

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 July 2014

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

Decision (including any steps ordered)

1. The complainant requested a copy of the report of a healthcare audit carried out on Harmondsworth Immigration Removal Centre in June 2012. The Home Office refused to disclose this report and cited the exemptions provided by the following sections of the FOIA:

36(2)(c) (prejudice to the effective conduct of public affairs)

40(2) (personal information)

43(2) (commercial interests)
2. The Commissioner's decision is that sections 36(2)(c) and 43(2) are engaged, but that the public interest favours disclosure, and that apart from one redaction section 40(2) is not engaged. The Home Office is, therefore, required to disclose the report.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose a copy of the audit report, redacting the reference to medication as noted in paragraph 53 below.
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 Act and may be dealt with as a contempt of court.

Request and response

5. On 16 April 2013, the complainant wrote to the Home Office and requested information in the following terms:

"I understand that in June 2012 Dr Stuart Morgan, Managing Medical Officer at IRC Haslar, undertook a Health Care Audit of IRC Harmondsworth on behalf of the UKBA. I hereby request a copy of the audit report under s1 of the Freedom of Information Act 2000."

6. The Home Office responded on 14 May 2013. It stated that the request was refused and cited the exemption provided by section 43(2) (prejudice to commercial interests) of the FOIA.
7. The complainant responded on 6 June 2013 and requested an internal review. After a very lengthy delay, which the Commissioner comments on in the 'Other matters' section below, the Home Office responded with the outcome of the internal review on 7 November 2013. The refusal of the request under section 43(2) was upheld and the Home Office now also cited the exemptions provided by sections 36(2)(c) (prejudice to the effective conduct of public affairs) and 40(2) (personal information) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 26 November 2013 to complain about the refusal of the above request and indicated that they disagreed with the reasoning given by the Home Office for the refusal of the request.

Reasons for decision

Section 36

9. The Home Office has cited section 36(2)(c). This section provides an exemption where disclosure would or would be likely to prejudice the effective conduct of public affairs in a manner other than that specified elsewhere in section 36. The Commissioner's approach to this exemption is that this should only be cited where none of the other exemptions in part II of the FOIA are relevant.
10. This section can only be cited on the basis of the reasonable opinion of a specified qualified person (QP). For government departments the QP is any government minister. The task for the Commissioner when

considering if this exemption is engaged is to establish whether this exemption was cited on the basis of the opinion of a government minister and whether that opinion was reasonable. This exemption is qualified by the public interest, meaning that if the exemption is engaged, the information should nonetheless be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

11. Covering first whether an opinion was given by a nominated QP, the Home Office stated that an opinion was given by Mark Harper MP, Immigration Minister, and that this opinion was given on 30 October 2013. In evidence for this, the Home Office supplied to the ICO a copy of a submission dated 23 September 2013 of which Mark Harper was amongst the recipients. The Commissioner accepts that an opinion was given by a valid QP and that this opinion was given prior to the date of the internal review outcome, which was the point at which section 36 was cited.
12. As to whether that opinion was reasonable, the submission records that the basis for the QP's opinion concerned prejudice to the process of the Home Office carrying out audits of IRCs. The submission did not state clearly whether it was believed that prejudice *would* result, or *would be likely to*, result and the Home Office stated that the QP did not address that point specifically when confirming that the exemption was engaged. Given this, the Commissioner has proceeded on the basis that the opinion of the QP was that prejudice *would be likely* to result.
13. In relation to other exemptions, for the Commissioner to accept that prejudice would be likely to result, there must be a real and significant likelihood of that outcome. In this case the Commissioner has considered whether it was reasonable for the QP to be of the opinion that there was a real and significant likelihood of the disclosure resulting in prejudice to the ability of the Home Office to carry out audits of IRCs.
14. Having reviewed the content of the information, the Commissioner accepts that the opinion of the QP was objectively reasonable – that disclosure of this information was likely to make the audit process less effective. He accepts that it was reasonable for the opinion to find that it would otherwise prejudice the conduct of public affairs.
15. The Commissioner would note at this point that the issue of whether section 33 (prejudice to audit functions) could have been cited was raised with the Home Office. The response from the Home Office on this point was that it did not have an audit function, so section 33 was not available to it. The Commissioner's view is that the process to which the withheld information relates is an audit function and so as this was carried out on the behalf of the Home Office, it is at least arguable that

the Home Office could cite section 33, but he accepts that the Home Office did not believe that section 33 was available to it when it chose to cite section 36(2)(c).

16. Having found that the opinion of the QP that disclosure would be likely to result in prejudice to the auditing of IRCs was reasonable, the Commissioner concludes that the exemption provided by section 36(2)(c) is engaged.

Public interest test

17. The next step is to consider the balance of the public interest. The Commissioner has accepted that the opinion of the QP that disclosure would be likely to result in prejudice was reasonable; the role of the Commissioner here is not to challenge or reconsider his conclusion on 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 interest, 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.

Public interest arguments in favour of maintaining the exemption

18. 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 audit the provision of healthcare at IRCs. As to how much weight this should carry in the balance of the public interest, the question is what the severity, extent and frequency would be of the prejudice identified by the QP.
19. The Commissioner recognises that prejudice would not be limited to future healthcare audits only of Harmondsworth IRC, but would extend to all other IRCs and would cover both healthcare audits and other kinds of audit. The severity, extent and frequency would therefore be wider than if it was limited only to Harmondsworth IRC. However, the severity and extent of this prejudice would be limited by the point that the disclosure would be viewed within the context of the timing of the request and the fact that nearly a year had elapsed between the audit being completed and the request being made, which clearly allowed a significant time and space for the results to be considered.

Public interest arguments in favour of disclosure

20. Turning to arguments in favour of disclosure, the Commissioner considers there to be a strong public interest both in the disclosure of the specific audit report in question here, and in general in relation to information about the operation of IRCs. Covering the public interest relating specifically to Harmondsworth IRC, whilst the Commissioner is unable to go into details here without inappropriately revealing the content of the withheld information, his view is that the content of the report means that there is a strong public interest in it being disclosed.
21. There are other factors relating to Harmondsworth IRC that the Commissioner can cover in more detail here. A full audit of that IRC was carried out in August 2013 by HM Chief Inspector of Prisons (HMCIP). The report of that audit is in the public domain¹ and is critical of the operation of Harmondsworth IRC in a number of respects, including its healthcare provision. In light of the publication of that report and what this reveals about the concerns that existed at that time, there is a strong public interest in publication of the report in question here in order to reveal whether similar concerns existed at the time of that report and whether the later HMCIP report indicates that healthcare provision had improved or deteriorated in the time between the reports. It would also be in the public interest to disclose the report in question in order to provide greater detail than is included within the HMCIP report about the operation of one area of the IRC.
22. Healthcare at Harmondsworth IRC is provided by a private sector contractor, which ultimately is funded by the taxpayer. There is a strong public interest in disclosure of this report into how effectively this contractor is meeting its contractual obligations to provide healthcare, which is funded by the tax payer. This public interest in understanding more about the quality of healthcare provision at Harmondsworth IRC is particularly acute due to the vulnerable nature of the people held in IRCs.
23. The operation of IRCs in general is an issue that has been the subject of scrutiny and concern. The HMCIP report referred to above reveals that there have been problems with the operation of that particular IRC, and there is much media coverage that suggests that the operation of IRCs in general has been an area of public debate. In light of this, and again taking into account the vulnerable nature of the individuals held in IRCs,

¹ <http://www.justice.gov.uk/downloads/publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/harmondsworth/harmondsworth-2014.pdf>

the Commissioner believes there to be a strong public interest in disclosure of information recording conditions within IRCs.

24. In conclusion, the Commissioner has recognised a significant public interest in avoiding the prejudice identified by the QP. However, he believes that the weight of that interest is not sufficient to outweigh the public interest in disclosure given the very strong public interest in information about the operation of this particular IRC and in the operation of IRCs generally. For these reasons, the Commissioner's finding is that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

Section 43

25. 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, as with section 36(2)(c), 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.
26. Covering first whether the exemption is engaged, the Home Office specified that it believed that prejudice to commercial interests *would be likely* to result. This means that the test that the Commissioner has applied here is whether there would be a real and significant, rather than hypothetical or remote, chance of prejudice occurring.
27. The reasoning given by the Home Office for this exemption being engaged was twofold. First, it argued that its own commercial interests would be likely to 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 contractor that provided healthcare services at Harmondsworth IRC at the time of the audit would be likely to be prejudiced.
28. 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.

29. A more convincing argument is that disclosure of this report would be likely to prejudice the commercial interests of the contractor that was providing the healthcare service at Harmondsworth IRC at the time of the audit. Again the Commissioner cannot include detail about the content of the withheld information, but he accepts that there is a real and significant likelihood that disclosure of it could lead to prejudice to the commercial interests of that contractor. On this basis, the conclusion of the Commissioner is that the exemption provided by section 43(2) of the FOIA is engaged.
30. The next step is to consider the balance of the public interest. In forming a conclusion on the balance of the public interest 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.
31. Covering first those 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 the likelihood of prejudice to the commercial interests of the Home Office was real or significant in this case, he does recognise that a number of disclosures likely to 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.
32. Turning to the arguments in favour of disclosure, the same factors as covered above at paragraphs 21 to 24 apply here; for those reasons the Commissioner believes there to be a very strong public interest in the disclosure of the audit report in question. It is of particular relevance to section 43(2) that disclosure would add to public knowledge on the extent to which the contractor was providing a value for money service. Further to this point, the Home Office confirmed that, whilst the service provider has since changed, at the time of the complainant's information request the same healthcare contractor was in place as at the time of the audit.
33. 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 a private sector contractor are likely to be 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 36(2)(c) 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

34. In relation to a minority of the content of the report the Home Office has cited 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 covers first whether each of the redactions where the Home Office has cited section 40(2) constitute personal data. Secondly, for the content that is personal data, the analysis covers whether disclosure would satisfy the first data protection principle, which states that personal data shall be processed fairly and lawfully.
35. Personal data 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”.*
36. This provides two criteria that must be fulfilled for information to constitute personal data; the information must relate to an individual, and that individual must be identifiable either from that information directly, or from that information combined with other information available to the holder of that information.
37. Taking each of the redactions in turn, the first of these is the names of the three individuals who carried out the audit, which clearly are personal data. The second redaction is of two excerpts that refer to a specific management role. The Commissioner accepts that there will be those who are aware of the identity of the holder of this post at the time of the request and so that content does constitute personal data.
38. The third redaction records that a detainee died. Section 1(1) of the DPA is clear that for information to be personal data, it must relate to a living individual; as this content does not relate to a living individual, it is not personal data.

39. The fourth redaction records the provision of a specific medication to a detainee. The position of the Home Office here is that there is sufficient information within this excerpt that the existing knowledge held by other individuals could enable it to be linked to an individual. The Commissioner accepts that knowledge of the medication taken by another detainee could enable a relevant third party to relate this information to an individual by reference to that medication. This redaction does, therefore, constitute personal data.
40. In relation to the redactions that the Commissioner has accepted do constitute personal data – the names of the three auditors, the content relating to the healthcare manager and the record of the provision of medication to a detainee – the next step is to consider whether disclosure of this information would be in breach of any of the data protection principles. The Commissioner has focussed here on the first principle, which requires that personal data be processed fairly and lawfully. In forming a view on whether disclosure would be fair, the Commissioner has taken into account the reasonable expectations of the data subjects, the consequences of disclosure upon the data subjects and whether there is legitimate public interest in the disclosure of the information in question.
41. On the issue of the reasonable expectations of the data subjects, of the three auditors it appears that one of these is the more senior; that individual is named as the author of the report. That individual has also been identified elsewhere in connection with this audit². As a result, the Commissioner does not believe that this individual would hold any reasonable expectation that his identity would be redacted from this report.
42. As to the other two auditors, as noted above these individuals appear to be in junior roles compared to the author of the report and the Commissioner is not aware of any information in the public domain linking them to this audit. However, the general approach of the Commissioner is that it will be less likely to be unfair to disclose information relating to an individual in a professional capacity than it would be in relation to information concerning an individual's private life. The likelihood of disclosure will generally increase with the professional seniority of the data subject, and where the relevant information relates to a public role they fulfilled at the time the information was recorded.

