

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 9 November 2010

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

Summary

The complainant requested information relating to a flight chartered for the purpose of deporting failed asylum seekers. The public authority refused the request, citing the exemptions provided by sections 31(1)(e) (prejudice to the operation of the immigration controls) and 43(2) (prejudice to commercial interests) of the Act. The Commissioner finds that the public authority correctly withheld the information in connection with which it cited section 43(2). However, the Commissioner also finds that the public authority applied the exemption provided by section 31(1)(e) incorrectly and breached sections 1(1)(b) and 10(1) by failing to disclose the information in relation to which this exemption was cited. The public authority is now required to disclose this information. The public authority also failed to comply with the requirement of section 17(1) in not responding to the request within twenty working days of receipt.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made the following information requests on 16 July 2009:

"[in connection with] the flight from Heathrow chartered to remove failed Afghan asylum seekers from the UK at 1830 hours on January 6 2009:

(1) I understand that this was a BMI [flight]. Is this correct?

(2) I understand that this flight took off with eight detainees on board. Is this correct?

(3) I understand that it took off with between 18 and 20 guards on board. Is this correct?

(4) I understand that in Azerbaijan the detainees changed planes for the onward journey to Kabul, to a Russian Airbus, and now with different (but the same number of) guards, and the same number of passengers/detainees. Is this correct?"

3. The public authority responded on 27 August 2009 and refused the requests. In response to request (1), the public authority cited the exemption provided by section 43(2) (prejudice to commercial interests). In response to requests (2), (3) and (4), the public authority cited section 31(1)(e), which provides an exemption for information that would, or would be likely to, prejudice the operation of the immigration controls.
4. The complainant responded to this on 28 August 2009 and requested the public authority to carry out an internal review of its handling of her information request. The public authority responded with the outcome of the review on 27 October 2009. The conclusion of this review was that the refusal under sections 31(1)(e) and 43(2) was upheld.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner by letter dated 17 December 2009. The complainant expressed her concern over the

deportation of a particular individual and suggested that the public authority did not welcome questions about deportation operations. The complainant also stated that she considered request (2) to be the most important of her requests.

6. As the complainant had emphasised that she considered request (2) to be the most important of her requests, the Commissioner asked the public authority to consider providing an answer to this request, even if it maintained the exemptions in relation to the other requests. The public authority agreed to do this and so this request is not covered further in this Notice. Following the provision of an answer to request (2), the complainant confirmed that she wanted the Commissioner to proceed to a Decision Notice in relation to requests (1), (3) and (4).

Chronology

7. The Commissioner contacted the public authority in connection with this case on 19 April 2010. The public authority was asked to respond with further explanations for the exemptions cited and with the information withheld from the complainant.
8. The public authority responded to this on 27 May 2010. It confirmed that it believed that section 43(2) was engaged in relation to request (1), and section 31(1)(e) in relation to requests (3) and (4), and provided further detail of its reasoning for the citing of these exemptions. This response also included the information withheld from the complainant.

