

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 February 2016

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

Decision (including any steps ordered)

1. The complainant requested information relating to Home Office handling of subject access requests. The Home Office disclosed some information, but applied a restrictive reading to one part of the request and cited the following exemptions when withholding information from a document within the scope of another part of the request:

31(1)(e) (prejudice to the immigration controls)

36(2)(c) (prejudice to the effective conduct of public affairs)

40(2) (personal information)

It also withheld some of the content of that document on the grounds that it was not within the scope of the request.

2. The Commissioner's decision is that the Home Office misread one part of the request and also failed to identify all the information it held that was within the scope of other parts of the request. In so doing it breached section 1(1)(a) of the FOIA. It is now required to provide a fresh response to those parts of the request.
3. In relation to the document from which some of the content was withheld, the Commissioner finds that its entire content is within the scope of the request and that the Home Office breached section 1(1)(a) when withholding information on the basis that it was not within scope.
4. In relation to the exemptions cited, the Commissioner finds that section 31(1)(e) was not engaged, but that sections 36(2)(c) and 40(2) were engaged and properly relied on. The Home Office is now required to

disclose the information in relation to which section 31(1)(e) has been found not engaged. In relation to the parts of this document which the Commissioner has now found were in scope, the Home Office is required to issue a fresh response.

5. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Provide a fresh response to request (4);
 - Provide a fresh response in respect of the document within the scope of requests (7) and (8) that the Commissioner has now found to be fully within scope;
 - Provide a fresh response in relation to any further information it holds that is within the scope of requests (7) and (8), in line with the description given in paragraph 28 below;
 - Disclose the information that was withheld under section 31(1)(e).
6. 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

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

"Please can you provide information relating to subject access requests.

(1) How many did the Home Office receive in the twelve months (oct 2013 - sept 2014).

(2) How many were processed within the legal time limit.

(3) How many were not processed within the legal deadline.

(4) Please provide a breakdown of how long applications took to process. 1 day. 2 day.... 40 days.

(5) Noting that legally all of the applications from the period above should have been concluded by now. How many remain unanswered.

(6) Of 5, please provide details of how long the cases have been open. And where possible the reason for failing to respond to the request.

(7) Please provide internal sar training material.

(8) Please provide internal sar guidance material."

8. After a delay, the Home Office responded substantively on 29 January 2015. For request (4), the Home Office disclosed the information in relation to requests that were responded to within 40 days, but not in relation to requests that were not responded to on time.
9. In response to the other requests, some of the requested information was disclosed, whilst other elements of the requests were refused under the following provisions of the FOIA:
 - 12(1) (costs)
 - 31(1)(e) (prejudice to the immigration controls)
 - 36(2)(c) (prejudice to the effective conduct of public affairs)
 - 40(2) (personal information)
 - 42(1) (legal professional privilege)
10. The complainant responded on 29 January 2015 and requested an internal review. The complainant specified that he did not agree with the reading by the Home Office of request (4) or with the exemptions that had been cited.
11. The Home Office responded with the outcome of the internal review on 23 February 2015. The conclusion of this was that the Home Office maintained that it had read request (4) correctly and it upheld the partial refusal under the several exemptions cited.

Scope of the case

12. The complainant contacted the Commissioner on 4 March 2015 to complain about the partial refusal of his information request. The complainant specified at this stage that his complaint was about the reading of request (4) by the Home Office and the exemptions cited in response to requests (7) and (8).
13. This decision notice does not cover the citing of section 12(1) as the complainant did not raise this when contacting the ICO, nor section

42(1) as the Home Office stated when in correspondence with the ICO that it no longer relied on that exemption.

14. During the investigation of this case, the Home Office disclosed some information that had previously been withheld under section 36. The analysis below does not cover that information.
15. During the investigation of this case, the Commissioner became concerned with how the Home Office had read requests (7) and (8) and consequently whether it had located all information it held that fell within the scope of those requests. This issue is also covered in the analysis below.

