

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 September 2020

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

Decision (including any steps ordered)

1. The complainant requested information about migrant rough sleepers and immigration surgeries in a five-part request. The Home Office provided some of the requested information, denied holding some of it and cited sections 38(1)(a) and (b) (the exemption for health and safety) for the remaining part of the request. The complainant confirmed she was only concerned with the Home Office's reliance on sections 38(1)(a) and (b) (cited for part 3 of her request).
2. The Commissioner's decision, in the circumstances of this case, is that the Home Office was not entitled to cite sections 38(1)(a) and (b) to withhold the information requested at part 3 of the complainant's request. Her full position is set out in a confidential annex which will be provided to the Home Office only.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information to the complainant.
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 Act and may be dealt with as a contempt of court.

Background

5. The Home Office has provided the Commissioner with information about immigration surgeries as follows:

"The Home Office (Immigration Enforcement Directorate) provides immigration surgeries across all communities where there is a demand from communities and/or community leaders, ensuring that our actions are proportionate, respectful and meet the public sector equality duty in line with Equality Act 2010. The surgeries that are conducted are with the direct approval of the Gurdwara, Temple, Mosque, Church or other approved location.

The purpose of a surgery is to provide a trusted point of contact for those who have entered or remain in the UK illegally but now wish to discuss their options including regularising their stay, or returning home with dignity and some financial support.

The surgeries are held by Immigration Officers who discuss the individual's circumstances with them. This is done without the fear of arrest, and no personal details are kept of the individual if they choose not to engage.

Immigration Officers signpost individuals to accurate advice and guidance so individuals with irregular immigration status can make informed decisions to resolve their status. Officers also signpost vulnerable individuals to available support services. Immigration Enforcement do not gather intelligence from community events."

Request and response

6. On 18 December 2019, the complainant wrote to the Home Office and requested information in the following terms:

"1) How many migrant rough sleepers has the Rough Sleepers Support Service ['RSSS'] worked with since it was set up in 2018?

2) Of the total number of migrant rough sleepers the Home Office has worked with since RSSS was set up how many has the Home Office assisted to return (voluntary and enforced return) to their home countries and how many has the Home Office helped regularise their immigration status in the UK?

- 3) *Please provide a complete and up to date list of Home Office immigration surgeries.*
- 4) *What is the total amount of Home Office payments to organisations which host immigration surgeries on their premises for the 2018/19 financial year?*
- 5) *Please provide figures for how many people the Home Office has assisted to return (voluntary and enforced return) to their home countries after making contact with these individuals at an immigration surgery and how many they have assisted to regularise their immigration status in the UK after making contact with these individuals at an immigration surgery."*

7. The Home Office responded on 8 January 2020. It responded to parts 1, 2 and 4 of the request and said that no information was held for part 5. For part 3, the Home Office refused to provide the requested information citing the following procedural sections of the FOIA exemptions: sections 38(1)(a) and (b) – health and safety, and said that the public interest favoured withholding the requested information.
8. On 9 January 2020, the complainant requested an internal review in respect of part 3 of her request. Following its internal review the Home Office wrote to the complainant late, on 3 March 2020, and maintained that section 38 applied to part 3 of the request.

Scope of the case

9. The complainant contacted the Commissioner on 6 March 2020 to complain about the way her request for information had been handled. She asked the Commissioner to consider that the list of immigration surgeries had been disclosed under FOIA previously in early 2019 (in accordance with decision notice FS50796737¹).
10. The Commissioner notes that the Home Office had relied on a different exemption in FS50796737, namely section 31(1)(e) (law enforcement – the operation of the immigration controls), which was not upheld. As a result, the Home Office was ordered to provide the list of immigration surgeries in operation at that time.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2019/2614297/fs50796737.pdf>

11. Whilst acknowledging the outcome of that case, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with FOIA. The current case involves consideration of a different exemption.
12. The analysis below considers the Home Office's application of the exemption at section 38 to the information requested at part 3 of the request.

Reasons for decision

Section 38 - health and safety

13. Section 38(1) of FOIA states that:

*"Information is exempt information if its disclosure under this Act, would, or would be likely to –
(a) endanger the physical or mental health of any individual, or
(b) endanger the safety of any individual."*

14. For the exemption to be engaged, it must be at least likely that the endangerment identified would occur. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
15. The Commissioner considers that the term 'endanger' in section 38(1) should be interpreted in the same way as the term 'prejudice' in other FOIA exemptions. In order to accept that the exemption is engaged, the Commissioner must be persuaded that the nature of the endangerment, and the likelihood of it occurring as a result of disclosure of the information in question, is *"real, actual and of substance"*, rather than trivial or insignificant. As part of this, she must be satisfied that some causal relationship exists between the potential disclosure and the stated endangerment.
16. This means that three conditions must be satisfied for the exemption to be engaged. First, the harm that it is envisaged would, or would be likely to occur, should relate to the applicable interest described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of the prejudice, or more precisely the endangerment, arising through disclosure. In this regard, a public authority is required to demonstrate that either disclosure 'would be likely' to result in prejudice or that disclosure 'would' result in prejudice - 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.

