

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 November 2015

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

Decision (including any steps ordered)

1. The complainant requested materials prepared for Home Office Ministers concerning asylum claims relating to the sexuality of claimants. The Home Office refused to disclose this information and cited the exemption provided by section 36(2)(b)(i) (inhibition to the free and frank provision of advice) of the FOIA.
2. The Commissioner's decision is that section 36(2)(b)(i) was cited correctly and so the Home Office was not obliged to disclose the requested information.

Request and response

3. On 18 December 2014 the complainant wrote to the Home Office and requested information in the following terms:

"Copies of documents, reports and briefing papers prepared for Home Office Ministers dealing with the issue of people claiming asylum based on their sexuality."
4. The Home Office responded on 19 January 2015. It refused the request and cited the exemption provided by section 35(1)(a) (formulation or development of government policy) of the FOIA.
5. The complainant responded on 10 February 2015 and requested an internal review. In a response dated only as March 2015, the Home Office gave the outcome of the internal review, which was that the refusal of the request under section 35(1)(a) was upheld.

Scope of the case

6. The complainant contacted the Commissioner on 5 June 2015 to complain about the refusal of his information request. He stated that he believed that the balance of the public interests favoured disclosure of the information he had requested.
7. During the investigation of this case the Home Office changed its position and withdrew the citing of section 35(1)(a) and cited section 36(2)(b)(i) (inhibition to the free and frank provision of advice) instead. It also introduced section 40(2) (personal information) in relation to names of officials within the withheld information. The Home Office was repeatedly asked to contact the complainant to advise of the change of position in this case, but despite indicating that it would do so, it failed to notify the ICO that this action had been taken. That issue, and a number of other issues about the approach of the Home Office in this case that gave the Commissioner cause for concern, are commented on in the "Other matters" section below.
8. The following analysis covers the exemptions that were cited during the Commissioner's investigation.

Reasons for decision

Section 36

9. The Home Office cited section 36(2)(b)(i), which provides an exemption where disclosure would, or would be likely to, inhibit the free and frank provision of advice. This exemption can only be cited on the basis of a reasonable opinion from a specified qualified person (QP). In the case of government departments, the QP is any Minister of the Crown. The task for the Commissioner when deciding whether this exemption is engaged is to reach a conclusion on whether the opinion of the QP was objectively reasonable. This exemption is also 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.
10. As to whether this exemption is engaged, the first issue to cover here is whether this exemption was cited on the basis of an opinion from a government minister. On this point the Home Office stated that this exemption was cited on the basis of an opinion from James Brokenshire MP, Immigration Minister and supplied evidence that this opinion was given on 4 November 2015. On the basis of this evidence, the Commissioner accepts that an opinion was given by a valid QP.

11. The next step is to consider whether that opinion was reasonable. The Commissioner's approach on this point is that an opinion must be objectively reasonable. This means that the opinion does not have to be one that the Commissioner would agree with, nor the *most* reasonable opinion. As long as the opinion was in accordance with reason, section 36 will be engaged.
12. The Home Office supplied to the ICO a copy of a submission that was prepared for the QP in order to assist in the formation of their opinion. The wording of the submission indicated that the opinion of the QP was that inhibition and prejudice *would* result, rather than *would be likely* to result. The approach of the Commissioner when considering other prejudice based exemptions is that he will accept that prejudice *would* result where the likelihood of this is more probable than not. He has applied a similar test here and considered whether it was reasonable for the QP to hold the opinion that disclosure would be more likely than not to result in prejudice.
13. The Home Office explained the opinion of the QP as being that disclosure in this case would have a "chilling effect" on officials' future submissions on the subject of asylum claims. The reasoning was that disclosure in this case would result in inhibition to those contributing to future submissions on this subject, as they would take disclosure in this case as an indication that their contributions may be disclosed to the world at large.
14. The Commissioner has reviewed the withheld information, which consists of submissions and briefings on LGBT asylum claims. He accepts that this is an area of great sensitivity, but does have reservations about the argument that disclosure in this case would be more likely than not to result in officials failing to contribute in a free and frank manner when working on future submissions and briefings.
15. However, as noted above, the question here is not whether the Commissioner necessarily agrees with the opinion, it is whether it is an opinion that a reasonable person could hold. Despite the reservations described above, the Commissioner accepts on balance that the QP's opinion is objectively reasonable and so his finding, therefore, is that the exemption provided by section 36(2)(b)(i) is engaged.
16. The next step is to consider the balance of the public interests. Having accepted that the opinion of the QP that prejudice would result 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 interests, 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.