² <http://www.justice.gov.uk/downloads/publications/corporate-reports/imb/annual-reports-2012/harmondsworth-2012.pdf>

Given that this information relates to these individuals acting in a professional public role, he believes that they could reasonably hold only a very limited expectation that this information would not be disclosed.

43. The Commissioner believes that a similar level of expectation would be held by the individual in the specific management role. This information also relates to their actions in a professional and public role. The Commissioner also notes that the content of this information is not controversial and believes that this data subject could reasonably hold only a very limited expectation that this information would not be disclosed.
44. As to the consequences of disclosure upon the data subjects, the question here is whether disclosure would be likely to result in damage and distress to those individuals. In relation to the author of this report, given that they have already been identified in this role in the public domain, the Commissioner's view is that they would suffer no damage or distress through the disclosure of this report.
45. As to the remaining three data subjects, the Commissioner would accept that some minor distress may occur through disclosure contrary to the very limited expectation of confidentiality referred to above. He does not, however, believe that any more material damage would be likely to occur.
46. The next step is to consider whether there would be any legitimate public interest in the disclosure of this information. Whilst section 40(2) is an absolute exemption and not qualified by the public interest, the public interest is relevant here as it is necessary for there to be a legitimate public interest in order for disclosure to be compliant with the DPA, and a sufficiently strong interest may outweigh the limited factors against disclosure described above.
47. The Commissioner has covered above the issue of the public interest in disclosure in relation to sections 36(2)(c) and 43(2); his view is that there is a legitimate public interest in disclosure of the full unredacted report for the same reasons as set out above at paragraphs 21 to 24.
48. For disclosure to be in line with the first data protection principle, disclosure must be *necessary* in order for the legitimate interests identified above to be satisfied. This is required by Schedule 2 Condition 6 of the DPA. The Commissioner's published guidance³ on this matter

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/librar

states that disclosure should be necessary in order to satisfy a pressing social need. It also states that:

"...the general need for transparency regarding public bodies may constitute a sufficiently 'pressing social need'".

49. In this case, as well as the general need for transparency, the Commissioner is of the view that there is a specific need for transparency in relation to this audit report for the same reasons as referred to previously when covering the public interest.
50. A second issue that must be addressed when considering necessity is whether the information may already be available elsewhere. In this case the Commissioner relies on the refusal of the Home Office to disclose this information as evidence that it is not available elsewhere.
51. For the first data protection principle to be satisfied, disclosure must be lawful, as well as fair. The approach of the Commissioner to the issue of lawfulness under the first data protection principle is that he will find that disclosure would be lawful unless the public authority has advanced convincing arguments as to why disclosure would be unlawful. In this case the Home Office has advanced no arguments on the issue of lawfulness and the Commissioner has no reason to believe that disclosure would not be lawful.
52. The Commissioner has found that disclosure would be both fair and lawful and, therefore, would satisfy the first data protection principle. As there would be no breach of the first data protection principle through the disclosure of this information, the overall conclusion of the Commissioner is that the exemption provided by section 40(2) is not engaged.
53. In relation to the fourth redaction the Commissioner finds that there is a clear case that it would not be within the detainee's reasonable expectation to have this sensitive personal data disclosed and the intrusion would be likely to cause distress. Section 40(2) is engaged in relation to this content and the identifying information should therefore be redacted from this paragraph – redacting one word, the name of the medication, will be sufficient.

54. In relation to the information for which the Commissioner's conclusion was that this does not constitute personal data, his conclusion is also that section 40(2) is not engaged. As a result of this finding and that above on sections 36(2)(c) and 43(2), the Home Office is required at paragraph 3 above to disclose the audit report, removing the reference to medication.

Other matters

55. The Commissioner's approach to internal reviews is that these should in general be completed within 20 working days, and 40 working days as a maximum. In this case the Home Office took over 5 months to complete the internal review.
56. The Home Office should ensure that internal reviews are carried out promptly and that there is no repetition of the delay in this case. A record has been made of this delay and this issue may be revisited if evidence from other cases suggests that this is a recurrent issue with the Home Office.

Right of appeal

57. 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: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

58. 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.
59. 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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