

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2023

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

Decision (including any steps ordered)

1. The complainant has requested information about the now-defunct Tier 1 (Investor) Visa scheme. The Home Office refused the request, citing sections 31(1)(a) and (b) (Law enforcement), and 23(1) (Information supplied by, or relating to, bodies dealing with security matters) and 24(1) (National security) in the alternative, of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to apply sections 23(1) and 24(1) in the alternative, to refuse the request. However, it failed to complete its deliberations on the balance of the public interest within a reasonable time, and therefore breached section 17(3) of FOIA.
3. The Commissioner does not require further steps as a result of this decision.

Background

4. The Tier 1 (Investor) Visa allowed high net worth individuals making a substantial financial investment in the UK, to enter and settle in the UK¹. Following a review, the scheme stopped accepting new applications in February 2022.
5. On 12 January 2023, the Home Secretary issued a statement, summarising the findings of the review². The statement included the following:

"I can confirm that the Home Office considered the cases of the 6,312 Tier 1 (Investor) migrants and Tier 1 (Investor) adult dependants... The review of cases identified a small minority of individuals connected to the Tier 1 (Investor) visa route that were potentially at high risk of having obtained wealth through corruption or other illicit financial activity, and/or being engaged in serious and organised crime...UK law enforcement have access to this data and are taking action as appropriate under their operational remits."

Request and response

6. On 12 January 2023, the complainant wrote to the Home Office and requested information in the following terms:

"Please provide me with the total number of individuals connected to the Tier 1 (Investor) visa route that have been identified as having potentially been at high risk of having obtained wealth through corruption or other illicit financial activity, and/or being engaged in serious and organised crime.

Please also provide a breakdown of the total number of individuals by nationality".

7. The Home Office contacted the complainant on 9 February 2023, saying that it was considering applying section 31(1)(a) to the request and needed further time to consider the balance of the public interest. It said

¹ <https://www.gov.uk/government/publications/guidance-on-application-for-uk-visa-as-tier-1-investor/tier-1-investor-guidance-accessible-version>

² <https://questions-statements.parliament.uk/written-statements/detail/2023-01-12/hcws492>

it aimed to respond in full by 9 March 2023. On 17 March 2023, it told the complainant it would respond in full "as soon as we can".

8. Following the Commissioner's intervention, the Home Office responded to the request on 24 April 2023. It confirmed that it held the information but it refused to disclose it, citing sections 23(1) and 24(1) in the alternative, of FOIA.
9. Following an internal review, the Home Office wrote to the complainant on 7 July 2023. It apologised for the delay in its initial response to the request. It maintained its application of sections 23(1) and 24(1) in the alternative, to refuse the request. It said that sections 31(1)(a) and (b) of FOIA were also engaged.

Scope of the case

10. The complainant initially contacted the Commissioner on 3 July 2023, prior to receiving the internal review outcome, to complain about the way his request for information had been handled. He contacted the Commissioner again on 17 July 2023. He disagreed with the application of the cited exemptions.
11. The analysis below considers the application of the cited exemptions to refuse the request, and the timeliness of the Home Office's response.
12. The Commissioner has viewed the withheld information.

Reasons for decision

Section 23(1) (Information supplied by, or relating to, bodies dealing with security matters)

Section 24(1) (National security)

13. These exemptions have been cited 'in the alternative' to withhold the requested information in its entirety. (This term is explained in paragraphs 19 and 20, below.)
14. Section 23(1) of FOIA provides an exemption which states that:

"Information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3)".
15. To successfully engage the exemption at section 23(1), a public authority only needs to demonstrate that the relevant information was

directly or indirectly supplied to it by, or it relates to, any of the security bodies listed at section 23(3) of FOIA³.

16. Section 24(1) of FOIA states that:

“Information which does not fall within section 23(1) is exempt information if exemption from section 1(1)(b) is required for the purpose of safeguarding national security”.

17. FOIA does not define the term ‘national security’. However, in *Norman Baker v the Information Commissioner and the Cabinet Office* (EA/2006/0045 4 April 2007) the Information Tribunal was guided by a House of Lords case, *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, concerning whether the risk posed by a foreign national provided grounds for his deportation. The Information Tribunal summarised the Lords’ observations as follows:

- ‘national security’ means the security of the United Kingdom and its people;
- the interests of national security are not limited to actions by an individual which are targeted at the UK, its system of government or its people;
- the protection of democracy and the legal and constitutional systems of the state are part of national security as well as military defence;
- action against a foreign state may be capable indirectly of affecting the security of the UK; and,
- reciprocal co-operation between the UK and other states in combating international terrorism is capable of promoting the United Kingdom’s national security.