Analysis

Exemptions

Section 31

9. The public authority has cited the exemption provided by section 31(1)(e) in relation to requests (3) and (4). This section is set out in full in the attached legal annex, as are all other sections of the Act mentioned in this Notice. 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 a result of prejudice relevant to the exemption being at least likely to occur. Secondly, this exemption is qualified by the public interest, meaning 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 the exemption is engaged, the first step is to address whether the arguments made by the public authority are relevant to this exemption. The overall argument of the public authority is that disclosure would be likely to prejudice the process of deporting failed asylum seekers. The Commissioner's published guidance¹ on the exemptions provided by section 31 notes that the 'Immigration Controls' referred to in section 31(1)(e) include the processing of asylum applications. The Commissioner therefore accepts that the argument of the public authority, which relates to this process, is relevant to section 31(1)(e).
11. Turning to the likelihood of prejudice, the public authority has specified that it believes that prejudice to the operation of the immigration controls *would be likely* to result through disclosure, rather than *would* result. The test that the Commissioner applies when considering whether prejudice would be likely to result is that the probability of this must be at least real and significant and more than hypothetical or remote. This is in line with the approach taken by the Information Tribunal in the case *John Connor Press Associates Limited v the Information Commissioner* (EA/2005/0005), in which it stated on this issue:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (paragraph 15)
12. In relation to request (3), the public authority argues that it would be likely to be prejudicial to reveal the ratio of deportees to guards as this could compromise the safety of deportation flights. In response to this argument the Commissioner notes that it is not clear how disclosing this ratio would result in this prejudice, the link between the information requested and any potential prejudice not having been made out.
13. The concern of the public authority in relation to request (4) also relates to what the public authority believes would be revealed about the operation of deportation flights through the provision of a response to the complainant's question. The public authority argues that revealing the detailed arrangements of deportation flights could lead to

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http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/s31_exemption_for_law_enforcement_v3.pdf

it being placed under public pressure to amend these arrangements. This could in turn lead to the public authority being obliged to make changes to these arrangements that are less advantageous to the effectiveness of the operation of the immigration controls. In response to this point the Commissioner believes that it is reasonable to assume that the decisions taken by the public authority as to how to conduct deportation flights were based on sound reasoning and this reasoning could be cited in response to public pressure to make different arrangements. The Commissioner also notes that a call for changes to the operation of the immigration controls would not, in itself, prejudice the effectiveness of these controls.

14. Furthermore, the Commissioner assumes that the public authority makes the arrangements for deportation flights on a case by case basis, with these arrangements dependant on such factors as the length of the flight, the health and disposition of the deportees and the reception arrangements at the destination. As the security arrangements for future flights would be dependant on these factors and so would not necessarily be similar to the arrangements for the flight to which the request relates, the Commissioner does not accept that disclosing the security arrangements of a flight that has already taken place would also provide an insight into the security arrangements for future deportation flights. Neither, therefore, does the Commissioner find the arguments made by the public authority in relation to request (4) compelling.
15. For the reasons covered above, the Commissioner does not accept that the likelihood of prejudice to the operation of the immigration controls occurring as a result of disclosure in response to requests (3) and (4) meets the test of real and significant. The exemption provided by section 31(1)(e) is not, therefore, engaged. As this conclusion has been reached, it has not been necessary to go on to consider the balance of the public interest.

Section 43

16. The public authority has cited section 43(2) in relation to request (1). This section provides an exemption for information the disclosure of which would, or would be likely to, prejudice the commercial interests of any individual or organisation. Similarly to section 31(1)(e), consideration of this exemption is a two-stage process; first, the exemption must be engaged as a result of it being at least likely that disclosure of the information in question would cause prejudice to commercial interests. Secondly, this exemption is qualified by the public interest, meaning that if the public interest in the maintenance

of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.

17. The public authority has specified that it believes that prejudice to commercial interests *would be likely* to result through disclosure, rather than *would* result. The test that the Commissioner has applied here is the same as that specified above at paragraph 11; the likelihood of prejudice occurring must be at least real and significant and more than hypothetical or remote.
18. Covering first whether the exemption is engaged as a result of the likelihood of prejudice meeting the threshold of being at least real and significant, the Commissioner has considered whether the arguments made by the public authority are relevant to the exemption, as well as the likelihood of the outcome of disclosure that it predicts. The public authority has specified two parties that it believes would be subject to prejudice; the airline that carried out the deportation flight in question, and itself. In relation to the airline, the argument of the public authority relates to the controversy that surrounds deportation flights. The public authority believes that an airline that became publicly associated with deportation flights would suffer a commercial disadvantage as a result of this controversy. The Commissioner accepts that this argument is relevant to the prejudice described in section 43(2).
19. In general, where a public authority argues that disclosure would be likely to cause prejudice to the commercial interest of a third party, the Commissioner would expect the public authority to have consulted with the third party in question about the information request and to provide to him evidence that the third party did object to disclosure on commercial grounds. This is in line with the approach taken by the Information Tribunal in the case *Derry City Council v the Information Commissioner* (EA/2006/0014) in which it stated the following on the issue of a public authority arguing prejudice to the commercial interests of a third party:

“Although, therefore, we can imagine that an airline might well have good reasons to fear that the disclosure of its commercial contracts might prejudice its commercial interests, we are not prepared to speculate whether those fears may have any justification in relation to the specific facts of this case. In the absence of any evidence on the point, therefore, we are unable to conclude that Ryanair’s commercial interests would be likely to be prejudiced.” (paragraph 24)

20. The public authority has not in this case contacted any third party in connection with this request and so has no evidence arising from such a consultation that the airline that carried out the deportation flight would not wish the information in question to be disclosed. That no consultation has taken place does not, however, necessarily preclude the possibility that the exemption could be engaged on the basis of prejudice to the commercial interests of a third party. Instead, the Commissioner will accept arguments about prejudice to a third party even where no consultation with that third party has taken place if there is evidence that the arguments made by the public authority genuinely reflect a concern held by the third party. This evidence may arise as a result of, for example, the third party having made its concerns known to the public authority prior to, or separately from, the information request.
21. As to whether evidence does exist that the airline that carried out the deportation flight would not wish to be identified as an operator of deportation flights on commercial grounds, the Commissioner's research has located some information that shows that airlines have concerns about carrying out these flights. This research shows that there are airlines that have refused to carry out such flights, but the publicly stated reasons of these airlines for having refused to undertake these flights is that they had an ethical, rather than commercial, objection to these. There is evidence that this concern may have arisen after pressure from activists.
22. Whilst the Commissioner may be willing to accept in general that airlines would be concerned about being publicly associated with deportation flights as a result of having located evidence of this, the argument of the public authority here is specific in that it relates to prejudice to the commercial interests of the airline that carried out the deportation flight that the complainant refers to in her request. In the absence of evidence that this specific airline would object to disclosure of the information requested by the complainant, the Commissioner does not accept this argument made by the public authority.
23. The second argument advanced by the public authority is that disclosure would be likely to cause prejudice to its own commercial interests. The basis for this argument is that some airlines that are currently willing to operate deportation flights would no longer be willing to do so if they were concerned that information that revealed that they operate deportation flights could be disclosed. This would then reduce the pool of airlines that would be willing to contract with the public authority to carry out deportation flights, which would be likely to lead to the public authority having to pay more for these flights as the reduced competition amongst airlines willing to operate

these flights would lead to increased charges. The Commissioner accepts that this argument is relevant to the prejudice described in the exemption.

24. As to the likelihood of this outcome occurring, the argument of the public authority here also relates to the controversial nature of deportation flights that is referred to above. As also referred to above, the Commissioner has carried out brief research into the subject of deportation flights and notes that these do attract controversy. He also notes that there are examples of airlines withdrawing from carrying out deportation flights after having become publicly associated with these flights. The Commissioner accepts this as evidence that airlines that carry out deportation flights may well prefer that their involvement with these remain confidential and that they may, as predicted by the public authority, be unwilling to carry out these flights if they believed that their involvement with these flights was to become public knowledge. The Commissioner does not dispute the argument of the public authority that, if there are fewer airlines willing to carry out deportation flights, the charges levied for carrying out these flights is likely to increase.
25. The conclusion of the Commissioner is, for the reasons given above, that there is a real and significant likelihood of prejudice to the commercial interests of the public authority as a result of disclosure of the information specified in request (1). The exemption provided by section 43(2) is, therefore, engaged.

