

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 June 2015

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

Decision (including any steps ordered)

1. The complainant has requested in relation to two Immigration Removal Centres, self-audit reports prepared by the contractors running those centres. The Home Office withheld this information under the exemptions provided by sections 41(1) (information provided in confidence) and 43(2) (prejudice to commercial interests) of the FOIA.
2. The Commissioner's decision is that section 41(1) was not engaged and that section 43(2) was engaged, but that the public interest in the maintenance of the exemption did not outweigh the public interest in disclosure of the information. The Commissioner has also proactively considered section 40(2) (personal information) and found this engaged in relation to a small amount of the content of the reports. The Home Office is now required to disclose the reports with the minor content in relation to which section 40(2) is engaged redacted.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose the two reports, with names of detainees 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.

Background

5. The complainant requested "*monthly staffing and self-audit reports*" for two Immigration Removal Centres (IRCs). The Home Office described these reports as follows:

"SERCO and CEO administer the [IRCs] in question as service providers...each [IRC] carries out a self audit each month and produces a report which is subsequently submitted to the Home Office...The information in question contains detailed breakdowns and insight in to the third parties' performance as service providers".

Request and response

6. On 25 July 2014 the complainant wrote to the Home Office and requested information in the following terms:

"On 24 February 2014, Immigration Minister James Brokenshire told Parliament that 'The contractual staffing levels for GEO at Harmondsworth Immigration Removal Centre (IRC) and for Serco at Colnbrook IRC are monitored by the on-site Home Office Immigration Enforcement Team and through monthly staffing and self-audit reports detailing the hours worked by detainee custody officers and managers.'

I request a copy of these monthly staffing and self-audit reports for the month of May 2014, to ascertain the total number of hours worked by detainee custody officers and managers at each of these centres (Harmondsworth and Colnbrook IRCs). If you are unable to provide me with full copies of these reports, please just extract the total number of hours worked by detainee custody officers and managers at each of these centres."

7. The Home Office responded substantively on 12 September 2014. It stated that the request was refused with the exemption provided by section 31(1)(f) (prejudice to the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained) of the FOIA cited.
8. The complainant responded on 15 September 2014 and requested an internal review. The Home Office responded with the outcome of the review on 6 October 2014 and stated that the refusal of the request under the exemption provided by section 31(1)(f) was upheld.

Scope of the case

9. The complainant contacted the Commissioner on 7 October 2014 to complain about the refusal of his information request. The complainant indicated at this stage he did not agree that it had been necessary for the Home Office to withhold the entirety of the information he had requested.
10. During the ICO investigation of this case the position of the Home Office changed. In a letter to the complainant of 28 November 2014 it referred to the complainant having requested the monthly staffing and self-audit reports "*to ascertain the total number of hours worked by detainee custody officers and managers*". It now stated that, whilst it held reports that fell within the scope of the request, they did not include the specific details referred to by the complainant. It stated that those details can be requested by "*Immigration Enforcement*" if this is deemed necessary, but they are not included within the reports as a matter of course.
11. The Home Office also stated that the citing of section 31(1)(f) was now withdrawn, but that it considered the reports to be "*commercially sensitive*", suggesting that it now believed that the exemption provided by section 43(2) (prejudice to commercial interests) was engaged.
12. In light of this clarification about the content of the reports, the complainant was asked by both the Home Office and the ICO to clarify whether he still wished to access them. The complainant responded on 1 December 2014 and confirmed that he did still wish to continue with this case. The complainant questioned whether the Home Office should be permitted to cite late exemptions and was advised that it has been established through the Information Rights Tribunal that public authorities can cite late exemptions during the Commissioner's investigation.
13. The Home Office subsequently confirmed that it was withholding the reports under the exemptions provided by sections 41(1) (information provided in confidence) and 43(2) of the FOIA and these exemptions are considered in the analysis below. For the reasons stated below, the Commissioner has exercised his discretion to also consider section 40(2) (personal information).