18. In this context, the Commissioner interprets ‘required for the purposes of’ to mean ‘reasonably necessary’. Although there has to be a real possibility that disclosure of the requested information would undermine national security, the impact does not need to be direct or immediate.

19. As is clear from the wording of section 24(1), the exemptions provided by sections 23(1) and 24(1) are mutually exclusive. This means they cannot be applied to the same information. On that point, the

³ A list of the bodies included in section 23(3) of FOIA can be viewed at: <http://www.legislation.gov.uk/ukpga/2000/36/section/23>

Commissioner's guidance on the interaction between sections 23 and 24⁴ says:

"The fact that section 24(1) can only be applied to information that is not protected by section 23(1) can present a problem, if a public authority does not want to reveal whether a section 23 security body is involved in an issue. If it could only cite section 24(1) in its refusal notice, this would disclose that no section 23 body was involved. Conversely, if only section 23(1) was cited, this would clearly reveal the involvement of a security body. To overcome this problem the Commissioner will allow public authorities to cite both exemptions 'in the alternative' when necessary. This means that although only one of the two exemptions can actually be engaged, the public authority may refer to both exemptions in its refusal notice."⁵

20. As the Commissioner's guidance explains, a decision notice which upholds the public authority's position will not allude to which exemption has actually been engaged. It will simply say that the Commissioner is satisfied that one of the two exemptions cited is engaged and that, if the exemption is section 24(1), the public interest favours withholding the information.

The complainant's position

21. The complainant argued that neither of the exemptions were engaged. As regards section 23, he said the connection between the information that had actually been requested, and any security body, was remote. As regards section 24, he argued that information about the matter had already been placed in the public domain by the Home Secretary's statement, and so there would be no increased threat to national security from the disclosure of the requested information.
22. He argued that there was a strong public interest in transparency and accountability, "...given the Government's own admission that the Tier 1 (Investor) visa route 'failed to deliver for the UK people and gave opportunities for corrupt elites to access the UK'".

The Commissioner's decision

23. The Commissioner has viewed the withheld information. Based on this, and the submissions provided to him by the Home Office during his investigation, the Commissioner is satisfied that the withheld

⁴ https://ico.org.uk/media/for-organisations/documents/1196/how_sections_23_and_24_interact_foi.pdf

⁵ the Upper Tribunal has issued a binding ruling approving this practice

information either falls within the scope of the exemption provided by section 23(1) of FOIA or it falls within the scope of the exemption provided by section 24(1) of FOIA, and that if the exemption engaged is section 24(1), then the public interest favours maintaining the exemption.

24. The Commissioner's decision is therefore that the Home Office was entitled to rely on sections 23(1) and 24(1) in the alternative, to withhold the requested information.
25. The Commissioner cannot elaborate on his rationale behind this finding without compromising the content of the withheld information itself or by revealing which of these two exemptions is actually engaged.
26. As the Commissioner has found that sections 23(1) and 24(1) in the alternative of FOIA are properly engaged, he has not found it necessary to consider the other exemption cited.

Procedural matters

Time taken to consider public interest and respond to request

27. Section 10(1) of FOIA states that on receipt of a request for information a public authority must respond promptly and within 20 working days.
28. However, where a qualified exemption is being considered, under section 17(3) a public authority can have a 'reasonable' extension of time to consider whether the balance of the public interest favours maintaining the exemption or disclosing the information. While FOIA does not define what might constitute a 'reasonable' extension of time, the Commissioner considers that a public authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days⁶.
29. While the Home Office did tell the complainant it needed further time to consider the public interest test, in all, it took 70 working days to provide its response to the request.

⁶ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/time-limits-for-compliance-under-the-freedom-of-information-act-section-10/>

30. The Commissioner considers that the Home Office breached section 17(3) of FOIA by failing to complete its deliberations on the public interest test within a reasonable time.
31. The Commissioner has made a record of this breach for monitoring purposes.

Right of appeal

32. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

33. 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.
34. 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

Samantha Bracegirdle
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