

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 April 2019

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

Decision (including any steps ordered)

1. The complainant requested information about a UK visa that he believed had been granted to Anwar Al-Awlaki and also about what he described as his subsequent "ban" from the UK. The Home Office would neither confirm nor deny ('NCND') whether it held the requested information, citing the exemption at section 41(2) (information provided in confidence) of the FOIA.
2. The Commissioner's decision is that the Home Office was not entitled to rely on section 41(2) to issue a NCND response to the request.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Confirm or deny whether information falling within the scope of the request is held, and either disclose any information identified or issue a refusal notice which is compliant with section 17 of the FOIA.
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. Anwar Al-Awlaki was a Yemeni-American citizen and cleric who was believed by Western intelligence services to have been an ideological figurehead of al-Qaeda. He was killed in a US drone strike in Yemen in 2011.

Request and response

6. On 12 June 2018 the complainant wrote to the Home Office and requested information in the following terms:

"I am looking for documents/correspondence regarding the UK visa that was granted to US citizen Anwar Al-Awlaki (b. 21 April 1971 d. 30 Sept 2011) during the period of 2002-04. I am also interested in documents and correspondence regarding his ban from the UK in 2006".

7. The Home Office responded on 10 July 2018. It would neither confirm nor deny whether it held the requested information, citing the exemption at section 41(2) of the FOIA.
8. Following an internal review, the Home Office wrote to the complainant on 6 September 2018. It upheld its decision to apply section 41(2) to issue a NCND response.

Scope of the case

9. The complainant contacted the Commissioner on 31 October 2018 to complain about the way his request for information had been handled.
10. The Commissioner has considered in this decision notice whether the Home Office was entitled to rely on the exemption at section 41(2) of the FOIA to issue a NCND response to the request.

Reasons for decision

Section 41(2) – Would confirmation or denial give rise to an actionable breach of confidence?

11. Section 1(1)(a) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held. This is known as *'the duty to confirm or deny'*.

12. However, section 41(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence."

13. In other words, if providing confirmation or denial would, of itself, constitute an actionable breach of confidence, a public authority is not obliged to do it.

14. Section 41(2) should be read in conjunction with section 41(1) which applies where disclosure of requested information would constitute an actionable breach of confidence. It explains more about the circumstances in which a disclosure can be actionable.

15. Section 41(1) provides that:

"Information is exempt information if-

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

16. To reach a decision on whether section 41(2) applies, the Commissioner has firstly determined whether the requested information, if held, would have been obtained by the Home Office from a third party, as described in section 41(1)(a). The Commissioner has not sought to ascertain whether the requested information is actually held. In the Commissioner's view, the Home Office's position depends on the merits of its arguments; she does not need to know whether the information is held or not in order to make a decision.

Was the information obtained from a third party?

17. The first part of the request asks for information about a UK visa granted to Mr Al Awlaki. The Commissioner is satisfied that, if information falling within the scope of this part of the request was held, some of it would have been provided to the Home Office by one or more third parties (namely, Mr Al Awlaki, at the point he made any visa application, plus any parties to such an application).
18. However, the Commissioner considers that, if held, some information would also have been created by the Home Office by way of its administration of the visa application. She also considers this to be the case for the second part of the request (for information about Mr Al Awlaki's supposed "ban" from the UK). However, in the Commissioner's view, if such information were held, it would be logical to assume that this would be because previous correspondence had been received by the Home Office pertaining to a visa application by Mr Al Awlaki. Thus, if the Home Office confirmed whether or not it held information falling within the scope of these other parts of the request it would in effect be confirming whether or not it held information falling within the scope of the first part of the request.
19. Consequently, although the Home Office would not have received all the information that is sought by the request from a third party (if, indeed, any such information *is* held), the Commissioner is satisfied that confirmation as to whether or not it held such information would reveal whether or not the Home Office had received information from a third party, and that section 41(1)(a) is satisfied.

Would confirmation or denial that information is held constitute a breach of confidence?

20. The test of confidence was established in the High Court case of *Coco v A N Clark (Engineers) Limited* [1968] FSR 415. For the Commissioner to find that confirming or denying that the requested information is held would, of itself, constitute a breach of confidence, it must be shown that:
 - the requested information would have the necessary quality of confidence,
 - if it had been imparted, the requested information would have been imparted in circumstances importing an obligation of confidence, and
 - unauthorised use of the information, if held, would be of detriment to the confider.

Does the information have the necessary quality of confidence?

21. Information will have the quality of confidence if it is more than trivial and not otherwise accessible. The information does not have to be particularly sensitive, but it must be more than trivial.
22. In its submission to the Commissioner, the Home Office said that information supplied via the visa application process was regarded by the Home Office as having been provided by the applicant (and any third parties to their application) in confidence. It argued that this expectation of confidentiality extended to confirming or denying whether an individual visa application had been made, granted or refused, and remained even after an applicant had died.
23. The Commissioner has considered the Home Office's arguments. However, she does not agree that the information that would be disclosed by confirmation or denial has the necessary quality of confidence. Her analysis contains information which the Home Office considers to be exempt, and so it is set out in a confidential annex to this decision notice, which has been made available only to the Home Office.
24. Since the Commissioner has determined that the information does not have the necessary quality of confidence, its disclosure cannot constitute an actionable breach of confidence, and section 41(2) is not engaged.
25. The Commissioner notified the Home Office of her preliminary view that section 41(2) was not engaged and twice invited it to provide further arguments in support of its position. She also asked it whether it had considered the application of an alternative exemption. The Home Office failed to respond.
26. The Home Office is therefore required to take the action set out in paragraph 3, above.

Right of appeal

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

28. 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.
29. 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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