Reasons for decision

Section 41

14. Section 41(1) of the FOIA provides an exemption for information that was obtained by the public authority from another person and where the disclosure of that information would constitute an actionable breach of confidence. Consideration of this exemption is a two-stage process; first, the information in question must have been provided to the public authority by a third party. Secondly, the disclosure of this information must constitute an actionable breach of confidence. As a breach of confidence would no longer be actionable if there is a defence that this breach was in the public interest, the Commissioner will also consider whether there would be any such public interest defence in this case.
15. As to whether the information in question was provided to the Home Office by a third party, the Commissioner considers it clear that this was the case in that the reports were supplied by the contractors to the Home Office.
16. Turning to whether disclosure of this information would constitute an actionable breach of confidence, the approach of the Commissioner on this issue is that he will consider the following points:
 - whether the information has the necessary quality of confidence;
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure of this information would result in detriment to the confider.
17. The approach of the Commissioner is that information will have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. On the issue of whether this information is otherwise accessible, the Commissioner is aware of no evidence that this is the case and the stance of the Home Office suggests that it is not. On this basis, the Commissioner accepts that this information is not otherwise accessible.
18. As to whether this information is more than trivial, the question here is whether the confider, in this case the contractors, would regard this information as such. The view of the Commissioner on this point is that the contractors would consider this information to be of importance to them; it reports on how successfully the contractors are operating the IRCs and so it is reasonable to conclude that this information would be of importance to these businesses.

19. Turning to whether the information was imparted in circumstances importing an obligation of confidence, the clearest means to show that this was the case would be if there had been an explicit agreement between confider and recipient that this information would be kept confidential. Alternatively, an implied obligation of confidence may be said to exist if, for example, the content of the information suggests that the confider would have expected it to remain confidential.
20. In this case, the Home Office has not provided evidence of an explicit agreement between it and the contractor that this information would remain confidential, but has asserted that this information was provided to it in confidence. Without evidence of an explicit agreement, the Commissioner has considered what the content of the information suggests about whether the contractor would have held a reasonable expectation that it would be held in confidence.
21. On this point the Commissioner notes that one of the reports – Colnbrook IRC - is marked “commercial in confidence”. He also notes that the content of both of the reports is detailed and was provided to the Home Office for a specific purpose. As covered in more detail in the section 43(2) analysis below, the Home Office believes that disclosure of this detailed information on the performance of the contractors could cause them commercial harm by aiding their competitors.
22. Given this context, the view of the Commissioner is that the contractors would have anticipated that this information would be used by the Home Office only for the purpose for which it was provided and not be disclosed into the public domain. The contractors would, therefore, have held a legitimate expectation that the Home Office would maintain the confidentiality of this information.
23. In cases relating to commercially confidential information it is relevant to consider whether there would be detriment to the confider. The citing of section 43(2), primarily on the basis of prejudice to the commercial interests of the contractors, indicates that the Home Office believes that disclosure could result in detriment to the confider. The issue of detriment to the confider has, therefore, been considered.
24. As covered above, the contractors would have expected the information in question to remain confidential on the basis that they would not wish their competitors to be privy to it. The Commissioner has accepted in the section 43(2) analysis below that disclosure would be likely to lead to the contractors’ competitors gaining an advantage and to the contractors losing business as a result. The view of the Commissioner is, therefore, that there is a possibility of detriment to the confider resulting from disclosure.

25. As referred to above at paragraph 14, the final step when considering if this exemption is engaged is to consider whether there would be a public interest defence to the breach of confidence that would result through the disclosure of the information in question. Such a defence would mean that this breach of confidence would no longer be actionable and so the exemption provided by section 41(1) would not be engaged.
26. Consideration of the public interest in relation to section 41(1) is not the same as consideration of the public interest test in relation to qualified exemptions. That test is whether the public interest in maintenance of the exemption outweighs the public interest in disclosure. The test here is whether the public interest in disclosure of the information exceeds the public interest in the maintenance of confidence.
27. The view of the Commissioner is that an obligation of confidence should not be overridden on public interest grounds lightly and that a balancing test based on the individual circumstances of the case will always be required. There must be specific and clearly stated factors in favour of disclosure for this to outweigh the public interest in the maintenance of confidence.
28. Turning to whether there may be any such factors in this case, the operation of IRCs in general is an issue that has been the subject of scrutiny and concern. As well as media coverage that suggests that the operation of IRCs has been a problematic area generally, reports of unannounced IRC inspections by HM Chief Inspector of Prisons are publicly available¹. The most recent reports for the two IRCs in question here – Harmondsworth and Colnbrook - are, to varying degrees of severity, critical of their operation.
29. The introduction to the report on Harmondsworth refers to *"inadequate focus on the needs of the most vulnerable detainees"*, *"shocking cases where a sense of humanity was lost"* and to the centre as *"dirty and bleak"* and *"in a state of drift"*. The Colnbrook report is less negative overall, but the introduction does include criticism, such as stating the Centre's *"cleanliness and decorative state needed improvement. Ventilation too was problematic."*
30. Given this publicly available criticism of the operation of these centres, the Commissioner's view is that there is in general a very strong public

