

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 September 2014

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

Decision (including any steps ordered)

1. The complainant requested reports on audits of healthcare provided at immigration removal centres. The Home Office refused to disclose this information under the exemptions provided by the following sections of the FOIA:
 - 36(2)(c) (prejudice to the effective conduct of public affairs)
 - 40(2) (personal information)
 - 43(2) (prejudice to commercial interests)
2. The Commissioner's decision is that the public interest does not favour withholding the reports under sections 36(2)(c) and 43(2), and that they should now be disclosed apart from some content in relation to which section 40(2) is engaged.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose the reports, with the personal data relating to detainees redacted.
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 pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. On 10 December 2013, the complainant wrote to the Home Office and requested information in the following terms:

"I hereby request the following information:

A copy of the most recent audit/inspection of each IRC healthcare unit commissioned by the Home Office.

Information on how frequently inspections are done"

6. The Home Office responded substantively on 6 February 2014. The complainant was provided with information on the frequency with which inspections are carried out, but the Home Office refused to disclose the audit reports. In relation to these it cited the exemption provided by section 43(2) (commercial interests) of the FOIA.
7. The complainant responded on 10 February 2014 and requested an internal review. The Home Office responded with the outcome of the internal review on 10 April 2014. The refusal of the request under section 43(2) was upheld and the Home Office now also cited the exemption provided by section 36(2)(c) (prejudice to the effective conduct of public affairs) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 10 April 2014 to complain about the refusal of her information request. The complainant indicated that she did not agree with the exemptions cited by the Home Office.
9. During the investigation of this case the Home Office cited the exemptions provided by section 40(2) of the FOIA in relation to some of the contents of the audit reports. The following analysis therefore covers the exemptions provided by sections 36(2)(c), 43(2) and 40(2) of the FOIA.

Reasons for decision

Section 36

10. The Home Office has cited section 36(2)(c). This section provides an exemption where disclosure would or would be likely to prejudice the

effective conduct of public affairs in a manner other than that specified elsewhere in section 36. The Commissioner's approach to this exemption is that this should only be cited where none of the other exemptions in part II of the FOIA are relevant.

11. This section can only be cited on the basis of the reasonable opinion of a specified qualified person (QP). For government departments the QP is any government minister. The task for the Commissioner when considering if this exemption is engaged is to establish whether this exemption was cited on the basis of the opinion of a government minister and whether that opinion was reasonable. This exemption is qualified by the public interest, meaning that if the exemption is engaged, the information should nonetheless be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
12. Covering first whether an opinion was given by a nominated QP, the Home Office stated that two ministers acted as qualified person in this case: Lord Taylor of Holbeach, Lords Minister and Minister for Criminal Information; and James Brokenshire, Minister for Immigration and Security. In evidence for this, the Home Office supplied to the ICO a copy of a ministerial submission dated 24 March 2014. The Commissioner accepts that an opinion was given by a valid QP and that this opinion was given prior to the date of the internal review outcome, which was the point at which section 36 was cited.
13. As to whether that opinion was reasonable, the submission records that the basis for the QP's opinion concerned prejudice to the process of the Home Office carrying out audits of IRCs. The submission did not state clearly whether it was believed that prejudice *would* result, or *would be likely to* result. Given this, the Commissioner has proceeded on the basis that the opinion of the QP was that prejudice *would be likely to* result.
14. In relation to other exemptions, for the Commissioner to accept that prejudice would be likely to result, there must be a real and significant likelihood of that outcome. In this case the Commissioner has considered whether it was reasonable for the QP to be of the opinion that there was a real and significant likelihood of the disclosure resulting in prejudice to the ability of the Home Office to carry out audits of IRCs.
15. Having reviewed the content of the information, the Commissioner accepts that the opinion of the QP was objectively reasonable – that disclosure of this information was likely to make the audit process less effective. He accepts that it was reasonable for the QP to find that disclosure would otherwise prejudice the conduct of public affairs.

