

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 October 2015

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

Decision (including any steps ordered)

1. The complainant requested information relating to a change in the process by which failed asylum seekers may make further submissions in support of their claim. The Home Office withheld this information under the exemptions provided by sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and to the free and frank exchange of views) of the FOIA.
2. The Commissioner's decision in relation to almost the entirety of the withheld information is that sections 36(2)(b)(i) and (ii) were cited correctly and so the Home Office was not obliged to disclose this information. However, in relation to one document the conclusion of the Commissioner is that these exemptions are not engaged and so the Home Office is now required to disclose this information.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose the 13 January 2015 letter.
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 23 January 2015 the complainant wrote to the Home Office and requested information in the following terms:

"I now request under the terms of the Freedom of Information Act, information which might be (but not limited to) emails, reports, memorandums, meeting records including minutes and other handwritten or otherwise notes which exist, telephone conversation notes or records and any other correspondence between any Member of Parliament, Mark Sedwill Permanent Secretary, Mike Wells CBE, any other civil servants or employees of the Home Office or any other government department:

(a) which relates to the decision to take effect from 26 January 2015 to change the process for making further submissions on asylum and human rights cases by centralising management of post appeal rights exhausted asylum seekers to Liverpool;

(b) which relates to consideration of public sector equality considerations - this would include a copy of an equality impact assessment or its equivalent plus any other documentation which may exist in relation to the determination and production of such a document. By requesting this I seek to establish what stage the duty was considered, what considerations were made and how it reached conclusions to establish full compliance with the public sector equality duty; and

(c) which relates to the process of selection which determined that with effect from 26 January 2015 Liverpool shall be the reporting centre, including any such material that relates to the consideration or otherwise of alternative locations."

6. The Home Office responded on 25 February 2015. It refused the request and cited section 35 (formulation or development of government policy etc) of the FOIA.
7. The complainant responded on 10 March 2015 and requested an internal review. The Home Office responded with the outcome of the review on 20 April 2015. The refusal of the request was maintained, but the Home Office at this stage withdrew the citing of section 35 and instead cited the exemptions provided by sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and to the free and frank exchange of views) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 28 May 2015 to complain about the refusal of his information request. The complainant indicated that he was dissatisfied with the reasoning given by the Home Office for the refusal of his request.
9. In correspondence with the ICO, the Home Office referred to having amended its stance on section 35 when carrying out the internal review. Section 36 only applies to information that is not covered by section 35 and the Home Office stated that, should the Commissioner decide that section 36 could not apply as the information was within the class described in section 35(1)(a), it would rely on that exemption in the alternative.
10. The Home Office also stated in its correspondence with the ICO that it relied on the section 40(2) exemption in relation to identifying information of any officials below Senior Civil Service level.

Reasons for decision

Section 36

11. The Home Office cited sections 36(2)(b)(i) and 36(2)(b)(ii). Section 36(2)(b)(i) provides an exemption in relation to information the disclosure of which would, or would be likely to, inhibit the free and frank provision of advice. Section 36(2)(b)(ii) provides the same in relation to the free and frank exchange of views for the purposes of deliberation. These exemptions can only be applied based on the reasonable opinion of a specified qualified person, which for government departments is any Minister of the Crown.
12. These exemptions are qualified by the public interest, which means that there are two stages when applying them. First, the exemptions must be engaged as a result of having been applied on the basis of a reasonable opinion from a Minister. Secondly, the balance of the public interests must be considered. If the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure, the information must be disclosed.
13. Covering first whether the exemptions are engaged, the questions here are whether an opinion was given by a Minister and whether that opinion was reasonable. The Home Office has stated that Lord Bates, Minister for Criminal Information acted as qualified person (QP) and has provided evidence that he gave an opinion on 17 April 2015. The

Commissioner accepts, therefore, that these exemptions were cited on the basis of an opinion from a Minister.