Reasons for decision

Section 1

16. Section 1(1)(a) of the FOIA obliges a public authority to confirm or deny whether requested information is held. Compliance with this obligation requires a public authority to read a request accurately. The complainant believed that the Home Office had misread his request (4). The Commissioner has also considered whether the Home Office identified correctly all the information it held that fell within the scope of requests (7) and (8).
17. Where there is a question over whether a request has been read correctly, the Commissioner will consider what would be an objective reading of the request. Starting with request (4), the position of the Home Office is that the complainant limited the scope of his request by including "1 day. 2 day... 40 days" in its wording. It argues that this means that the scope of the request covers only those subject access requests (SARs) that were responded to within the statutory deadline of 40 calendar days and does not cover any requests that were responded to outside that time period. The complainant disputes this and argues that his request covered all SARs.
18. The view of the Commissioner is that an objective reading of request (4) was that it covered *all* SARs during the period specified in the request and that the mention of numbers of days was simply intended to illustrate the form in which the complainant wished the information to be disclosed. If further confirmation of this beyond the wording of the request is needed, it is clear from his other requests that the interest of the complainant extended to SARs that were not complied with within the time limit. In any event, the Home Office had the benefit of the complainant's own clarification, given when requesting an internal review, of what he intended his request to be, with implications for the

Home Office's duty under section 16 to provide advice and assistance in clarifying the request.

19. In misreading request (4), the Home Office breached section 1(1)(a) of the FOIA. At paragraph 5 above it is now required to provide a fresh response to that request that covers *all* SARs within the time period specified in the request.
20. Turning to requests (7) and (8), as covered below the Home Office identified one document that fell within the scope of these requests. This document is a guide for staff on dealing with subject access requests. The Home Office stated that some of this document was outside the scope of the requests and so that content was redacted from the version disclosed to the complainant.
21. Whilst the Commissioner is not aware of precisely which parts of the document were withheld on this basis, his view is that it is clear that the overall purpose of this document means that the entirety of it is within the scope of an objective reading of requests (7) and (8). The argument of the Home Office was that information within the document on "*process*" was not within the scope of the requests for information on training and guidance.
22. The view of the Commissioner is that where an item of information, such as a document, is as a whole within the scope of a request, it is not necessary or desirable to attempt to exclude parts of it from the duty to disclose on the ground that it is outside the scope of the request, unless that content is very clearly not within the scope of the request, which was not the case here. That approach was not within the spirit of the FOIA. In incorrectly finding that some of the content of the document in question was not within the scope of requests (7) and (8), the Home Office breached section 1(1)(a) and at paragraph 5 above it is now required to issue a fresh response in relation to the information that was withheld on that basis.
23. The Commissioner had further concerns about how requests (7) and (8) had been read and the thoroughness with which searches had been carried out for information within scope. Firstly, on the reading of the request issue, in correspondence with the ICO the Home Office suggested, when writing under the heading "*Out of scope material*", that further information of potential relevance to the request may be held. Under that heading it stated that the complainant had asked for "*policy and procedure*" but not for "*process*". The Home Office went on to refer to information that it believed was out of the scope of the request on the basis of that reading.

24. The requests do not, however, refer to any of policy, procedure or process. If the information that the Home Office has excluded from the scope of the request is internal SAR guidance or training material, it is in the scope of the request and it should not have been disregarded on the grounds that it was *"process"* rather than *"policy and procedure"*. The Home Office had the opportunity to address this point when the Commissioner issued a second information notice in this case that referred to the apparently erroneous reading of this request by the Home Office. It failed to address this point in its reply to the information notice, however.
25. Secondly, the version of the subject access request training document that was supplied to the ICO contained links to other documents that the Commissioner believes were within the scope of the requests. These links were under the heading *"UKBA Staff SARs"*.
26. Furthermore, when responding to the second information notice the Home Office addressed the point about links within the document by referring to a number of other links that were not within the version of the document supplied to the ICO. It appears that those links were within parts of the document that were not sent to the ICO as they were considered outside the scope of the request. In particular, a reference is made to *"Page 28 – Two links which relate to HR SARs"*. The Home Office stated that this link no longer works as the information was reorganised onto the Home Office intranet in early 2015. That is not, however, relevant as this notice concerns the situation at the time of the request. The Commissioner's view is that, on the balance of probabilities, the information connected to by that link was held at the time of the request and was within its scope.
27. Having already issued two information notices in this case, and in the interests of getting this case resolved within a reasonable timescale, the Commissioner was not prepared to prolong this case further by contacting the Home Office again about these points. He has, therefore, reached a decision on the information available to him and his conclusion is that, on the balance of probabilities, the Home Office breached section 1(1)(a) of the FOIA by failing to identify all the information it held that was within the scope of requests (7) and (8).
28. At paragraph 5 above, the Home Office is now required to issue a fresh response in relation to the further information that the Commissioner believes is held and is within the scope of the request. This fresh response should cover the links under the heading *"UKBA Staff SARs"* in the version of the SAR document supplied to the ICO and the links referred to in the Home Office letter to the ICO of 15 January 2016 as *"Page 28 – Two links which relate to HR SARs"*. It should also cover any information that was withheld on the basis that it concerned *"process"*

rather than “*policy and procedure*”, albeit that the Commissioner recognises that point may be covered by disclosing those parts of the SAR training document that the Home Office had stated were out of scope. The Commissioner’s view is also that compliance with this step should be taken as an opportunity by the Home Office to carry out a new and thorough search for all information it holds that is within the scope of these broadly worded requests.

