

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 August 2015

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

Decision (including any steps ordered)

1. The complainant requested training materials for Home Office officials about immigration law. The Home Office disclosed the majority of the requested information, but withheld the remainder under the exemptions provided by sections 31(1)(e) (prejudice to the operation of the immigration controls), 36(2)(c) (other prejudice to the effective conduct of public affairs) and 42(1) (legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the redacted information was withheld incorrectly and must now be disclosed.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the withheld information.
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 6 August 2014 the complainant wrote to the Home Office and requested information in the following terms:

"There were some very major changes to immigration law that took effect on 28 July 2014 through a combination of commencement of

certain parts of the Immigration Act 2014 and also Statement of Changes to the Immigration Rules HC 532. Most of the changes relate to human rights immigration rules and to deportation appeals.

I understand that training was delivered to Home Office Presenting Officers and others about these changes.

I would be grateful for release of any or all training materials relating to the immigration law changes that took effect on 28 July 2014, both the changes to human rights rules and the changes to deportation appeals."

6. The Home Office response was sent on 15 September 2014, outside 20 working days from receipt of the request. The request was refused under the exemption provided by section 21 (information accessible by other means) of the FOIA and the complainant was referred to information available on the Home Office website.
7. The complainant responded on the same date and requested an internal review, questioning whether there were other training materials than the published information to which he was referred. After a further delay, the Home Office responded with the outcome of the internal review on 11 December 2014.
8. At this stage the Home Office acknowledged that it had failed to confirm or deny in the refusal notice whether the specific information requested was held; the information to which the refusal notice referred was related to the request, but was not the specific information requested. The Home Office now confirmed that it did hold the requested information, but refused to disclose it under the exemption provided by section 31(1)(e) (prejudice to the immigration controls) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 15 December 2014 to complain about the refusal of his information request. The complainant indicated at this point that he did not agree with the reasoning given by the Home Office for the part refusal of his request.
10. During the investigation of this case, the position of the Home Office changed; it disclosed the majority of the information that had initially been withheld, but continued to withhold a minority of this information. In relation to the withheld content, the Home Office now cited the exemptions provided by sections 36(2)(c) (prejudice to the effective conduct of public affairs) and 42(1) (legal professional privilege) of the

FOIA, as well as section 31(1)(e) (prejudice to the operation of the immigration controls).

11. The complainant was informed of this change in the position of the Home Office. Following this he confirmed that he wished the ICO to proceed with the issuing of a decision notice in relation to the information that continued to be withheld. The following analysis covers the content redacted from the information disclosed to the complainant and the exemptions cited by the Home Office in relation to that content.

Reasons for decision

Section 36

12. The Home Office cited section 36(2)(c), which provides an exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs in a way other than specified elsewhere in section 36. The Commissioner's approach is that section 36(2)(c) should also be cited only where the prejudice identified would not be covered by any of the other exemptions in Part II of the FOIA.
13. These exemptions can only be cited on the basis of a reasonable opinion from a specified qualified person (QP). In the case of government departments, the QP is any Minister of the Crown. The task for the Commissioner when deciding whether this exemption is engaged is to reach a conclusion on whether the opinion of the QP was objectively reasonable. This exemption is also 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.
14. As to whether this exemption is engaged, the first issue to cover here is whether this exemption was cited on the basis of an opinion from a government minister. On this point the Home Office stated that this exemption was cited on the basis of an opinion from James Brokenshire, Immigration Minister and supplied evidence that this opinion was given on 9 March 2015. On the basis of this evidence, the Commissioner accepts that an opinion was given by a valid QP.
15. The next step is to consider whether that opinion was reasonable. The Home Office supplied to the ICO a copy of a submission that was prepared for the QP in order to assist in the formation of their opinion. This shows that the reasoning for citing section 36(2)(c) concerned the undermining of future training materials.