14. Turning to whether the opinion was reasonable, the Commissioner's approach here is that an opinion must simply be objectively reasonable. This means that it must be an opinion that a reasonable person could hold and not necessarily the most reasonable or only reasonable opinion that could be held.
15. The withheld information consists of emails and draft papers written by officials as they formulated a plan for and advised Ministers about a change in the process for failed asylum seekers to make further submissions. The basis for the opinion of the QP as explained by the Home Office was that disclosure in this case would be likely to inhibit officials when providing advice and exchanging views in future. The submission to the QP suggests that disclosure in this case would be likely to inhibit officials in their advice and exchanges in future as their assessment based on this case would be that there was a possibility of a record of their work being disclosed.
16. The Commissioner notes that the withheld information dates from shortly before the date of the request and that the Home Office stated that the matter it relates to was still 'live' at the time of the request. The Commissioner therefore recognises that the likelihood of inhibition would not have lessened through the passage of time, as well as that immigration enforcement is a high profile and controversial issue.
17. When applying other prejudice based exemptions, the Commissioner takes the approach that in order for him to conclude that prejudice would be likely to result, there must be a real and significant, rather than remote, possibility of that outcome occurring. The submission prepared for the QP refers to *would be likely*, rather than arguing that inhibition *would* result. Applying his usual test here, particularly given that the withheld information relates to a sensitive issue that was live at the time of the request, the Commissioner accepts that it was objectively reasonable for the QP to hold the opinion that disclosure would be likely to result in inhibition relevant to sections 36(2)(b)(i) and (ii). His conclusion is, therefore, that these exemptions are engaged.
18. In relation to one item of withheld information, however, the view of the Commissioner is that this exemption is not engaged. This is a letter sent from the Chief Operating Officer of UK Visas and Immigration to members of the National Asylum Stakeholder Forum on 13 January 2015. This letter does not fall within the reasoning for the QP's opinion given in either the submission to the QP, nor the correspondence from the Home Office to the ICO, and so the Commissioner does not accept that the QP's opinion was reasonable in relation to this information.

19. As this finding is not based on section 36 being ineligible in relation to this information, the condition described above at paragraph 9 for the Home Office to rely on section 35(1)(a) does not apply and so the Commissioner has not considered that exemption in relation to this information. He also has not considered section 40(2) as the only identifying information in this letter relates to a senior official. At paragraph 3 above the Home Office is required to disclose this information.
20. The next step is to consider the balance of the public interests. When forming a conclusion on the public interest in relation to section 36, the role of the Commissioner is not to reconsider his conclusion that the QP's opinion was reasonable. Instead, it is to consider the severity, extent and frequency of the inhibition that the QP believed was likely to result through disclosure and weigh against that the public interest factors in favour of disclosure.
21. Covering first the public interest in favour of disclosure, immigration enforcement is a controversial and high profile area. Immigration related matters in general are perpetually high on the political agenda and there is a strong public interest in disclosure of information that relates to this area.
22. This information in particular concerns the approach to control of a particular form of immigration - asylum claims. The Commissioner's view is that the public interest in information about the approach taken to controlling this area of immigration policy is particularly high.
23. Turning to factors in favour of maintenance of the exemptions, having accepted as reasonable the QP's opinion that disclosure of the information in question would be likely to cause inhibition, the Commissioner must recognise that avoiding that outcome is a factor in favour of maintenance of the exemptions. However, as referred to above, the weight that this should carry as a public interest factor depends on the severity, extent and frequency of that inhibition.
24. The Commissioner again takes into account here the timing of the request. That the information concerned a live issue is significant here. The impact of inhibition to officials as they are concerned that their work on live issues could be disclosed may be severe. The concern that the record of their work could be subject to disclosure very shortly after it was drafted may have a particularly inhibiting effect to officials.
25. As to the extent and frequency of that inhibition, the Commissioner would not accept that the effect of disclosure in this case would be that inhibition would be likely in *any* future case where officials are involved in exchanges and advice about a change in approach. Instead, he

considers that it would only be reasonable to expect that the extent and frequency would stretch as far as officials' work on related topics.

26. Whilst the Commissioner's view is that the frequency and extent of inhibition would be limited to work on similar subject matter, he does consider that the inhibition could be severe due to the request in this case being for information on a live, ongoing policy area. His view is, therefore, that the public interest in avoiding the outcome that the QP believed would be likely to occur is of significant weight.
27. In conclusion, the Commissioner has recognised valid public interest in disclosure given the subject matter of the withheld information. However, his view is that the weightiest factor here is the public interest in avoiding the outcome that the QP believed would be likely to occur, with the attendant harm that this would cause to the work of the Home Office. The finding of the Commissioner is, therefore, that the public interest in the maintenance of the exemptions outweighed the public interest in disclosure and so the Home Office was not obliged to disclose the requested information.

Right of appeal

28. 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>

29. 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.
30. 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

Gerrard Tracey
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