Section 31(1)(e)

29. The Home Office cited section 31(1)(e) of the FOIA. This section provides an exemption for information the disclosure of which *would, or would be likely to, prejudice* the operation of the immigration controls. Consideration of this exemption is a two-stage process. First the exemption must be engaged as prejudice relevant to the exemption would be at least likely to occur. 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.
30. Covering first whether the exemption is engaged, for the Commissioner to accept that prejudice would be likely to occur, there must be a real and significant likelihood of the outcome predicted by the public authority occurring as a result of disclosure. The question here is, therefore, whether there is a real and significant likelihood of disclosure of the information in question resulting in prejudice to the immigration controls.
31. The argument of the Home Office was that disclosure of the relevant parts of the document could lead to individuals who had made a subject access request being able to deduce what had been redacted from the personal data disclosed to them. The Home Office believed that if this enabled them to deduce that, for example, their case had been referred to a team that dealt with human trafficking, this could make them more likely to abscond.
32. The Commissioner accepts that this argument is relevant to section 31(1)(e), but does not believe that it is made out by the content of the information in question. The content redacted under this exemption concerns the administration of subject access requests and does not appear to include anything that could lead to an individual deducing from redactions in personal data disclosed to them that they are under investigation for some particular reason and thus seeking to evade the immigration controls.
33. Having viewed this content, the Commissioner does not accept that there is anything more than a remote likelihood of disclosure of it

leading to prejudice to the immigration controls. A remote likelihood of prejudice is not sufficient for the Commissioner to find that the exemption is engaged and his conclusion is, therefore, that the exemption provided by section 31(1)(e) is not engaged. Having reached this conclusion it has not been necessary to go on to consider the balance of the public interests.

Section 36(2)(c)

34. This section provides an exemption in relation to information the disclosure of which *would, or would be likely to,* prejudice the effective conduct of public affairs in a way other than specified elsewhere in section 36. The approach of the Commissioner is that section 36(2)(c) should also only be cited where none of the other exemptions in part II of the FOIA would be applicable.
35. This exemption can only be cited on the basis of a reasonable opinion from a specified qualified person (QP). For central government departments, the QP is any Minister of the Crown. Consideration of this exemption involves two stages; first, it must be established whether the exemption is engaged as it was cited on the basis of a reasonable opinion from a valid QP. 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.
36. As to whether the exemption is engaged, after earlier flaws with its citing of section 36(2)(c) were brought to its attention, the Home Office supplied evidence that James Brokenshire, Minister for Immigration, gave an opinion on 11 January 2016. On the basis of this evidence, the Commissioner accepts that an opinion was given by a valid QP.
37. The next step is to consider whether that opinion was reasonable. 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. This shows that the reasoning for citing section 36(2)(c) concerned inhibition to staff drafting internal guidance in future.
38. The information in question is excerpts from a subject access request (SAR) training document. That the QP's opinion was that these excerpts should be withheld suggests that he believed that disclosure of this content would have an inhibitory effect on staff drafting internal guidance in future.
39. The submission is inconsistent in its references as to whether the QP was being advised that prejudice *would* or *would be likely* to result. Where it is not clear which test has been applied, the Commissioner will

consider whether the QP was correct to hold the opinion that prejudice *would be likely* to result. The approach of the Commissioner in relation to other exemptions in Part II of the FOIA is that he will accept that an outcome would be likely where there is a real and significant likelihood of this, rather than that outcome being a remote possibility. The question here is, therefore, whether it was objectively reasonable for the QP to hold the opinion that there was a real and significant likelihood of prejudice in the manner identified in the submission.

