# Freedom of Information Act 2000 (FOIA)

# Decision notice

**Date:** **16 December 2014**

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

## Decision (including any steps ordered)

1. The complainant requested information relating to an immigration enforcement operation that took place at Walthamstow Station on 1 August 2013. The Home Office disclosed some information, but withheld the remainder under the exemptions provided by the following sections of the FOIA:

   36(2)(b)(i) (inhibition to the free and frank provision of advice)

   36(2)(b)(ii) (inhibition to the free and frank exchange of views)

   40(2) (personal information)

2. The Commissioner's decision is that the public interest favours disclosure of the information withheld under sections 36(2)(b)(i) and (ii), but that section 40(2) was cited correctly. The Home Office is now required to disclose the information withheld under sections 36(2)(b)(i) and (ii), with the information covered by section 40(2) redacted.

3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.

   - Disclose the information withheld under sections 36(2)(b)(i) and (ii), with the staff names covered by section 40(2) redacted.

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 FOIA and may be dealt with as a contempt of court.

## Request and response

5. On 7 August 2013, the complainant wrote to the Home Office and requested information in the following terms:

*"The information relates to arrest of suspected immigration offenders on 1 August 2013.*

*(1) On the relevant date, how many individuals were stopped and checked on suspicion of being immigration offenders.*
*(2) Please provide, for the relevant date, the nationalities of those at (1) together with the number of persons stopped of each nationality.*
*(3) Please provide, for the relevant date, the nationalities of those arrested together with the number of persons arrested of each nationality.*
*(4) Please provide the content of any information held relating to the Home Office's tweets of the 1 August 2013. This part excludes all tweets as they are already available in the public domain."*

6. The Home Office responded on 18 September 2013, outside 20 working days from receipt of the request. At this stage the request was refused under the exemptions provided by sections 31(1)(b) (prejudice to the apprehension of offenders) and 31(1)(e) (prejudice to the operation of the immigration controls) of the FOIA.

7. The complainant responded on 22 September 2013 and requested an internal review. After an extremely lengthy delay, which the Commissioner comments on elsewhere in this notice, the Home Office responded with the outcome of the internal review on 4 July 2014.

8. At this stage the Home Office withdrew the citing of sections 31(1)(b) and 31(1)(e). In relation to requests (1) to (3), the Home Office disclosed the information where it related to 5 or more individuals. Where the numbers were 4 or fewer, the information was withheld under section 40(2) (personal information) of the FOIA.

9. In response to request (4), the Home Office disclosed some information, with staff names redacted under section 40(2). In relation to the remainder of the information held by the Home Office that was within the scope of request (4), it withheld this information under the exemptions provided by sections 36(2)(b)(i) and 36(2)(b)(ii) (inhibition to the free and frank provision of advice and exchange of views) of the FOIA.

## Scope of the case

10. The complainant contacted the Commissioner on 12 July 2014 to complain about the part refusal of his information request. The complainant indicated at this stage that he did not agree that the exemptions cited had been applied correctly. The complainant also raised the issue of the extreme delay in the completion of the internal review, which is commented on in the 'Other matters' section below.

11. During the Commissioner's investigation the Home Office disclosed to the complainant some further information falling within the scope of request (4). The following analysis concerns the information that continued to be withheld after that disclosure.

12. The analysis below also does not cover one item of withheld information that was supplied to the ICO, but that post-dates the complainant's request. As that information post-dates the request, it is not within its scope.

## Reasons for decision

### Section 36

13. The Home Office cited sections 36(2)(b)(i) and 36(2)(b)(ii). Section 36(2)(b)(i) provides an exemption in relation to information the disclosure of which would, or would be likely to, inhibit the free and frank provision of advice. Section 36(2)(b)(ii) provides the same in relation to the free and frank exchange of views for the purposes of deliberation. These exemptions can only be applied based on the reasonable opinion of a specified qualified person, which for government departments is any Minister of the Crown.

14. These exemptions are qualified by the public interest, which means that there are two stages when applying them. First, the exemptions must be engaged as a result of having been applied on the basis of a reasonable opinion from a Minister. Secondly, the balance of the public interests must be considered. If the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure, the information must be disclosed.

15. Covering first whether the exemptions are engaged, the questions here are whether an opinion was given by a Minister and whether that opinion was reasonable. The Home Office has stated that Mark Harper, Immigration Minister, acted as qualified person (QP) and that he gave an opinion on 11 December 2013. Whilst the submission that assisted

him in forming an opinion (a copy of which was supplied to the ICO) referred to a different information request, the Commissioner accepts that opinion can be taken as applying in this case as that other request was made around the same date as the complainant's request and, most importantly, covered the same information as this case. The Commissioner accepts, therefore, that these exemptions were cited on the basis of an opinion from a Minister.

16. Turning to whether the opinion was reasonable, the Commissioner's approach here is that an opinion must simply be objectively reasonable. This means that it must be an opinion that a reasonable person could hold and not necessarily the most reasonable or only reasonable opinion that could be held.