¹ <http://www.justiceinspectorates.gov.uk/hmiprison/inspections/?prison-inspection-type=immigration-removal-centre-inspections>

interest in other information about their operation. The published inspection reports pre-date the self-audit reports that are the subject of this notice. In particular, therefore, there is a strong public interest in favour of disclosure in order to reveal whether, according to the contractors' own accounts, the operations of these IRCs improved during the interim between the reports.

31. It is also highly relevant that the contractors are paid with public money to operate these IRCs. The disclosure of the self-audit reports would add to public knowledge on the extent to which a value for money service is being provided to the taxpayer, which is also in the public interest. Furthermore, all of the factors in favour of disclosure are made more acute by the vulnerable nature of people held within IRCs.
32. The protection provided by the duty of confidence here is to the process by which contractors provide to the Home Office details of the operation of IRCs. There is a public interest in preserving a space within which contractors and the Home Office can communicate freely about the operation of IRCs. However, where the provision of performance data is a contractual requirement, that process should not be impacted by the possibility of disclosure under the FOIA.
33. The conclusion of the Commissioner is that, such is the weight of the public interest in favour of the disclosure of this information, there would be a public interest defence to an action for breach of confidence. As this means that a breach of confidence through disclosure of the information in question would no longer be actionable, the Commissioner finds that the exemption provided by section 41(1) of the FOIA is not engaged.

Section 43

34. The Home Office has cited section 43(2), which provides an exemption for information the disclosure of which would, or would be likely to, result in prejudice to commercial interests. There are two steps when considering this section. First whether the exemption is engaged as a result of prejudice to commercial interests being at least likely to result. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
35. Covering first whether the exemption is engaged, the Home Office specified that it believed that prejudice to commercial interests *would* result, rather than *would be likely to* result. This means that the test that the Commissioner has applied here is whether it is more likely than not that prejudice would occur.

36. The reasoning given by the Home Office for this exemption being engaged was twofold. First, it argued that its own commercial interests would be prejudiced through third party suppliers being less likely to want to contract with the Home Office and that this would disadvantage the Home Office position in contract negotiations. Secondly it argued that the commercial interests of the contractors that operated the IRCs would be prejudiced.
37. Covering the argument of prejudice to the Home Office first, the Commissioner does not find this convincing. His view is that the Home Office is likely to be in a sufficiently strong position when negotiating contracts for services at IRCs that it could withstand the impact of disclosure without it having a significant effect upon its commercial interests. The Commissioner would accept that third party contractors may prefer that a report of the kind in question here would not be disclosed, but he would not accept that they would allow this preference to reduce their chances of securing Home Office contracts, which for companies that provide services to IRCs would represent a significant success.
38. A more convincing argument is that disclosure of this report would be likely to prejudice the commercial interests of the contractors. As the Home Office stated in correspondence with the ICO, the reports contain "*detailed breakdowns and insight into the [contractors'] performance as service providers*" which "*could be used by [the contractors'] competitors at future biddings*". The Commissioner accepts that disclosure of the information in question would be more probable than not to prejudice the commercial interests of the contractors. On this basis, the conclusion of the Commissioner is that the exemption provided by section 43(2) of the FOIA is engaged.
39. The next step is to consider the balance of the public interest. In forming a conclusion here, the Commissioner has taken into account the general public interest in the transparency of the Home Office, as well as specific factors that apply in relation to the information in question.
40. Covering first arguments in favour of maintenance of the exemption, the Commissioner recognises that there is a public interest in preserving a situation in which private sector suppliers can contract with public authorities without prejudice to their commercial interests. Whilst the Commissioner was not convinced that prejudice to the commercial interests of the Home Office was more probable than not in this case, he does recognise that a number of disclosures that result in prejudice to the commercial interests of private sector contractors could lead to a less favourable environment for public authorities seeking to contract with private sector contractors. Avoiding that outcome is in the public interest.

