

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 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 the police registration scheme. The Home Office confirmed that it held some information, but refused to disclose this under the exemption provided by section 35(1)(a) (formulation or development of government policy) of the FOIA. It also refused to confirm or deny whether it held any further information falling within the scope of the request under sections 23(5) (information relating to, or supplied by, security bodies) and 24(2) (national security) of the FOIA.
2. The Commissioner's decision is that the Home Office cited these exemptions correctly, so it was not obliged to disclose the information it confirmed was held, or to confirm or deny whether it held any further information.

Background

3. The request concerns the police registration scheme. This scheme requires migrants of certain nationalities to register with the police within seven days of their arrival in the UK, or within seven days of being given leave to remain.

Request and response

4. On 7 February 2014, the complainant wrote to the Home Office and requested information in the following terms:

"Provide any internal Home Office policy documents or reports prepared in the last two years that evaluate the merit or purpose of continuing to impose a requirement for nationals of certain countries to register with the police pursuant to the Immigration (Registration with Police) Regulations 1972."

5. The Home Office responded on 26 March 2014, outside 20 working days from receipt of the request. It stated that the request was refused under the exemptions provided by the following sections of the FOIA:

23(5) (information supplied by, or relating to, security bodies)

24(2) (national security)

35(1)(a) (information relating to the formulation or development of government policy)

6. The complainant responded on 11 May 2014 and requested an internal review. The Home Office responded with the outcome of the internal review on 8 August 2014. The conclusion of this was that the refusal of the request under the exemptions cited previously was upheld.

Scope of the case

7. The complainant contacted the Commissioner on 12 August 2014 to complain about the refusal of his information request. The complainant indicated that he did not agree that the exemptions cited by the Home Office had been applied correctly.

Reasons for decision

Section 35

8. The Home Office has cited section 35(1)(a), which provides an exemption for information that relates to the formulation and development of government policy. Consideration of section 35(1)(a) involves two stages; first, the exemption must be engaged. 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.

9. As to whether the exemption is engaged, the issue here is whether the information in question relates to the formulation or development of government policy. In forming a conclusion on this point, the Commissioner has taken into account the nature and content of the withheld information and the representations from the Home Office.
10. The information in relation to which this exemption was cited is a document titled "*Review of the Police Registration Scheme*". The argument of the Home Office is that this is within the class described in this exemption as it records a review that was carried out for the purpose of informing government policy on the future of the scheme. The Home Office also confirmed that a decision on the future of the police registration scheme would require the consent of Ministers.
11. Having reviewed the content of the withheld information, the Commissioner accepts that this was prepared for the purpose of informing the Government on its policy. He also notes the confirmation from the Home Office that Ministerial input would be required for any change to be made to the police registration scheme, which indicates that this would amount to government policy, rather than, for example, departmental policy.
12. For these reasons the Commissioner finds that the information in question does relate to the formulation or development of government policy. The exemption provided by section 35(1)(a) is, therefore, engaged.
13. The next step is to consider the balance of the public interest. In his consideration here, the Commissioner has taken into account the general public interest in information about the work of the Home Office, as well as those factors that apply in relation to the specific information in question.
14. Covering first arguments in favour of disclosure of the information, the Commissioner considers it significant that the government policy to which the information in question relates is concerned with immigration. Immigration policy is currently at the very top of the political agenda. Given this, the Commissioner believes that there is significant public interest in information that relates to government policy in this area.
15. The Commissioner does recognise, however, that the police registration scheme is not an issue at the heart of the immigration debate. Instead, the information in question is on a relatively obscure detail of

immigration policy and, crucially, does not concern the rate of immigration or any attempt to control this.

16. Brief research was carried out for the purposes of this notice on whether the police registration scheme was itself a matter of particular public interest. Evidence of this could have been, for example, that there had been significant controversy about the scheme. This research did not, however, suggest that there was any such public interest.
17. In view of this, the Commissioner's view is that there is a valid public interest in disclosure of the information in question given that it concerns immigration policy. However, the particular subject matter of this information means that this public interest is of significantly less weight than would apply to information on an issue more central to the immigration debate.
18. Turning to factors that favour the maintenance of the exemption, the arguments advanced by the Home Office concerned the need to preserve an arena away from public scrutiny for the government policy making process. When considering the balance of the public interest in relation to section 35(1)(a) the Commissioner will generally always consider it relevant to take into account the public interest in preserving a degree of confidentiality in the policy making process given the possibility of harm to the quality of that process if those involved were not confident that their contributions would remain confidential.
19. The Commissioner recognises that the argument concerning the preservation of a space within which to carry out the policy making process is, in general, valid on the grounds that this will assist in the open discussion of all policy options, including those that may be considered politically unpalatable. However, the weight that this argument carries in each case will vary, depending on the circumstances.
20. In this case the policy making process to which this information relates is current; the Home Office advised the Commissioner that a decision from Ministers on the future of the police registration scheme was pending. The argument from the Home Office therefore relates directly to the policy making process recorded in the information in question; that disclosure would harm policy making on the issue of the future of the police registration scheme. On this point the Commissioner notes that the content of the information includes free and frank views on the police registration scheme; the author of the report has expressed their view openly.
21. Whilst participants in the policy making process are required to contribute in a free and frank manner, as noted above the Commissioner

does accept that the argument concerning a safe space within which to carry out policy making is valid. In this case the view of the Commissioner is that this argument carries particular weight due to the information relating to a current, ongoing policy making process. Therefore, the need to preserve a safe space within which to carry out the policy making process is a valid factor of significant weight in favour of maintenance of the exemption.