17. The basis for the opinion of the QP as explained by the Home Office was that disclosure in this case would be likely to inhibit staff when providing advice and exchanging views in future. The information records the drafting of potential Twitter messages in the run up to an immigration enforcement operation known as "Operation Compliance" that took place on 1 August 2013. The finalised Twitter messages were publicised during this operation. The Home Office stated that *"inevitably"* exchanges between the staff drafting those messages were free and frank.

18. The Commissioner notes that the majority of the withheld information dates from shortly before the date of the operation, or the day of the operation itself, so accepts that free and frank exchanges between staff would have been necessary in order to finalise the Twitter messages within a tight timeframe. He also notes that the date of the request was only shortly after the withheld information was recorded, so the likelihood of inhibition would not have lessened through the passage of time, and that immigration enforcement is a high profile and controversial issue.

19. When applying other prejudice based exemptions, the Commissioner takes the approach that in order for him to conclude that prejudice would be likely to result, there must be a real and significant, rather than remote possibility of that outcome occurring. The submission prepared for the QP refers to *would be likely*, rather than arguing that inhibition *would* result. Applying his usual test here the Commissioner accepts that it was objectively reasonable for the QP to hold the opinion that disclosure would be likely to result in inhibition relevant to sections 36(2)(b)(i) and (ii). His conclusion is, therefore, that these exemptions are engaged.

20. The next step is to consider the balance of the public interest. When forming a conclusion on the public interest in relation to section 36, the

role of the Commissioner is not to reconsider his conclusion that the QP's opinion was reasonable. Instead, it is to consider the severity, extent and frequency of the inhibition that the QP believed was likely to result through disclosure and weigh against that the public interest factors in favour of disclosure.

21. Covering first the public interest in favour of disclosure, the Commissioner has referred above to immigration enforcement being a controversial and high profile area. Immigration related matters in general are perpetually high on the political agenda and there is a strong public interest in disclosure of information that relates to this area.

22. Brief research reveals that the 1 August 2013 immigration operation was a matter of controversy and public concern. Given this context, there is a particularly strong public interest in the disclosure of the information in question that goes beyond the public interest attached to all immigration related information. The Commissioner's view is, therefore, that there is a public interest in favour of disclosure of this information of significant weight.

23. The Home Office argued that as there had been openness about immigration policy generally and as some of the information requested by the complainant had been disclosed, the public interest had been satisfied. However, the view of the Commissioner is that where there is public interest in information on a particular subject, that public interest extends to all information on that subject.

24. Turning to factors in favour of maintenance of the exemptions, having accepted as reasonable the QP's opinion that disclosure of the information in question would be likely to cause inhibition, the Commissioner must recognise that avoiding that outcome is a factor in favour of maintenance of the exemptions. However, as referred to above, the weight that this should carry as a public interest factor depends on the severity, extent and frequency of that inhibition.

25. The view of the Commissioner is that the severity and extent of the inhibition would not be great. In finding that the exemptions were engaged, the Commissioner accepted that it was reasonable for the QP to hold the opinion that *some* inhibition would be likely to result. The Commissioner does not, however, believe that the severity and extent of this would be great.

26. This view is based on the content of the withheld information, which is benign. Some inhibition may result through the timing of the request and as this information relates to the sensitive subject matter of immigration enforcement. The Commissioner does not believe, however,

that Home Office staff would be greatly concerned by the disclosure of this content. As a result, whilst the QP's opinion holds some weight as a public interest factor, this is less than it would have carried had the severity and extent of the inhibition been greater.

27. For the reasons given above, the Commissioner finds that the public interest in disclosure on the grounds of the subject matter of the information is the weightiest factor. His conclusion is, therefore, that the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure and so the Home Office is required at paragraph 3 above to disclose this information.

**Section 40**

28. Section 40(2) has been cited in relation to staff names included in the information within the scope of request (4) that the Commissioner has ordered disclosure of above. It has also been cited in relation to all of the withheld information within the scope of requests (1) to (3). The names withheld from the response to request (4) are covered first here.

- Request (4)

29. Section 40(2) provides an exemption for information that constitutes personal data and where the disclosure of that personal data would be in breach of any of the data protection principles. This means that consideration of this exemption involves two stages; first the information must constitute personal data and secondly disclosure of that personal data must be in breach of at least one of the data protection principles.

30. The definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA) 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 other information which is in the possession of, or is likely to come into the possession of the data controller".*

31. The information withheld from the response to request (4) under section 40(2) is staff names. Clearly these both relate to and identify these individuals and so these are personal data.

32. As to whether disclosure of this personal data would be in breach of any of the data protection principles, the Commissioner has focussed here

on the first data protection principle, which requires that personal data is processed fairly and lawfully. In order to comply with the first principle disclosure must be both in general fair and must comply with at least one of the conditions for fair processing set out in Schedule 2 of the DPA.