The public interest

26. Having found that the exemption is engaged, it is necessary to go on to consider the balance of the public interest. In reaching a conclusion on the balance of the public interest here, the Commissioner has taken into account those factors that relate to the specific information in question, including the arguments advanced by the complainant and the public authority. He has also taken into account the public interest in avoiding prejudice to the commercial interests of the public authority, which the Commissioner has found would be likely to occur through disclosure of the information in question, and the general public interest in improving the openness and transparency of the public authority.
27. Covering first those factors that favour disclosure, the information in question concerns the deportation of failed asylum seekers. As noted previously, this is an issue that attracts controversy. The research carried out by the Commissioner has also revealed that this is an issue that is the subject of widespread debate, as is also evidenced by the

existence of a number of pressure groups concerned with immigration related issues. The existence of this controversy and widespread debate is a factor of considerable weight in favour of disclosure.

28. The complainant's arguments relate to the deportation of a specific individual. The complainant believes that this individual was deported on the flight which the requests concern partly due to the public authority wishing to make maximum use of this flight after having chartered it. The Commissioner agrees that, if an individual asylum seeker has been deported unjustly or inappropriately, there would be a legitimate public interest in disclosure of information relating to this deportation. However, the Commissioner is not aware of any widespread controversy, beyond the controversy relating to the deportation of asylum seekers in general, that would suggest that this specific deportation is a matter of genuine public interest. Whilst this is an issue that is clearly of great and undoubtedly justified import to the complainant, this does not necessarily equate to this being an issue of genuine public interest.
29. Turning to those factors that favour maintenance of the exemption, as noted above there is a public interest in avoiding prejudice to the commercial interests of the public authority. The Commissioner considers this public interest to be heightened given the straitened economic circumstances and pressure on public spending that existed at the time of the request. Given the economic circumstances at the time of the request, the Commissioner considers this a factor in favour of maintenance of the exemption that carries significant weight.
30. The arguments of the public authority concerning the balance of the public interest were also focused on the public interest in avoiding the prejudice inherent in the exemption. The public authority believed that it was of particular importance not to jeopardise the willingness of airlines to carry out deportation flights.
31. The conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. Whilst the Commissioner has recognised a significant factor in favour of disclosure on the basis of the subject matter of the information in question, he concludes that this is outweighed due to the increased public interest in avoiding prejudice to the commercial interests of the public authority, particularly given the economic circumstances at the time of the request.
32. The Commissioner would stress that his conclusion is based on the argument concerning a general reduction in willingness by airlines to carry out deportation flights. No inference should be drawn from the

wording of this Notice as to whether the airline identified in the complainant's request conducts deportation flights.

Procedural Requirements

Sections 1 and 10

33. In failing to confirm within twenty working days of receipt of the request that it held information, or to disclose within twenty working days information that the Commissioner now finds was not exempt, the public authority did not comply with the requirements of section 10(1). In failing to provide the information that was not exempt by the time of its internal review it breached section 1(1)(b).

Section 17

34. In failing to respond to the request within twenty working days of receipt, the public authority did not comply with the requirement of section 17(1).

The Decision

35. The Commissioner's decision is that the public authority dealt with request (1) in accordance with the Act in that it applied the exemption provided by section 43(2) correctly. However, the Commissioner also finds that the public authority did not comply with the Act in that it applied section 31(1)(e) in relation to requests (3) and (4) incorrectly and, in so doing, failed to comply with the requirements of sections 1(1)(b) and 10(1). The public authority also breached section 10 by failing to confirm within twenty working days that it held the requested information, and failed to comply with section 17(1) in that it did not respond to the requests with a refusal notice within twenty working days of receipt.

Steps Required

36. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose to the complainant the information specified in requests (3) and (4).

37. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

38. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

39. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to respond with the outcome of the internal review within twenty working days. The public authority should ensure that internal reviews are carried out promptly in future.

Right of Appeal

40. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Dated the 9th day of November 2010

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 10

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Section 17

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 31

Section 31(1) provides that –

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(e) the operation of the immigration controls".

Section 43

Section 43(2) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."