17. 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 draft briefing materials. As to how much weight this should carry in the balance of the public interests, the question here is what the severity, extent and frequency would be of the prejudice identified by the QP.
18. As covered above, the Commissioner accepted on balance the opinion of the QP that inhibition to officials contributing to submissions and briefings on asylum would result, but he does not consider that the frequency of that inhibition would extend to every case where a submission on asylum related matters is being prepared. Instead, his view is that this inhibition would only result in situations of a similar level of sensitivity as LGBT related asylum claims; so only in situations in which the sensitivity of the subject matter is of a higher level than it generally would be in relation to asylum related matters, or where government is attempting to implement a difficult or controversial policy. That the frequency would not be as great as covering every asylum related situation also means that the severity and extent of the inhibition is reduced.
19. The Commissioner did, however, accept that inhibition *would* occur and he must give due weight to that here. He also notes that, whilst there has since been a change of administration, the withheld information was current at the time of the request as it comprises submissions and briefings given to members of the then Government. As a result, even given the Commissioner's views as set out above on the frequency of the inhibition, he accepts that there is a valid public interest in avoiding that inhibition and that this is a factor in favour of maintenance of the exemption of significant weight.
20. Turning to factors in favour of disclosure of the information, the treatment of LGBT asylum seekers has been an issue of attention and some controversy¹. Against this background, the Commissioner believes that there is a strong public interest in understanding how government has acted in this area. The withheld information in this case gives a particular insight into how this issue is being presented to Ministers,

¹ <http://www.newstatesman.com/world/2015/03/guilty-until-proven-innocent-trial-lgbt-asylum-seekers-detained-uk>

including how the Government approach to this issue has been presented within the Home Office. The Commissioner's view is that there is valid public interest in the disclosure of this information owing to its subject matter.

21. The questioning of LGBT asylum seekers has been an issue of particular controversy² and is a matter that is covered in the withheld information. The view of the Commissioner is that there is a valid public interest in this information being disclosed in order to understand how the Government responded to the issue of inappropriate questioning of some asylum seekers being raised in the media.
22. The Commissioner has also taken into account that the subject matter of this information concerns a form of immigration. Immigration is an issue that is perpetually high on the political agenda and of significant public interest. The relevance of this to the balance of the public interest can be argued in either direction, however. There is a strong public interest in information that records how government has approached the issue of immigration, including asylum claims. On the other hand, the importance of that issue means that there is also a public interest in ensuring that government can act effectively in this area, which can be cited as an argument in favour of the preservation of a safe space for work on this issue.
23. Turning to the conclusion, the Commissioner has recognised the public interest in disclosure of this information due to its subject matter. However, as mentioned above he must give due weight to his finding that inhibition to the free and frank provision of advice would occur, even given his view set out above on the limits to the severity, extent and frequency of that inhibition. Taking into account the very weighty public interest in government being capable of acting effectively on immigration related matters, the finding of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure of the requested information. The Home Office was not, therefore, obliged to disclose the requested information.
24. Given this finding it has not been necessary to go on to also consider the citing of section 40(2).

² <http://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office>

Other matters

25. The Home Office was the cause of delays in this case. The Commissioner contacted the Home Office on 17 June 2015 and asked it to respond within 20 working days, which is the agreed timescale. The Home Office failed to respond substantively until 4 September 2015 and even then only after the Commissioner had issued an information notice under section 51 of the FOIA. The Commissioner notes that these delays were not caused by a failure of the QP to provide an opinion promptly as that opinion was not sought until 28 August 2015.
26. That response of 4 September 2015 necessitated further correspondence, first as it did not include all the supporting documentation required and secondly because the explanation for the citing of section 36 was lacking. The Home Office has been informed on numerous occasions of how vital it is that it responds to the ICO promptly. The Commissioner is disappointed that it was the cause of severe delays in this case and expects it to take steps to prevent any repeat.
27. On the issue of the poor initial explanation for the citing of section 36, the Commissioner was informed that section 36(2)(b)(i) was cited, but on being supplied with a copy of the submission prepared to assist the QP in the formation of their opinion, it transpired that the QP had been advised that section 36(2)(c) was relevant and had responded consenting to the citing of that subsection. It was only after bringing these discrepancies to the attention of the Home Office that a coherent explanation for the citing of section 36 was given.
28. The Home Office is aware that section 36(2)(c) can be cited only where the reasoning for its citing would not be covered by any other subsection of 36(2) and is surprised that the Home Office made this error in this case. The Home Office must bear in mind that section 36(2)(c) should be cited only where no other exemption is relevant. Whilst the Commissioner allowed the Home Office a further opportunity to explain its reasoning in this case, in other cases he will consider the option of simply ordering disclosure if the Home Office does not provide a valid explanation for the exemption it is relying on at the first opportunity.
29. As stated above, even after repeated prompting, the Home Office did not notify the ICO that it had contacted the complainant to advise him of its change in position. The Home Office is aware that the ICO approach is that a public authority should inform the requester in writing in any case where the position of the public authority changes during the ICO investigation. In future cases the Home Office must ensure it does this

at the first opportunity, rather than requiring repeated chasing, with the attendant waste of time, before it does so.

Right of appeal

30. 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>

31. 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.
32. 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

Ben Tomes
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