16. The Commissioner would note at this point that the issue of whether section 33 (prejudice to audit functions) could have been cited was raised with the Home Office in a related case. The response from the Home Office on this point was that it did not have an audit function, so section 33 was not available to it. The Commissioner's view is that the process to which the withheld information relates is an audit function and so as this was carried out on the behalf of the Home Office, it is at least arguable that the Home Office could cite section 33. However, he accepts that the Home Office did not believe that section 33 was available to it when it chose to cite section 36(2)(c).
17. Having found that the opinion of the QP that disclosure would be likely to result in prejudice to the auditing of IRCs was reasonable, the Commissioner concludes that the exemption provided by section 36(2)(c) is engaged.
18. The next step is to consider the balance of the public interest. The Commissioner has accepted that the opinion of the QP that disclosure would be likely to result in prejudice was reasonable; the role of the Commissioner here is not to challenge or reconsider his conclusion on the reasonableness of that opinion. Instead, his role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP. In forming a view on the balance of the public interest, the Commissioner has taken into account the general public interest in the openness and transparency of the Home Office, as well as those factors that apply in relation to the specific information in question here.
19. Having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the Home Office to audit the provision of healthcare at IRCs. As to how much weight this should carry in the balance of the public interest, the question is what the severity, extent and frequency would be of the prejudice identified by the QP.
20. The request covers audits of healthcare at all IRCs, indicating that the extent of the prejudice would be substantial. The Commissioner also recognises that prejudice may not be limited to healthcare audits, but could also cover other kinds of audit, which indicates that the frequency of the prejudice would be considerable.
21. The timing of the request is also relevant to the severity and extent of the prejudice. The most recent of the audits was carried out and the report submitted to the Home Office over 6 months prior to the date of the request. The majority of the reports are significantly older than this; up to 22 months prior to the date of the request. This passage of time clearly allowed a significant time and space for the results to be

considered and so the severity and extent of the prejudice is limited as a result.

22. Turning to arguments in favour of disclosure, the Commissioner considers there to be a strong public interest both in the disclosure of the specific audit reports in question here, and in general in relation to information about the operation of IRCs. Covering the public interest relating specifically to the audit reports in question, whilst the Commissioner is unable to go into details here without inappropriately revealing the content of the withheld information, his view is that the content of the reports means that there is a strong public interest in them being disclosed.
23. There are other factors relating to the operation of the IRCs that the Commissioner can cover in more detail here. As well as the healthcare audits that are the subject of the request in this case, full inspections of IRCs are carried out periodically by HM Chief Inspector of Prisons (HMCIP). Reports of those audits are in the public domain¹ and they comment on healthcare provision in the IRCs. In light of the publication of those reports and what this reveals about any concerns that existed

¹ <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2014.pdf>

<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/conbrook/colnbrook-irc-2013.pdf>

<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/tinsley-house/tinsley-house-2012.pdf>

<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/brook-house/brook-house-2013.pdf>

<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/campsfield-house/campsfield-house-irc-2011.pdf>

<http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/yarls-wood/Yarls-Wood-2013.pdf>

at that time, there is a strong public interest in publication of the reports in question here in order to reveal whether similar concerns existed at the time of these reports. It varies between the IRCs which is the more recent report; the HMCIP report or the healthcare audit report. In either case, disclosure of the reports in question would indicate whether healthcare provision had improved or deteriorated in the time between the reports. It would also be in the public interest to disclose the reports in question in order to provide greater detail about the operation of one area of the IRCs than is included within the HMCIP report.

24. Healthcare at the IRCs is ultimately funded by the taxpayer. There is a strong public interest in disclosure of the reports into how effectively the contractors are meeting their contractual obligations to provide healthcare, which is funded by the tax payer. This public interest in understanding more about the quality of healthcare provision at IRCs is particularly acute due to the vulnerable nature of the people held in these centres.
25. The operation of IRCs in general is an issue that has been the subject of scrutiny and concern. Some of the HMCIP reports referred to above reveal that there have been problems with the operation of the IRCs, and there is much media coverage that suggests that the operation of IRCs in general has been an area of public debate. In light of this, and again taking into account the vulnerable nature of the individuals held in IRCs, the Commissioner believes there to be a strong public interest in disclosure of information recording conditions within IRCs.
26. In conclusion, the Commissioner has recognised a significant public interest in avoiding the prejudice identified by the QP. However, he believes that the weight of that interest is not sufficient to outweigh the public interest in disclosure given the very strong public interest in information about the operation of IRCs. For these reasons, the Commissioner's finding is that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