16. The information in question is a set of presentation slides that form training for officials representing the Home Office in immigration tribunals. The parts of this that were considered most sensitive was the information redacted when the remainder was disclosed to the complainant. Although this was not set out clearly in the submission to the QP, it appears that the concern of the Home Office that led to the citing of section 36(2)(c) is that officials drafting training materials in future may be inhibited when it came to providing direction on controversial or debatable points.
17. The submission advised the QP that prejudice *would be likely* to result through disclosure, rather than *would* result. The approach of the Commissioner in relation to other exemptions in Part II of the FOIA is that he will accept that an outcome would be likely where there is a real and significant likelihood of this, rather than that outcome being a remote possibility. The question here is, therefore, whether it was objectively reasonable for the QP to hold the opinion that there was a real and significant likelihood of prejudice in the manner identified in the submission.
18. Having viewed the content of the withheld information, the Commissioner recognises that the Home Office would prefer that this content is not available to the opposing party in a tribunal proceeding. Whilst he has reservations about accepting that officials would allow disclosure in this case to prejudice the thoroughness with which they draft training in future, the question here is not whether the Commissioner holds the same opinion as the QP. Instead, as mentioned above, it is whether the opinion held by the QP is objectively reasonable; in other words, whether it is an opinion that it is reasonable to hold. On balance, the Commissioner is willing to accept that the QP's opinion in this case was objectively reasonable. The exemption provided by section 36(2)(c) is, therefore, engaged.
19. The next step is to consider the balance of the public interests. Having accepted that the opinion of the QP that prejudice would be likely to result was reasonable, the role of the Commissioner here is not to challenge or reconsider his conclusion of the reasonableness of that opinion. Instead, his role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP. In forming a view on the balance of the public interests, the Commissioner has taken into account the general public interest in the openness and transparency of the Home Office, as well as those factors that apply in relation to the specific information in question here.
20. Having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the Home Office to draft training materials. As to how

much weight this should carry in the balance of the public interests, the question here is what the severity, extent and frequency would be of the prejudice identified by the QP.

21. As covered above, the Commissioner accepted on balance that the opinion of the QP was reasonable, but that he had some reservations about doing so. Were this an exemption where it was necessary for the Commissioner to form his own view on the likelihood of prejudice, his view would have been that the likelihood of prejudice occurring was at most at the lower end of the scale that must be reached for the exemption to be engaged. In this case, this means that the Commissioner is of the view that the severity, extent and frequency of the prejudice identified by the QP would not be great. This means that the weight that the QP's opinion carries as a public interest factor in this case is less than would be the case were the likely severity, extent and frequency of the identified prejudice greater.
22. Turning to factors in favour of disclosure of the information, whilst the specific reasoning for the QP's conclusion was as set out above, it is evident that much of the concern of the Home Office was about its ability to achieve favourable outcomes in immigration tribunal cases. It believed that disclosure of the information in question may adversely impact upon that.
23. The Commissioner recognises that disclosure of this information could impact on tribunal proceedings, including their outcome. He does not agree, however, that the public interest necessarily lies with the Home Office being successful in such proceedings. Instead, his view is that there is a strong public interest in these tribunals reaching whatever is the *correct* conclusion based on the evidence.
24. The Home Office argued that disclosure of this information could lead to unnecessary appeals being made and to unnecessary challenges being made in proceedings relating to the points covered in the redacted content. However, to the extent that disclosure would have those impacts, the Commissioner's view is that these would be issues for the tribunal to deal with, rather than being relevant here. If a tribunal believed that an appeal was unnecessary in that it would not have a realistic chance of success, it would be halted early. Similarly, if groundless challenges were made to the Home Office case in an appeal that had progressed further, the tribunal would dismiss these points. On the other hand, if the tribunal found such a challenge persuasive, this would demonstrate that it was not "unnecessary".
25. Whilst the Commissioner agrees with the Home Office that the impact disclosure of this information would have on future immigration tribunal proceedings is relevant to the balance of the public interest, he

disagrees with the Home Office about the side of the balance that this factor favours. The Commissioner's view is that there is a strong public interest in immigration tribunals having access to all information that may assist them in reaching the correct conclusion and that this is a factor in favour of disclosure of the information in question of considerable weight.

26. In conclusion, the Commissioner has recognised public interest in favour of not disclosing this information on the basis that it is in the public interest to avoid the outcome that the QP believed would be likely to occur as a result of disclosure. However, the weight that this factor carries is reduced as the Commissioner does not consider that the severity, extent or frequency of that outcome would be great. Given this, the finding of the Commissioner is that the public interest in the maintenance of the exemption does not outweigh the public interest described above in favour of disclosure of this information.

Section 42

27. The Home Office cited section 42(1) of the FOIA. This section provides an exemption for information that is subject to legal professional privilege (LPP). Similarly to section 36(2)(c), this exemption is qualified by the public interest, meaning that there are two steps when considering it; first whether the information is question is covered by legal professional privilege and, secondly, whether the balance of the public interests favours the maintenance of this exemption.
28. As to whether the information is covered by LPP, the Home Office stated that it was relying on litigation privilege. Litigation privilege is described in the ICO guidance on this exemption¹ as:

"Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation".

