expressed in previous HMIP reports about inadequacies with regard to health and education provision at the centre⁶ and broadcast a documentary examining the controversy surrounding the centre⁷. In July 2011 there was a death in custody and the public report into that incident was critical about deficiencies in emergency response procedures. And a serious fire at the centre in October 2013 prompted the Chief Fire Officer's Association to issue a press release⁸ urging the fitting of sprinklers at Campsfield House and highlighting that it had previously made this recommendation, but it was not acted upon.

⁵ See, for example, <http://closecampsfield.wordpress.com/>

⁶ <http://www.bbc.co.uk/news/uk-england-oxfordshire-15173833>

⁷ http://www.youtube.com/watch?v=BqI2Axa_qys

⁸ <http://www.cfoa.org.uk/16022>

59. Therefore, it is fair to say that general concerns about healthcare and welfare arrangements at the centre are already in quite widespread public circulation.
60. Furthermore, and most significantly, reference to the withheld report's "*severely critical*" comments on healthcare provision was made in Campsfield House's 2011 annual report⁹. Thus, while the exact nature of that criticism is not currently in the public domain, the fact that concerns have been registered by various agencies is, and this cannot itself be considered confidential.
61. The Commissioner therefore considers it likely that MITIE may already have suffered some reputational damage as a result of these previous public criticisms and that it is not feasible to attribute any further damage to the company's commercial interests solely to the disclosure of the inspection report.
62. Set against this, the Commissioner considers that a significant public interest argument in favour of disclosure is discussed at paragraph 5 of the confidential annex to this decision notice. As explained at paragraph 39, above, the Commissioner is unable to examine this in the main body of this decision notice without disclosing information which the Home Office considers to be exempt.
63. The Commissioner also attaches considerable weight to there being appropriate transparency surrounding the welfare of vulnerable individuals.
64. Taking all the factors presented by the complainant and the Home Office into account, together with his own assessment of the case, the Commissioner considers the arguments in favour of disclosure to be sufficiently important as to not be outweighed by public interest arguments in favour of maintaining the exemption. The Commissioner's view is, therefore, that while section 43(2) is engaged, the public interest nevertheless favours the disclosure of the inspection report.

⁹ Paragraph 4.5.1

<http://www.justice.gov.uk/downloads/publications/corporate-reports/imb/annual-reports-2011/campsfield-house-2011.pdf>

Right of appeal

65. 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: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

66. 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.
67. 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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