Section 43

27. The Home Office has cited section 43(2), which provides an exemption for information the disclosure of which would, or would be likely to, result in prejudice to commercial interests. There are two steps when considering this section. First, whether the exemption is engaged as a result of prejudice to commercial interests being at least likely to result. Secondly, as with section 36(2)(c), this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
28. Covering first whether the exemption is engaged, the Home Office specified that it believed that prejudice to commercial interests *would be likely* to result. This means that the test that the Commissioner has applied here is whether there would be a real and significant, rather than hypothetical or remote, chance of prejudice occurring.
29. The reasoning given by the Home Office for this exemption being engaged was twofold. First, it argued that its own commercial interests would be likely to be prejudiced through third party suppliers being less likely to want to contract with the Home Office and that this would disadvantage the Home Office position in contract negotiations. Secondly it argued that the commercial interests of the contractors that provided healthcare services at the IRCs at the time of the audits would be likely to be prejudiced.
30. Covering the argument of prejudice to the Home Office first, the Commissioner does not find this convincing. His view is that the Home Office is likely to be in a sufficiently strong position when negotiating contracts for services at IRCs that it could withstand the impact of disclosure without it having a significant effect upon its commercial interests. The Commissioner would accept that third party contractors may prefer that reports of the kind in question here would not be disclosed, but he would not accept that they would allow this preference to reduce their chances of securing Home Office contracts, which for companies that provide services to IRCs would represent a significant success.
31. A more convincing argument is that disclosure of these reports would be likely to prejudice the commercial interests of the contractors. Again the Commissioner cannot include detail about the content of the withheld information, but he accepts that there is a real and significant likelihood that disclosure of it could lead to prejudice to the commercial interests of the contractors. On this basis, the conclusion of the Commissioner is that the exemption provided by section 43(2) of the FOIA is engaged.

32. The next step is to consider the balance of the public interest. In forming a conclusion on the balance of the public interest here, the Commissioner has taken into account the general public interest in the transparency of the Home Office, as well as specific factors that apply in relation to the information in question.
33. Covering first those arguments in favour of maintenance of the exemption, the Commissioner recognises that there is a public interest in preserving a situation in which private sector suppliers can contract with public authorities without prejudice to their commercial interests. Whilst the Commissioner was not convinced that the likelihood of prejudice to the commercial interests of the Home Office was real or significant in this case, he does recognise that a number of disclosures likely to result in prejudice to the commercial interests of private sector contractors could lead to a less favourable environment for public authorities seeking to contract with private sector contractors. Avoiding that outcome is in the public interest.
34. Turning to the arguments in favour of disclosure, the same factors as covered above at paragraphs 22 to 25 apply here; for those reasons the Commissioner believes there to be a very strong public interest in the disclosure of the audit reports in question. It is of particular relevance to section 43(2) that disclosure would add to public knowledge on the extent to which the contractors were providing a value for money service.
35. In conclusion, the Commissioner has recognised that it is in the public interest to maintain the exemption in order to avoid a situation in which the commercial interests of private sector contractors are likely to be prejudiced as a result of working in the public sector. He does not, however, consider the weight of that public interest to match that in favour of disclosure, the grounds for which are set out in more detail under the section 36(2)(c) heading above. The Commissioner finds, therefore, that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

Section 40

36. In relation to a minority of the content of the reports the Home Office has cited section 40(2). This section provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. The following analysis covers first whether the redactions where the Home Office has cited section 40(2) constitute personal data. Secondly, for the content that is personal data, the analysis covers whether disclosure would satisfy the

first data protection principle, which states that personal data shall be processed fairly and lawfully.

37. Personal data is defined in section 1(1) of the Data Protection Act 1998 (DPA) as follows:

"personal data' means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller".

38. This provides two criteria that must be fulfilled for information to constitute personal data; the information must relate to an individual, and that individual must be identifiable either from that information directly, or from that information combined with other information available to the holder of that information.
39. The redactions can be separated into two broad categories. First, information that relates to individuals who participated in the audit in their professional capacity, or who are referred to in the audit report in relation to their profession. The second category is information that relates to detainees. Some of the information about individuals in their professional capacity identifies these individuals by name, so clearly is their personal data.
40. The remainder of the redactions about individuals in their professional capacity, and all of the redactions that relate to detainees, do not identify the subjects by name. The Commissioner accepts, however, that these redactions include sufficient information to enable another individual, such as a fellow employee or detainee, to identify the subject of the redacted content. This information is also, therefore, personal data.
41. One redaction records that a detainee died. Section 1(1) of the DPA is clear that for information to be personal data, it must relate to a living individual; as this content does not relate to a living individual, it is not personal data.
42. In relation to the redactions that the Commissioner has accepted do constitute personal data, the next step is to consider whether disclosure of this information would be in breach of any of the data protection principles. The Commissioner has focussed here on the first principle, which requires that personal data be processed fairly and lawfully. In forming a view on whether disclosure would be fair, the Commissioner has taken into account the reasonable expectations of the data subjects,

the consequences of disclosure upon the data subjects and whether there is legitimate public interest in the disclosure of the information in question.

