

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 8 April 2015

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

#### **Decision (including any steps ordered)**

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1. The complainant requested, for each of the Immigration Removal Centres (IRCs) for which the Home Office (HO) is responsible, its performance against the published Operating Standards for IRCs and the number of performance points deducted in terms of the performance regime set by the contracts or service level agreements (SLAs), and any associated financial deductions applied to the service providers.
2. The Commissioner did not uphold HO's application of the section 43(2) and section 41(1) FOIA exemptions to the performance information held and also to the performance points information held except that which would make public parts of the business models used by HO and its contractors.
3. He did however uphold HO's application of the section 43 FOIA exemption to information the disclosure of which would reveal parts of the business models used by HO and its contractors. He also decided that the balance of the public interest favoured maintaining the exemption for this information.
4. The Commissioner also decided that a small amount of information should be redacted from the information to be disclosed where not doing so would disclose personal information proper to be withheld under the section 40(2) FOIA exemption.
5. For the avoidance of doubt the Commissioner set out his decision in detail in a confidential schedule which has been provided to HO only.
6. HO provided the Commissioner, for the purposes of his investigation, with the requested information for three IRCs - those at Colnbrook,

Brook House and Yarl's Wood - for him to consider as a 'test case' which he has done. He now requires HO to apply disclosure principles set out in this Decision Notice to the corresponding information held by HO for its other IRCs, whether publicly or privately operated.

7. The Commissioner requires HO to take the following steps to ensure compliance with the legislation:
  - Disclose to the complainant the performance information and the performance points information specified in the confidential schedule to this decision.
  - Apply the same principles to the corresponding information held about other IRCs but which HO did not provide to the Commissioner for his consideration.
8. 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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9. On 27 April 2014, the complainant wrote to HO and requested information in the following terms:

*In relation to each Immigration Removal (or Detention) Centre (IRC), for the latest year for which the information is available:*

- *its performance against the Operating Standards for IRCs*
- *the number of penalty points deducted in terms of the performance regime set by the contract or SLA, and the associated financial deductions from payments to the operator, if any.*

The complainant made clear that his request covered all IRCs, not just those operated by private contractors.

10. On 28 May 2014 HO responded and refused to provide the requested information citing the section 43(2) FOIA (Commercial interests) exemption and concluded that the balance of the public interest favoured maintaining the exemption in respect of all of the requested information.

11. Following a delayed internal review, HO wrote to the complainant on 4 September 2014 maintaining its decision with respect to the section 43(2) FOIA exemption and the balance of the public interest. HO also hinted that the section 41(1) FOIA (Information provided in confidence) exemption could apply.

## Scope of the case

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12. The complainant contacted the Commissioner on 6 October 2014 to complain about the way his request for information had been handled. He said that HO had assumed that his request excluded the publicly run IRCs and failed completely to address his request for operating standards information. During the Commissioner's investigation HO said that it recognised that the request did extend to the IRCs that are run publicly and indicated that this made no material difference to its response.
13. The Commissioner has considered evidence and submissions from both HO and the complainant. In reaching his decision, he has also had regard for information published by HO itself, by HM Chief Inspector of Prisons (HMIP) in respect of IRCs and by the Ministry of Justice (MOJ) in respect of prisons. He has reviewed past decisions regarding information requests for information about IRCs by both himself and the Tribunal.
14. The Commissioner reviewed withheld information provided by HO in respect of three IRCs, those at Colnbrook, Brook House and Yarl's Wood using these as a 'test case'. Following analysis of this information he provided a confidential schedule to HO, which does not form part of this Notice but has been sent to HO to be read in conjunction with it, setting out his decision in detail. HO made clear that it was withholding '*a huge volume of data*' in respect of other IRCs which it had not provided to the Commissioner for his initial consideration. It follows that the principles of this decision apply equally to the information about other IRCs, both public and private, which HO hold but did not provide to the Commissioner as part of the 'test case'.
15. The Commissioner considered that the withheld information fell to be considered within three categories:  
information reporting the operational performance of the service provider at each IRC ("operational performance");  
performance points arising from service performance failings ("performance points"); and,  
additional financial payments arising out of the performance points accumulated by service providers ("performance payments").

He considered the application of the section 43(2) FOIA exemption and the balance of the public interest to each of these.

16. HO, in addition to relying on the section 43(2) exemption, contended that the section 41(1) FOIA exemption applied. For the information he decided had been wrongly withheld under section 43(2) FOIA, and for that information only, the Commissioner proceeded to consider the application of section 41(1) FOIA.