40. Having viewed the content of the withheld information, the Commissioner is not clear why all the redactions were made. Whilst he has reservations about accepting that officials would allow disclosure in this case to prejudice the thoroughness with which they draft internal guidance in future, the question here is not whether the Commissioner holds the same opinion as the QP. Instead, as mentioned above, it is whether the opinion held by the QP was objectively reasonable; in other words, whether it is an opinion that it is reasonable to hold. On balance, the Commissioner is willing to accept that the QP's opinion in this case was objectively reasonable. The exemption provided by section 36(2)(c) is, therefore, engaged.
41. The next step is to consider the balance of the public interests. Having accepted that the opinion of the QP that prejudice would be likely to 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.
42. 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 internal guidance materials. As to how much weight this should carry in the balance of the public interests, the question is what the severity, extent and frequency would be of the prejudice identified by the QP.
43. On this point, the Commissioner's reservations about finding that the QP's opinion was reasonable are relevant. Whilst the Commissioner accepted that on balance the QP's opinion was reasonable, had this been an exemption where he was required to form his own view on the likelihood of prejudice, his conclusion would have been that the likelihood was, at most, at the lower end of the scale necessary for the exemption to be engaged. The effect of that here is that he does not believe that the severity, extent and frequency of the prejudice

identified by the QP would be great. This means that, whilst the weight given to the finding that the QP's opinion was reasonable is a valid factor in favour of maintenance of the exemption, this factor carries less weight than it would have done were the severity, extent and frequency of the prejudice greater.

44. Turning to factors in favour of disclosure of the information, the Commissioner is of the view that there is some public interest in the disclosure of this information, on the basis that it would be in the public interest to improve public knowledge about the steps taken by the Home Office to comply with its obligations relating to SARs. The Commissioner does not believe, however, that there is any strong public interest in the particular content in question here. This relates to the administrative processes within the Home Office for responding to subject access requests. The Commissioner does not believe that information with this subject matter is a matter of pressing public interest and so, whilst there is some general public interest in favour of the disclosure of this information, this carries less weight than may have been the case in relation to different subject matter.
45. In conclusion, the Commissioner has recognised public interest of limited weight on both sides. His view is that the single weightiest factor is that relating to avoiding the outcome that the QP believed would be likely to result and his finding is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. The Home Office was not, therefore, obliged to disclose the information withheld under section 36(2)(c).

Section 40(2)

46. This section provides an exemption for information that is the personal data of an individual aside from the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process, covering first whether the information in question is personal data and, secondly, whether the disclosure of that personal data would be in breach of any of the data protection principles.
47. As to whether the information constitutes personal data, section 1(1) of the Data Protection Act 1998 ("DPA") defines personal data 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 any other information which is in the possession of, or is likely to come into the possession of, the data controller”.

48. The information in question here is names of two officials. Whilst only first names are given, the Commissioner accepts that there are others, such as colleagues of those officials, who would be able to identify those individuals from this information. Therefore, this information both relates to and identifies those individuals and so is their personal data.
49. The next step is to consider whether disclosure of that personal data would breach any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which requires that personal data be processed fairly and lawfully, and in particular on whether disclosure would be fair to the data subjects. In forming a conclusion on this point, the Commissioner has taken into account the reasonable expectations of the data subjects and the consequences of disclosure upon them. He has also considered whether there is any legitimate public interest in the disclosure of this information.
50. The Commissioner's view is that in general it will be far less likely to be unfair to an individual to disclose personal data that relates to their professional capacity than it would be to disclose personal data relating to private life. In this case, the Commissioner can see no convincing arguments as to why the data subjects would hold a reasonable expectation that this information would not be disclosed, or how disclosure would be damaging or distressing to them. This information relates to the data subjects in their professional capacities.
51. However, whilst section 40(2) is an absolute exemption, in order for disclosure to be in line with the first data protection principle, it is necessary for there be a legitimate public interest in disclosure of the personal data. The Commissioner does not believe that disclosure of junior officials' names is necessary in order to satisfy any legitimate public interest. As a result he concludes that disclosure of the names of officials would be in breach of the first data protection principle.
52. Having found that the information recording officials' names is personal data and that disclosure of it would be unfair and in breach of the first data protection principle, the conclusion of the Commissioner is that the exemption provided by section 40(2) of the FOIA is engaged.

Other matters

53. During the investigation of this case, the Home Office was responsible for multiple lengthy delays that necessitated the issuing of two

information notices. The agreed time scale for a response in ICO investigations is 20 working days. The delays in this case were unhelpful to all concerned with the prompt resolution of this case.

54. The delays in responding to the ICO compounded the earlier delay in its responding to the complainant's information requests and the issues identified in this notice that resulted from the Home Office applying an unnecessarily restrictive reading to the requests and failing to identify all information that was within the scope of these requests. The overall effect of these various issues was that the Home Office's handling of these requests was poor. The Home Office must ensure that there is no repeat of the various issues that have arisen in this case in relation to future information requests.

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

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