22. The Commissioner has recognised public interest in favour of disclosure of this information on the grounds of its subject matter. However, he has also recognised that disclosure may result in harm to the policy making process. Particularly in view of the policy making process in question having been ongoing at the time of the request, the conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. The Home Office was not, therefore, obliged to disclose this information.

Sections 23(5) and 24(2)

23. In addition to the information that it confirmed was held and for which it cited section 35(1)(a), the Home Office also refused to confirm or deny whether it held any further information falling within the scope of the complainant's request. Section 23(5) provides an exemption from the duty imposed by section 1(1)(a) to confirm or deny whether information is held if to do so would involve the disclosure of information, whether or not recorded, that relates to or was supplied by any of the security bodies listed in section 23(3). This is a class-based exemption, which means that if the confirmation or denial would have the result described in section 23(5), this exemption is engaged.
24. The argument from the Home Office on this exemption was that if further information falling within the scope of the request did exist, this is likely to relate to consultation with section 23(3) bodies on the future of the police registration scheme. Were it the case that absolute certainty of the connection with a section 23(3) body was required, this might mean that the possibility, however slim, of the Home Office holding relevant further information that was not related to, or supplied by, a section 23(3) body would undermine its reliance on section 23(5).
25. However, in the Tribunal case *The Commissioner of Police of the Metropolis vs Information Commissioner* (EA/2010/0008) the argument was advanced that it was *highly likely* that any information held by the public authority that fell within the scope of the request would have been supplied to it by a section 23(3) body and, therefore, section 23(5) was engaged. The counterargument was made that only certainty as to the source of the information would be sufficient. The Tribunal rejected this counterargument and stated:

*"[The evidence provided] clearly establishes the **probability** that the requested information, if held, came through a section 23 body." (paragraph 20)*

26. The approach of the Commissioner on this point is that he accepts the Tribunal view that the balance of probabilities is the correct test to apply. This means that for section 23(5) to be engaged, the evidence must suggest to a sufficient degree of likelihood (rather than certainty) that any information held that falls within the scope of the request would relate to, or have been supplied by, a body specified in section 23(3).
27. In this case, the Commissioner accepts the possibility that section 23(3) bodies may have been consulted for their view on the police registration scheme. The Commissioner also accepts that, on the balance of probabilities, any further information held by the Home Office falling within the scope of the complainant's request would relate to, or have been supplied by, a body or bodies listed in section 23(3). His conclusion is therefore that section 23(5) is engaged.
28. As this conclusion has been reached on section 23(5), it is not strictly necessary to go on to also consider any other exemptions. However, as the Home Office also relied on section 24(2), he has gone on to consider that exemption.
29. Section 24(2) provides an exemption from the duty to confirm or deny where this is required for the purpose of safeguarding national security. Consideration of this exemption is a two-stage process. First, the exemption must be engaged due to the requirement of national security; secondly, this exemption is qualified by the public interest, which means that the confirmation or denial must be provided if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
30. The Home Office provided very little explanation to both the complainant and the Commissioner as to why it believed that this exemption was engaged. In the absence of clarity from the Home Office as to why it was citing this exemption, the Commissioner has considered what arguments there may be for this.
31. The Commissioner has already accepted, when finding that section 23(5) is engaged, that stating whether or not information is held within the scope of the request would reveal information relating to the role of the security bodies. The Commissioner also accepts that disclosure that touches on the work of the security bodies would consequentially undermine national security. For that reason section 24(2) is also engaged as exemption from the duty to confirm or deny is required for the purposes of national security.

32. Turning to the balance of the public interest, the question here is whether the public interest in safeguarding national security is outweighed by the public interest in disclosure of the confirmation or denial. Clearly, the public interest in safeguarding national security carries very great weight. In order for the public interest to favour provision of the confirmation or denial, it will be necessary for there to be public interest factors in favour of this of at least equally significant weight.
33. The view of the Commissioner is that there is some valid public interest in confirmation or denial in response to this request. This would increase public knowledge of the work in which the Home Office is involved in the area of immigration.
34. The Commissioner considers it to be clearly the case, however, that this public interest does not match the weight of the public interest in safeguarding national security. This means that his conclusion is that the public interest in the maintenance of the exemption provided by section 24(2) outweighs the public interest in disclosure of the confirmation or denial.
35. In view of this finding and that above on section 23(5), the Home Office was not required to confirm or deny whether it held any further information to that in relation to which it cited section 35(1)(a).

Right of appeal

36. 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>

37. 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.
38. 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
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**