41. Turning to the arguments in favour of disclosure, the same factors as covered above at paragraphs 25 to 33 apply here; for those reasons the Commissioner believes there to be a very strong public interest in the disclosure of the information in question. It is of particular relevance to section 43(2) that disclosure would add to public knowledge on the extent to which the contractors were providing a value for money service.
42. In conclusion, the Commissioner has recognised that it is in the public interest to maintain the exemption in order to avoid a situation in which the commercial interests of private sector contractors are prejudiced as a result of working in the public sector. He does not, however, consider the weight of that public interest to match that in favour of disclosure, the grounds for which are set out in more detail under the section 41(1) heading above. The Commissioner finds, therefore, that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

Section 40

43. Although it was not cited by the Home Office, in light of his findings above on sections 41(1) and 43(2) requiring the disclosure of the reports, the Commissioner has exercised his discretion to consider section 40(2). This section provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. The following analysis concerns only content within the reports that identifies IRC detainees.
44. The first step is whether the content in question constitutes personal data, which is defined 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".
45. The content in question here is names of IRC detainees. Clearly this information both identifies and relates to those individuals and so it is their personal data according to the definition in section 1(1) of the DPA.
46. 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 focussed here on the first data protection principle,

which requires that personal data is processed fairly and lawfully, and in particular on whether disclosure of these names would be, in general, fair to those individuals.

47. In forming a conclusion on this point the Commissioner has taken into account the reasonable expectations of the data subjects, what consequences disclosure may have on them and whether there is any legitimate public interest in the disclosure of this information.
48. On the issue of the expectations of the data subjects, the Commissioner believes that it is clearly the case that those individuals would not expect information recording that they had been detained in an IRC to be disclosed into the public domain. As to the consequences of disclosure, breaching the reasonable expectation referred to above is likely to be distressing to those individuals.
49. As to whether there is any legitimate public interest in the disclosure of this information, whilst section 40(2) is not a qualified exemption in the same way as section 43(2), it is necessary for there to be a public interest element for disclosure to comply with the first data protection principle. Whilst the Commissioner has recognised significant public interest in the disclosure of the reports in question when covering the other exemptions above, he does not believe that disclosure of the very minor content covered here is necessary to satisfy that public interest.
50. For the above reasons, the Commissioner finds that disclosure of this personal data would be unfair and in breach of the first data protection principle. His conclusion is, therefore, that the exemption provided by section 40(2) of the FOIA is engaged. At paragraph 3 above the Home Office is required to disclose the reports, with names of detainees redacted.

Other matters

51. Two issues are commented on here; the poor standard of the responses provided to the complainant and the delay caused by the Home Office during the ICO investigation.
52. On the responses to the complainant first, it was only during the investigation of this case that the complainant received a response that made clear that the particular information he was originally interested in was not within the reports he had requested. The Commissioner also notes that the refusal notice was less than clear when it referred to "some" of the information being exempt, when all of the information had been withheld.

53. The Home Office had two opportunities to provide the complainant with a clear and accurate reply prior to the Commissioner's investigation – the refusal notice and internal review response – but failed to do so.
54. Turning to the delays during the Commissioner's investigation, the Home Office held up the progress of this case by failing to respond within reasonable time scales. This necessitated the issuing of an information notice by the Commissioner.
55. The Home Office should ensure that there is no repetition of these issues in relation to future information requests or complaints to the ICO. A record has been made of the issues that arose in this case and these may be revisited in future.

Right of appeal

56. 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>

57. 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.
58. 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

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF