

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 March 2012

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

Decision

1. The complainant requested the Home Office to release the names of its staff involved in an immigration decision regarding the Church of Jesus Christ of Latter-day Saints.
2. The Commissioner's decision is that the Home Office's reliance on section 40(2), not to release the names, was correct.
3. However the Commissioner, on a balance of probabilities, finds that the Home Office is unlikely to have informed the complainant of the totality of the requested information it holds. He therefore directs that the Home Office informs the complainant whether it holds additional information and, if it does, provide him (i.e. the complainant) with the additional information or issue a valid refusal notice compliant with section 17 of the Act.
4. The public authority 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 3 June 2011 the complainant requested "all documents held by the Home Office that relate to the Church of Jesus Christ of Latter-day Saints. In particular, this request covers, but is not limited to, any documents outlining the government's approach toward its missionary program".

6. The Home Office provided its response on 29 June 2011 in which it disclosed part of the information requested but withheld the remainder of the information based on the exemption contained in section 40(2) of FOIA.
7. The complainant requested an internal review of the Home Office's decision on 7 July 2011. On 4 August 2011 the Home Office wrote to him with the details of the result of the internal review it had carried out, the outcome of which was to uphold the original decision.

Scope of the case

8. On 4 August 2011 the complainant contacted the Commissioner to complain about the Home Office's decision not to release the staff names withheld under section 40(2). The complainant averred that the Commissioner should follow his previous decision in FS5038752 and order the release of the withheld information.
9. The Commissioner has considered whether the Home Office handled the request for information in accordance with the Act.

Reasons for decision

Section 40(2)

10. Section 40(2) of FOIA states that the personal data of a third party is exempt from disclosure if to do so would contravene any of the data protection principles. The first principle of the Data Protection Act ("DPA") states that personal data shall be processed fairly and lawfully.
11. 'Personal data' is defined under section 1(1) of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the data controller or is likely to come into the possession of the data controller. The Commissioner is satisfied that the withheld names constitute personal data.
12. The information released to the complainant centres on one subject: the reinstatement of the Home Office's concession whereby missionaries seeking admission to the United Kingdom should normally be granted leave to enter for a period of two years (instead of one) if all other requirements of the Immigration Rules are met. The withheld information consists of the names of Home Office staff that were to varying degrees involved in the said decision to reinstate the concession.

They appear in a relatively small number of internal and external communications dating from the years 1990 to 2000.

13. The Home Office explained that it can now only locate two of the named individuals. At the time at which the communications in which their names appear date from, their grades were Executive Officer and Higher Executive Officer respectively.
14. The Home Office stated that it has contacted the two officers. The then Executive Officer maintains that at the relevant times s/he was not in a public facing role but did have occasional meetings with "stakeholders". The then Higher Executive Officer specifically asked that his/her name is not released due to their current employment status. The Home Office states that it had not been able to secure from these two individuals their consent to release their names. It could not, of course gain, the consent of those individuals it could not contact.
15. In considering whether disclosure of personal data would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner considers the following factors:
 - The data subject's reasonable expectations of what would happen to their personal data.
 - The consequences of disclosure.
 - The balance between the rights and freedoms of the data subject and the legitimate interests of the public.
16. The Home Office states that its usual policy is to inform joining staff that it will not routinely disclose their names unless they are in public facing roles or are at a senior grade such as Senior Civil Servants (SCS) – grade 5 and above. In training, regarding the DPA, it informs staff that it may be necessary to release their names and contact details, on a case-by-case basis, on occasion in order to comply with the DPA and FOIA. However, staff are told that their consent will be sought and that notice and explanation as to why their details might be released will be given. The Home Office further explained that as it had not been able to secure from the relevant individuals their consent to release their names it does not consider that the disclosure of the staff names in this case would comply with the general "fairness" test in accordance with the first data protection principle. This is due to the expectations that these staff have about the disclosure of their identities and contact details in the course of performing their daily duties.
17. The complainant, in his complaint to the Commissioner, put forward his own views on the fairness issue. In summary, he said that:

