

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2015

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

Decision (including any steps ordered)

1. The complainant requested a report of an investigation into the restraining whilst in hospital of an immigration detainee, who died shortly after the restraint was removed. The Home Office refused to disclose this information and cited the exemption provided by section 38(1)(a) (endangerment to health and safety) of the FOIA.
2. The Commissioner's decision is that section 38(1)(a) is not engaged in relation to some of the content of the report, and, in relation to the remainder of the content, that this exemption is engaged and the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose the following parts of the report:
 - Cover sheet and contents (pages 1 and 2)
 - Paragraphs 1.1 to 1.5 – executive summary
 - Paragraph 2 – terms of reference
 - Paragraphs 3.1 to 3.2 – methodology
 - Paragraphs 8.1 to 8.16 – recommendations

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 22 October 2014, the complainant wrote to the Home Office and requested information in the following terms:

"The HMIP annual report mentions the death of a Harmondsworth detainee in November 2012: 'In another case at Harmondsworth in November 2012, a detainee who was dying continued to be handcuffed while he was sedated and undergoing an angioplasty in hospital, although the handcuffs were removed before he died. The Home Office's professional standards unit has completed a critical investigation into this case.' I request a copy of the PSU investigation and the PPO report on this case."

6. The Home Office responded substantively on 3 December 2014. It stated that no report by the Prisons and Probation Ombudsman (PPO) was held as the PPO had not carried out an investigation into this case. In relation to the Home Office Professional Standards Unit (PSU) report, it confirmed that this information was held, but refused to disclose it under the exemption provided by section 38 (endangerment to health and safety) of the FOIA.
7. The complainant responded on 10 December 2014 and requested an internal review. The Home Office responded with the outcome of the review on 21 January 2015. The conclusion of this was that the refusal under section 38 was upheld.

Scope of the case

8. The complainant contacted the Commissioner on 19 January 2015 to complain at that stage about the failure of the Home Office to complete the internal review. Following the completion of the internal review, the complainant contacted the ICO again on 5 February 2015 to complain about the refusal of her information request. The complainant argued that the public interest favoured disclosure of the information she had requested.

9. During correspondence with the ICO about this case, the Home Office specified that it was relying on subsection 38(1)(a), which is the provision covered in the analysis below.

Reasons for decision

Section 38

10. The Home Office cited the exemption provided by section 38(1)(a) of the FOIA. This section provides that information is exempt from the requirement to disclose if to do so would, or would be likely to, endanger the physical or mental health of any individual. Consideration of this exemption involves two stages; first the exemption must be engaged as a result of endangerment to health being at least likely to result. Secondly, 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.
11. Covering first whether the exemption is engaged, the Home Office specified that it believed endangerment to health *would be likely* to result, rather than *would* result. The test that the Commissioner applies when considering whether an outcome would be likely to occur is that there must be a real and significant likelihood of this outcome. The question for the Commissioner here is, therefore, whether the Home Office was correct to find that there was a real and significant likelihood of endangerment to health occurring through disclosure of the information in question.
12. The reasoning of the Home Office was that disclosure of this information would be likely to endanger the mental health of the family of the deceased individual referred to in the request. Its argument was that the report is a detailed account of the final hours and days of their relative's life, which had not been provided to them previously. The Home Office also suggested that the report may include details that the family members were not previously aware of.
13. Having reviewed the content of the report, the Commissioner recognises that it does provide a very detailed account of the events leading up to that individual's death. This content includes medical information that would be considered sensitive personal data under the Data Protection Act if it related to a living individual.
14. Disclosure under the FOIA means that information is placed in the public domain. The Commissioner recognises that disclosure of this sensitive information about their late family member into the public domain would

be distressing to the surviving relatives of that individual, both due to that loss of privacy about the incident and, as the Home Office argued, as a result of becoming aware of the content of this report.