43. On the issue of the reasonable expectations of the data subjects and covering first the redactions relating to individuals in their professional capacity, the general approach of the Commissioner is that it will be less likely to be unfair to disclose information relating to an individual in a professional capacity than it would be in relation to information concerning an individual's private life. The likelihood of disclosure will generally increase with the professional seniority of the data subject, and where the relevant information relates to a public role they fulfilled at the time the information was recorded. Given that this information relates to individuals acting in a professional public role, he believes that they could reasonably hold only a very limited expectation that this information would not be disclosed.
44. As to the consequences of disclosure upon the data subjects, the question here is whether disclosure would be likely to result in damage and distress to those individuals. The Commissioner would accept that some minor distress may occur through disclosure contrary to the very limited expectation of confidentiality referred to above. He does not, however, believe that any more material damage would be likely to occur.
45. The next step is to consider whether there would be any legitimate public interest in the disclosure of this information. Whilst section 40(2) is an absolute exemption and not qualified by the public interest, the public interest is relevant here as it is necessary for there to be a legitimate public interest in order for disclosure to be compliant with the DPA, and a sufficiently strong interest may meet the test in schedule 2 condition 6 of the DPA, of being a necessary disclosure to meet a legitimate public interest. This must be considered against whether disclosure is unwarranted by virtue of any prejudice to the interests of the data subject.
46. The Commissioner has covered above the issue of the public interest in disclosure in relation to sections 36(2)(c) and 43(2); his view is that there is a legitimate public interest in disclosure of the full unredacted reports for the same reasons as set out above at paragraphs 22 to 25.
47. For disclosure to be in line with the first data protection principle, disclosure must be *necessary* in order for the legitimate interests

identified above to be satisfied. This is required by Schedule 2 Condition 6 of the DPA. The Commissioner's published guidance² on this matter states that disclosure should be necessary in order to satisfy a pressing social need. It also states that:

"...the general need for transparency regarding public bodies may constitute a sufficiently 'pressing social need'".

48. In this case, as well as the general need for transparency, the Commissioner is of the view that there is a specific need for transparency in relation to these audit reports for the same reasons as referred to previously when covering the public interest.
49. A second issue that must be addressed when considering necessity is whether the information may already be available elsewhere. In this case the Commissioner relies on the refusal of the Home Office to disclose this information as evidence that it is not available elsewhere.
50. For the first data protection principle to be satisfied, disclosure must be lawful, as well as fair. The approach of the Commissioner to the issue of lawfulness under the first data protection principle is that he will find that disclosure would be lawful unless the public authority has advanced convincing arguments as to why disclosure would be unlawful. In this case the Home Office has advanced no arguments on the issue of lawfulness and the Commissioner has no reason to believe that disclosure would not be lawful.
51. The Commissioner has found that disclosure would be both fair and lawful and, therefore, would satisfy the first data protection principle. As there would be no breach of the first data protection principle through the disclosure of this information, the overall conclusion of the Commissioner is that the exemption provided by section 40(2) is not engaged in relation to the redactions that relate to individuals in their professional capacity.
52. Turning to the redactions that relate to detainees, section 2 of the DPA lists categories of *sensitive* personal data. Included within this list is personal data that relates to physical or mental health or condition. The

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http://www.ico.org.uk/for_organisations/guidance_index/~media/document_s/library/Freedom_of_Information/Detailed_specialist_guides/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf

personal data in question here is within that category and so is sensitive.

53. Sensitive personal data, by its very nature, has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the data subjects, the Commissioner considers that it would be unfair to disclose these redactions. The exemption provided by section 40(2) is, therefore, engaged in relation to the redactions that relate to detainees.
54. In relation to the information that the Commissioner does not consider to be personal data, his conclusion is also that section 40(2) is not engaged. As a result of this finding and that above on sections 36(2)(c) and 43(2), the Home Office is required at paragraph 3 above to disclose the audit reports, with the personal data of detainees redacted. In relation to the redaction from the Harmondsworth report, the Home Office should take the same step as ordered in the recent linked decision notice, namely to remove the reference to a specific medication.

Right of appeal

55. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

56. 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.
57. 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

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF