

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 April 2015

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

Decision (including any steps ordered)

1. The complainant requested the total payments made to the previous operators of two Immigration Removal Centres (IRCs) for the final year of the contracts. The Home Office refused to disclose this information under the exemption provided by section 43(2) (prejudice to commercial interests) of the FOIA.
2. The Commissioner's decision is that the Home Office cited section 43(2) correctly and so it was not obliged to disclose this information.

Request and response

3. On 14 October 2014 the complainant wrote to the Home Office and requested information in the following terms:

"I ask for the following information: for Colnbrook and Harmondsworth Immigration Removal Centres, the actual total payment made to the operator in respect of each of those facilities (ie separately) in the last full year of operation under the previous operator, ie under the contracts which are now superseded by that with MITIE."
4. The Home Office responded on 10 November 2014. It stated that the request was refused and cited the exemption provided by section 43(2) (prejudice to commercial interests) of the FOIA.

5. Somewhat misleadingly, it also stated at this stage that "*some*" of the requested information was exempt under section 43(2) and suggested that information relevant to the complainant's request was available on the Home Office website. It later clarified in correspondence with the ICO that all the information falling within the scope of the complainant's request was believed to be exempt under section 43(2) and that no information within its scope was published online.
6. The complainant responded on 11 November 2014 and requested an internal review. The Home Office responded with the outcome of the internal review on 26 November 2014. The conclusion of this was that the refusal of the request under section 43(2) was upheld.

Scope of the case

7. The complainant contacted the Commissioner on 29 December 2014 to complain about the refusal of his information request. The complainant stated at this stage that he did not agree with the refusal of his request and gave reasoning for this.

Reasons for decision

Section 43(2)

8. This section provides an exemption for information the disclosure of which would, or would be likely to, prejudice commercial interests. Consideration of this section involves two stages. First, the exemption must be engaged as a result of prejudice to commercial interests being at least likely to result. Secondly, this exemption is qualified by the public interest, which means that if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
9. Covering first whether this exemption is engaged, the question here is whether disclosure of the information in question would be likely to prejudice the commercial interests of any person. In order for the Commissioner to accept that prejudice would be likely to result, the probability of this outcome must be real and significant, rather than remote. That test has been applied here.
10. The argument of the Home Office concerned its own commercial interests. In short, its position was that disclosure of payments made to the previous contractors for the IRCs named in the request would be likely to prejudice its negotiating position with other contractors, with

the result that it would have to pay more for the running of IRCs. The Commissioner recognises that this argument is relevant to section 43(2). The next step is whether the likelihood of that outcome meets the test described above.

11. The counter-argument made by the complainant focussed on his request concerning payments made under the last year of completed contracts. The argument of the complainant was that prejudice would not be likely to arise from the disclosure of payments made under completed contracts. The complainant believed that disclosure of the amount paid under a previous contract could not result in prejudice in a similar way to disclosure of details of a current contract.
12. In a previous decision notice¹, the Commissioner considered a similar information request made by the complainant at an earlier date, albeit that request was for information concerning contracts that were current at that time. The conclusion of that decision notice was that section 43(2) was engaged and that the balance of the public interest favoured the maintenance of the exemption. That decision was later upheld by the First-tier Tribunal (Information Rights)².
13. The complainant's argument is that the circumstances in this case differ very significantly as he has requested information relating to contracts that are no longer current. He believes that as those contracts are finished, disclosure of the details of costs paid under those contracts would not be likely to prejudice commercial interests.
14. The Commissioner does not agree that the arguments from the earlier case do not also apply in this case. Instead, his view is that section 43(2) was cited correctly in this case for similar reasons as were recognised in the earlier case.
15. Primarily, the Commissioner does not agree that the change of contractors means that the circumstances differ in this case so much that section 43(2) does not apply. Whilst the figures the complainant requested relate to contracts that are not current, those contracts were recent.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/964430/fs_50501792.pdf

²

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i1420/Le%20Vay,%20Julian%20EA-2014-0091.pdf>

16. Brief research suggests that MITIE began the operation of the immigration removal centres in September 2014, meaning that the request covers approximately September 2013 to September 2014. The request was made in October 2014; the information requested related to a contract that finished only very shortly earlier.
17. That short passage of time means that the following argument from the decision notice in the previous case remains relevant, even though the October 2014 request related to old contracts:

"...disclosure of the withheld information would prejudice [the Home Office's] ability to achieve best value in any future tendering exercises from the limited market of suppliers by revealing the exact amount it was prepared to pay for the service."

18. The conclusion of the Commissioner, for similar reasons as given in the earlier decision notice, is that prejudice to commercial interests as a result of disclosure of the requested information is likely and, therefore, the exemption provided by section 43(2) of the FOIA is engaged.
19. Having reached that conclusion, the next step is to consider the balance of the public interest. In forming a conclusion on the balance of the public interest in this case, the Commissioner has taken into account the general public interest in the openness and transparency of the Home Office. The public interest inherent in the exemption is also relevant; that is the public interest in avoiding prejudice to the commercial interests of the Home Office. These factors are in addition to those that apply to the specific information in question here.
20. Covering first factors in favour of disclosure, the operation of IRCs in general is an issue that has been the subject of scrutiny and concern. As well as media coverage that suggests that the operation of IRCs has been a problematic area generally, reports of unannounced IRC inspections by HM Chief Inspector of Prisons are publicly available³. These are, to varying degrees of severity, critical of the operation of IRCs.
21. Given this publicly available criticism of the operation of these centres, the Commissioner's view is that there is in general a very strong public interest in other information about their operation, including how much is paid from public funds for their operation. The Commissioner

³ <http://www.justiceinspectorates.gov.uk/hmiprison/inspections/?prison-inspection-type=immigration-removal-centre-inspections>

recognises, however, that the weight of this public interest in relation to the information in question here is not as great as would be the case in relation to information that includes more substantive content about the operation of these IRCs.

22. Turning to factors in favour of maintenance of the exemption, as noted above the public interest inherent in the exemption is a relevant factor here. The Commissioner has accepted the likelihood that disclosure would be likely to prejudice the commercial interests of the Home Office. Particularly at a time of pressure on public spending there is strong public interest in avoiding that outcome and in preserving the ability of the Home Office to negotiate the best possible rate with suppliers of IRC services.
23. In conclusion, the Commissioner has recognised that there is public interest in disclosure of this information on the basis that it relates to IRCs and there is a strong public interest in information relating to the operation of these centres. However, he has also recognised that this public interest is of limited weight in relation to the financial information in question here. As a result, the Commissioner's view is that this public interest is outweighed by the public interest in avoiding prejudice to the commercial interests of the Home Office. His finding is, therefore, that the public interest in the maintenance of the exemption outweighed the public interest in disclosure and so the Home Office was not obliged to disclose this information.

Right of appeal

24. 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>

25. 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.
26. 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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