29. The explanation provided by the Home Office for citing this exemption focussed on the harm it believed would occur to its work in defending deportation appeals, rather than on why it believed that LPP applied. It was evident from this explanation that the litigation in question was immigration appeals.

¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

30. The view of the Commissioner is that the information in question is not covered by LPP. This is excerpts from training materials that sets out broad policy positions to follow in general; it is not for the purpose of providing or obtaining legal advice about specific litigation. The Commissioner considers that this information is too far removed from specific litigation for it to be covered by LPP. As the Commissioner does not accept that this information is covered by LPP, the exemption provided by section 42(1) is not engaged and it is not necessary to go on to consider the balance of the public interests.

Section 31

31. In the event that the Commissioner did not uphold the citing of sections 36(2)(c) or 42(1), the Home Office maintained the citing of section 31(1)(e), which 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 involves two stages. First the exemption must be engaged as prejudice relevant to the exemption would be at least likely to result and, secondly, this exemption is qualified by the public interest. As explained above, this means that the public interest in the maintenance of the exemption must outweigh the public interest in disclosure in order for the information to be withheld.
32. Covering first whether the exemption is engaged, the Home Office specified that its position was that prejudice *would be likely* to result, rather than *would* result. As mentioned previously, this means that the question here is whether there is a real and significant likelihood of prejudice, rather than the likelihood of this outcome occurring being remote.
33. The reasoning of the Home Office for the citing of this exemption was that disclosure "*would severely impact on the Home Office's ability to remove those individuals who no longer had a right to remain in the UK and to deport foreign criminals*". The Home Office believed that disclosure of the information in question would lessen its chances of success at immigration tribunals and thus it would be able to deport fewer foreign nationals.
34. However, the view of the Commissioner is that the Home Office is not the sole custodian of "the immigration controls" as that term is used in section 31(1)(e); instead, he regards immigration tribunals as part of those controls. Were a disclosure to disrupt the operation of the immigration controls such that they no longer operated as they are intended to, this may indicate that section 31(1)(e) is engaged. A disclosure that makes it more likely that an immigration tribunal will find against the Home Office does not, however, amount to prejudice to

the immigration controls if that outcome is the result of that tribunal operating as it should and reaching the correct decision on the basis of the available evidence.

35. If an individual successfully appealed against deportation, the inability of the Home Office to deport that individual would be due to their having successfully challenged their deportation through the correct legal channel. Even if that successful appeal had been made using the information in question in this case, utilising an immigration tribunal appeal for the purpose for which it is intended does not constitute prejudice to the immigration controls. This remains the case where an immigration tribunal makes a decision that contradicts the political priorities of Home Office ministers. The Commissioner does not, therefore, accept that the Home Office being unsuccessful at an immigration tribunal necessarily amounts to prejudice to the immigration controls.
36. For these reasons the conclusion of the Commissioner is that disclosure of the information in question would not result in a real and significant likelihood of prejudice to the operation of the immigration controls. The exemption provided by section 31(1)(e) is not, therefore, engaged and so it is not necessary to go on to consider the balance of the public interests.
37. In view of this conclusion and that above on sections 36(2)(c) and 42(1), the Home Office is now required at paragraph 3 above to disclose the information in question.

Other matters

38. As mentioned above there were delays at both the refusal notice and internal review stages in providing a response to the complainant. The delay at refusal notice stage was compounded by the error identified at internal review that the refusal notice failed to confirm or deny whether the requested information was held.
39. There were also delays in responding to the ICO during the investigation of this case, which necessitated the issuing of an information notice under section 51 of the FOIA and which delayed the issuing of this decision notice.
40. The Home Office is aware of its obligations to respond to a requester promptly. It must also respond to the ICO within agreed timescales to enable complaints to the Commissioner to be investigated promptly. A record has been made of the delays in this case and these issues may

be revisited should evidence from other cases suggest that this is necessary.

41. As also mentioned above, the information within the scope of the request is in the form of presentation slides. When disclosing the majority of the content of this information to the complainant, for reasons that are unclear the Home Office transposed the content into a different format, rather than simply disclosing the presentation slides with some of the content redacted. The Commissioner's view is that it would be appropriate when complying with the step at paragraph 3 for the Home Office to disclose the presentation slides, rather than transpose their contents into a different format.

Right of appeal

42. 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>

43. 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.
44. 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

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