- The members of staff involved in the released information are likely to be of grade Higher Executive Officer or above and thus sufficiently senior for the release of their names to be appropriate.
 - The information relates to the relevant officials' professional lives rather than their private lives.
 - Release of the staff names would help members of the public understand who makes important decisions relating to immigration.
 - Release of the information would provide additional transparency as regards the level of seniority of the staff who made the decisions and were responsible for corresponding on the issue of missionary migration.
 - Home Office staff of level Higher Executive Officer or above can be considered accountable for some of the decisions they make as part of their professional roles. It would appear to be in line with the Information Commissioner's decision in case FS50308752 to release the relevant staff names.
18. The Commissioner acknowledges what is now the current advice the Home Office gives to staff regarding the releasing of their names via FOIA. However, the withheld names occur in communications as far back as 1990 and the commencement of their employment with the Home Office must precede those communications. By some margin, both these events occurred before the implementation of the Act. The Commissioner is thus somewhat sceptical that these two individuals were addressed about releasing their names to the public as suggested by the Home Office. Therefore the Commissioner, on the balance of probabilities, finds that when the withheld information was generated the two individuals would not have expected their names to be released to the public by their "employer". The Commissioner is of the same view in relation to the other named individuals who could not be located.
19. The Commissioner acknowledges the reasoned arguments of the complainant on the issue of fairness. The complainant's arguments may have prevailed if the withheld information (i.e. the staff names) were generated in communications that postdated the coming into force of FOIA. In such a situation then the staff would or should have been aware that their names *may* be released to the public as a result of a request under the Act. Moreover, however, the Home Office informed the Commissioner that the named individuals had not made the actual

immigration decision that provided the context of the information request. In the Commissioner's view this adds further weight to the arguments regarding disclosure being unfair when combined with the age of the information and consent for disclosure not having been obtained from the data subjects.

20. Notwithstanding the data subject's reasonable expectations or the occurrence of damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure. The Commissioner's view is that in considering 'legitimate interests', these interests can include broad general principles of accountability and transparency for their own sakes. Notwithstanding these general principles of accountability and transparency, the Commissioner cannot discern a sufficient overriding public interest to warrant releasing the withheld names. Accordingly, he finds that the Home Office correctly relied on section 40(2) not to release the names of the Home Office officials.
21. The Commissioner notes that the complainant specifically asked him to follow, so far as relevant, the Commissioner's decision in FS50308752 and order the release of the withheld names. However in FS50308752 the withheld names, the releasing of which he ordered, were found to be of public knowledge in any event. Further, the expectations of the data subject, as to the release of their names, would have been formed with the knowledge of FOIA since the relevant events post date that Act. By way of differentiation, in this matter the withheld names are not public knowledge and the names are in documents that precede the Act.

Other information

22. During the course of his investigation it became apparent to the Commissioner that, on the balance of probabilities, it was likely that the Home Office had not informed the complainant the totality of the requested information it held.
23. The Commissioner asked the Home Office to clarify and/or expand upon why the withheld names were those of people that had not made the actual immigration decision that provided the context of the information request. The Home Office informed the Commissioner that at the material times the authors of the immigration decision would have been the then Director for Policy and a Head of Team. The Commissioner notes that the information released to the complainant is not that generated by a Director for Policy and/or a Head of Team who were the authors of the immigration decision. The Commissioner also notes that

the released information does not have as an addressee or sender the Director for Policy and/or the Head of Team.

24. It is therefore possible that further information considered (as well as that generated) by the Director for Policy and the Head of Team has not been made known to the complainant as required by section 1 of FOIA. The Commissioner therefore directs the Home Office to inform the complainant whether it holds any such information and, if it does, provide him (i.e. the complainant) with the additional information or issue a valid refusal notice compliant with section 17 of the Act.

Right of appeal

25. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. 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

Alexander Ganotis
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