33. Covering first the general fairness issue, the view of the Commissioner is that it will be far less likely to be unfair to disclose personal data that relates to an individual in their professional capacity than it will be to disclose information that relates to an individual in a private capacity. In this case the personal data relates to the data subjects in their professional capacity. The Home Office argues that it would nonetheless be unfair to those individuals to disclose this personal data as they are junior staff and would have no expectation of disclosure.

34. The Commissioner disagrees with the Home Office that the staff named within this information would hold no expectation that their names would be disclosed with this information. As employees of a public authority, they should be aware of the possibility of the disclosure of the information in question. He also doubts that these individuals are of a level that would be commonly understood as "junior".

35. However, as already mentioned above, this information concerns a sensitive and controversial area, namely immigration enforcement. The Commissioner recognises that disclosure of information that would associate the named individuals with the operation that the information relates to may result in distress to those individuals. For this reason, he accepts that it would be unfair and in breach of the first data protection principle to disclose this personal data. The exemption provided by section 40(2) is therefore engaged in relation to the names of staff members in the information that is within the scope of request (4). At paragraph 3 above, the Home Office is required to disclose that information with the names of staff members redacted.

- Requests (1) to (3)

36. The information withheld in response to these requests is numerical. The Home Office disclosed to the complainant a table showing the numbers of individuals *"Encountered"* by immigration officials at Walthamstow Station on 1 August 2013 and, of those, the numbers arrested. These numbers were broken down by nationality. Figures of five or more were disclosed. For example, the table disclosed to the complainant shows that six British citizens were *"Encountered"*, but the number of those who were arrested was withheld.

37. The position of the Home Office is that figures of four or fewer constitute personal data that it would be unfair and in breach of the first data

protection principle to disclose. The first question for the Commissioner here is whether figures of four or fewer do constitute personal data.

38. The argument of the Home Office is that the figures combined with existing knowledge, such as that held by associates of the individuals encountered, would mean that disclosure of numbers of four or fewer could lead to the identification of individuals. The definition in section 1(1) of the DPA quoted above refers to *other* information that could be combined with the information in question to enable the identification of an individual, so the basis of this argument is valid.

39. As to whether the Commissioner accepts that there would be others who would have existing knowledge that could enable them to link the numerical information to an individual, as previously mentioned there are two separate columns within the withheld information: *"Encountered"* and *"Arrested"*. Encountered refers to what appears likely to have been a fairly brief process whereby individuals were stopped and questioned as to their right to be in the UK. Arrested clearly refers to a longer and more complicated process, during which the individuals in question were presumably held for a period of time and which may have led to proceedings to remove them from the UK.

40. In relation to those individuals who were arrested, the Commissioner accepts that it is likely that there will be others aware that the arrest took place, such as relatives and friends of the arrestee. It is also likely that those other individuals would be aware of the nationality of the arrested individuals. As a result the Commissioner accepts that the numerical information relating to arrests could be linked to an identifiable individual and so this information does constitute personal data.

41. In relation to the Encountered column, the Commissioner accepts that the situation is similar; an individual who was stopped and questioned as to their right to be in the UK would be likely to tell close associates about this. Those associates would be aware of the nationality of the individual in question, and also that this event had taken place at Walthamstow Station on 1 August 2013. This would then enable those associates to link the numerical information to an individual and so that numerical information would constitute personal data.

42. Having accepted that this numerical information constitutes personal data, the next step is to consider whether disclosure of that personal data would be in breach of any of the data protection principles. The Commissioner has again focussed here on the first data protection principle.

43. Section 2 of the DPA lists what is considered *sensitive* personal data for the purposes of that Act. Included in this list is the commission or alleged commission of an offence and the Commissioner has considered whether the personal data in question here falls within that definition.

44. The information relating to arrests clearly does; the arrests were on the basis that the individual was suspected of an immigration offence. Whether the personal data on encounters is sensitive is less clear, but the Commissioner is of the view that it is. This is on the basis that by selecting individuals to be stopped and questioned, immigration officials were alleging that those individuals had or may have committed an offence.

45. Sensitive personal data has by its very nature been deemed to be information that individuals regard as the most private information about themselves. As disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner considers that it would be unfair and in breach of the first data protection principle to disclose the requested information.

46. Having found that the numerical information withheld in response to requests (1) to (3) constitutes personal data and that disclosure of that personal data would be in breach of the first data protection principle, the conclusion of the Commissioner is that the exemption provided by section 40(2) is engaged. The Home Office was not, therefore, required to disclose that information.

## Other matters

47. The Commissioner's approach is that internal reviews should be completed within a maximum of 40 working days. In this case, the Home Office took more than nine months to complete the review, which the Commissioner considers to be grossly excessive. He also considers this delay inexplicable given that, as covered above, the QP's opinion on the citing of section 36 was provided close to seven months prior to the review being completed.

48. The Commissioner is concerned about the severity of the delay in this case and the lack of any apparent justification for this. The Home Office must ensure that there is no repetition of this delay in future. The Commissioner has made a record of this delay and this issue may be revisited should evidence from other cases suggest that this is necessary.

## Right of appeal

49. 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

50. 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.

51. 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 .....**

**Gerrard Tracey**
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