15. The next question is whether the Commissioner accepts that this distress would be to such an extent that it would be likely to endanger the mental health of the family members. It has been established by the Commissioner and the Information Rights Tribunal through previous cases that for this exemption to be engaged disclosure must have a greater impact than stress or worry. In this case, having been party to the content of the information, the Commissioner accepts that the level of the psychological impact of the disclosure of this information would go beyond mere stress or worry. In relation to the majority of the content of the report, the Commissioner accepts that disclosure of this information would be likely to endanger the mental health of the surviving relatives and so the exemption provided by section 38(1)(a) of the FOIA is engaged.
16. However, in relation to some of the report, the Commissioner has formed a different conclusion:
 - Cover sheet and contents (pages 1 and 2)
 - Paragraphs 1.1 to 1.5 – executive summary
 - Paragraph 2 – terms of reference
 - Paragraph 3.1 to 3.2 – methodology
 - Paragraph 8.1 to 8.16 – recommendations
17. This information does not contain intrusive details of the medical condition of the deceased individual or of the events leading up to their death. Instead, it contains an overview of the report, explains the approach taken and comments more broadly on the lessons that should be taken from that incident. The Commissioner's view is that disclosure of this part of the content would not be likely to endanger the mental health of any individual and so section 38(1)(a) is not engaged in relation to it. At paragraph 3 above, the Home Office is now required to disclose that content.
18. The Commissioner also finds that there is also a particularly strong public interest in the disclosure of that content. Whilst it is not necessary to go on to consider the balance of the public interest in relation to that information as he has found that the exemption is not engaged, had he done so the Commissioner would have found that the balance of the public interests favoured disclosure.

19. In relation to the remainder of the content, which is the majority and about which the Commissioner found that the exemption provided by section 38(1)(a) is engaged, it is necessary to go on to consider the balance of the public interests. In forming a conclusion here, the Commissioner has taken into account the public interest inherent in the exemption, which is the public interest in avoiding endangerment to health, and the public interest in the openness of the Home Office. This is in addition to the factors that apply in the specific circumstances of this case.
20. Covering first factors in favour of disclosure of the information, the complainant argued that there was a very strong public interest in disclosure of details of events leading to the death of a person whilst they were, in the complainant's words, "*detained administratively by the Home Office*". The complainant believed that it was strongly in the public interest for this information to be disclosed in order for the Home Office to be held to account about its actions in this case and its policy on restraining detainees.
21. The complainant also referred to the circumstances of this case having meant that no investigation was carried out by the Prisons and Probation Ombudsman. The complainant stated that, had such an investigation been carried out, it would have been standard practice for the report of it to be published.
22. The Commissioner notes that the events to which the withheld information relates were serious and generated significant public concern. Brief online searching reveals media coverage about the events recorded within the withheld information, which focusses on the inappropriateness of a severely ill individual being restrained whilst hospitalised.
23. The Commissioner also notes the report¹ by HM Chief Inspector of Prisons on Harmondsworth Immigration Removal Centre. This refers to two incidents where "*vulnerable and incapacitated detainees...were needlessly handcuffed in an excessive and unacceptable manner*" and describes them as "*shocking cases where a sense of humanity was lost*".

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<http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2014.pdf>

24. The Home Office argued that releasing the content of the report would not be in the public interest, as this had already been served by the investigation having been carried out and new guidance having been issued since then about the use of restraints. The Commissioner still finds that there was a strong public interest in disclosure of information about the investigation of an incident of such seriousness. His view is that the public interest in the disclosure of information about the incident is of very significant weight. The public interest is highest for the sections of the report already identified for disclosure above, particularly the recommendations. Whilst there is still a significant public interest in the detailed content in the main body of report there is less public interest in revealing it.
25. Turning to factors in favour of maintenance of the exemption, the arguments made by the Home Office on this point focussed on the public interest inherent in the exemption. The Commissioner agrees that this is a valid factor in any case where section 38(1)(a) is engaged as it is in the public interest to avoid endangering the health of any individual.
26. As to the weight that this factor should carry in this case, as covered above, the Commissioner found that endangerment to health *would be likely* to result. The Commissioner has reached this view from considering the content of the information and it seems reasonable to assume that any relative would have been severely distressed by disclosure of the information, though the case would have been stronger if the Home Office had supplied specific evidence about the impact on the surviving relatives.
27. Despite the lack of specific evidence from the Home Office the Commissioner finds that there is a very significant public interest in protecting the relatives from the distress likely to be caused by disclosure, albeit the weight to be placed on maintaining the exemption would have been higher if this evidence had been available.
28. Having considered all the circumstances, and the weighty arguments on both sides, the Commissioner has found that the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

Right of appeal

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Steve Wood
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