17. The relevant applicable interests cited in this exemption are physical or mental health (section 38(1)(a)) and the safety of any individual (section 38(1)(b)).
18. The Commissioner's guidance² sets out that under section 38(1)(a), endangering physical health usually means an adverse physical impact and often involves medical matters. This can relate to individuals or groups.
19. Her guidance also states that endangering mental health implies that the disclosure of information might lead to a psychological disorder or make mental illness worse. This means that it has a greater impact than stress or worry. A public authority may find it difficult to demonstrate a danger to mental health. It might consider obtaining an expert opinion confirming that the disclosure of the information would be likely to endanger the mental health of the applicant or any other individual; however the Commissioner considers that clinical evidence of a psychiatric condition is not always necessary.
20. Endangering safety (section 38(1)(b)) is usually connected to the risk of accident and the protection of individuals. Information that could endanger an individual's safety could also endanger their mental or physical health. If so, both parts of the exemption may be relied upon.

Is section 38 engaged?

21. In the case under consideration here, the Home Office considered that both subsections 38(1)(a) and 38(1)(b) applied. In that respect, it told the complainant it considered that:

"...there was the need to protect the physical, mental health and safety of immigration officials and all other stakeholders engaged in working in immigration surgeries as well as those attending the surgeries."

22. As is her practice in a case such as this, and given that the Home Office considered that both limbs of the exemption applied, the Commissioner asked it to explain why disclosure of the information would, or would be likely to, endanger the health or safety of an individual.
23. The Home Office advised the complainant that:

² <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

"The Home Office has been informed of the spread of misinformation regarding the purpose of these community engagement events and one of our immigration surgery partners has faced recent disruption and intimidation as a result. We are aware of concerns and sensitivities our presence within the community can have and as a result work closely with our partners to mitigate any potential risks."

24. Similarly, in its submission to the Commissioner, the Home Office explained that release of the requested information would endanger the health and safety of those individuals involved in, or connected to, the immigration surgeries.
25. The Home Office stated that the disruption and intimidation of one of its immigration surgery partners occurred in December 2019 following media coverage about the disclosure of the locations of the immigration surgeries. It provided the Commissioner with further arguments to support its citing of section 38, including more details of the incident.
26. The Commissioner has set these arguments out in a confidential annex available to the Home Office only. This is because the arguments submitted by the Home Office would reveal specific health and safety details and concerns it associates with the previous disclosure of the immigration surgery list.
27. The Commissioner is satisfied that the prejudice the Home Office is envisaging in this case is relevant to the particular interests which sections 38(1)(a) and (b) are designed to protect. The exemptions provided by sections 38(1)(a) and (b) very obviously serve to protect individuals' health and safety. Accordingly, the first limb of the three part test outlined above (ie applicable interests) is met.
28. The Commissioner has therefore gone on to consider the next stage of the prejudice test; that is, whether there is a causal link between disclosure and the harm referred to by the Home Office. In her guidance on the prejudice test, the Commissioner acknowledges that it will not usually be possible for a public authority to provide concrete proof that the prejudice 'would' or 'would be likely' to result. This is because the test relates to something that may happen in the future. However, the Commissioner considers that the engagement of an exemption cannot be based on mere assertion or belief but must reflect a logical connection between the disclosure and the prejudice.
29. In this case, the Home Office has explained that the 'endangerment' to staff involved with the immigration surgeries has already occurred given that a serious incident took place in December 2019.
30. The Home Office said it considers that disclosure of the requested information into the public domain "would" have a prejudicial effect.

31. With regard to the second limb of the three-part test, the Commissioner notes the Home Office's contention that a previous disclosure of the requested information, which attracted media coverage, resulted in a serious incident where the police were called.
32. Whilst it is not in dispute that an incident occurred in December 2019, from the evidence provided to her by the Home Office the Commissioner is not persuaded that the publication of the list itself, and/or the associated media coverage, was a catalyst for the incident. Whilst she accepts that the incident itself presented a risk to the health and safety of the staff at one of the immigration surgeries, she has not seen any evidence that the incident arose as a result of an earlier disclosure of the list of immigration surgeries. Further details are set out in the confidential annex.
33. Having considered the arguments put forward by the Home Office, alongside the withheld information itself, the Commissioner is not satisfied that it has demonstrated a causal link between the potential disclosure and endangerment. She has considered this at the both the higher level of endangerment, ie 'would' and the lower level of 'would be likely to' occur. It follows that she does not find the exemption engaged.
34. As the exemption at sections 38(1)(a) and (b) is not engaged the Commissioner has not gone on to consider the associated public interest test.

Other matters

35. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
36. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.

37. The Commissioner is concerned that it took 40 days for an internal review to be completed in what she would view as neither a complex nor a voluminous case.
38. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

39. 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@justice.gov.uk

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

40. 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.
41. 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

Carolyn Howes
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