## Reasons for decision

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### Section 43 Commercial interests

17. Section 43(2) of FOIA states that:

*'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'*

18. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner believes that three criteria must be met. First, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption. Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, whether disclosure *'would'* or *'would be likely to'* result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk of prejudice. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
19. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

20. The reasoning given by HO for this exemption being engaged was that its own commercial interests would be prejudiced through third party suppliers being less likely to want to contract with it and that this would disadvantage HO in contractual negotiations. HO also argued that the commercial interests of its service providers would be prejudiced.
21. HO confirmed that the views of the service providers had been sought and that they had made clear to HO that they considered the detail of their performance was commercially sensitive in its entirety. HO added that disclosure would offer competitors an opportunity to analyse current contracts, particularly contractors' performance, to gain a business advantage.
22. The complainant said that HO had not explained why informing the public about how well or how badly IRCs were performing against the operating standards published by HO would discourage potential service providers from tendering for such contracts or cause them to withhold information from HO. He noted that much operating performance information is routinely published across all public services including for prisons.
23. As regards the argument of prejudice to HO, the Commissioner's view is that HO is likely to be in a sufficiently strong position when negotiating contracts for services at IRCs to withstand the impact of disclosure without its having a significant adverse effect upon its commercial interests. The Commissioner accepts that third party contractors might prefer the withheld information not to be disclosed, but does not accept that they would allow this preference to reduce their chances of securing the relevant HO contracts which, for current and potential future IRC service providers, would represent a significant success.
24. A more convincing argument is that disclosure of this report would (as HO say) or would be likely to, prejudice the commercial interests of the service providers. The Commissioner accepts that there is a real and significant risk that disclosure of information about poor performance could on occasion prejudice the commercial interests of a contractor. On that basis, his conclusion is that the exemption provided by section 43(2) FOIA is engaged in respect of the information about the service providers' operational performance, performance points and performance payments.

*Public interest test*

25. Section 43(2) FOIA is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 FOIA and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. If

the public interest arguments are equally weighted, the information must be disclosed; to that extent the legislation effectively contains a presumption in favour of disclosure.

*Public interest arguments for maintaining the exemption*

26. The evidence of HO, supported by the view of the service providers, was that disclosure would prejudice both of their commercial interests. HO said that there was, in its view, a strong in-built public interest in favour of maintaining the exemption. HO argued that this had been consistently upheld in similar cases by both ICO and the Tribunal. In particular HO drew the Commissioner's attention to the case of *Le Vay (Julian Le Vay v The Information Commissioner (The Home Office) [EA/2014/0091]* which, HO said, was very similar to this matter.
27. HO said there was a public interest against disclosure in government departments being able to secure contracts that represented best value for money in the application of public funds. HO said that value for money could best be obtained where there was a healthy and competitive environment. HO maintained that disclosure in this matter would harm government's commercial relationships with public sector companies and thus weaken the competitive environment.
28. HO maintained that disclosure of the withheld information would reveal the delivery plans and pricing structures, including the performance measures, for each service provider. HO said that these were their own commercial delivery models and that if the public were made aware of this information, the service providers' commercial position would be severely compromised. HO considered that releasing information on the performance of companies under contract might discourage others from dealing with the public sector, fearing disclosure of information that might damage them commercially.

*Public interest arguments for disclosure*

29. There is a general public interest in favour of HO being open, transparent and accountable for its actions, also for the performance of its service providers where it does not provide services itself.
30. The complainant told the Commissioner that HO had not explained why informing the public how well or how badly IRC operators were performing against published operating standards would discourage operators from tendering for contracts or cause them to withhold information or what information they might withhold. He added that information about the performance of contractors was routinely published across all public services and utilities.

31. The complainant drew the Commissioner's attention to the HO's code of operating standards, the Detention Services Operating Standards manual for IRCs, published in 2009, which said that the published standards were a public document and '*make transparent the way we expect detainees to be treated and how our centres operate more generally*'. He said that it was not transparent for HO to not say whether and how far IRCs had complied with those standards when there was a clear public interest in the public knowing what was the level of compliance as immigration detention was an extremely sensitive issue, as was outsourcing detention services to private companies.
32. The complainant drew attention to the HMIP 2012 published criteria of "Expectations", a set of criteria for assessing the conditions for the treatment of immigration detainees. He said that HMIP's reports of its visits to IRCs already contained quantified measures of assessment of performance of IRCs against these expectations, many of which overlapped with HO's own published operating standards. The Commissioner has noted the reports of inspections of Brook House and Colnbrook IRCs in 2013 by HMIP and the operating performance information contained in them.
33. The complainant added that HO had not explained how publishing performance against the published set of universal operating standards would disclose sensitive information about pricing or delivery plans for individual IRCs and said that it would not.
34. The complainant said that HO's withholding of performance information was at variance with its own past practice in relation to prisons, before these responsibilities were transferred to MOJ when HO published details of financial performance payments imposed on the operators of private prisons. He added that MOJ still published this information and that MOJ also published details of the performance of private prison operators against its own set of operating standards which differed slightly from those of HO for IRCs but which also overlapped significantly with them.

*Balance of the public interest*

35. In determining the balance of the public interest in this matter, the Commissioner recognises the public interest in preserving a situation in which private sector suppliers can contract with public authorities without prejudicing their commercial interests. The Commissioner was not satisfied that the likelihood of prejudice to the commercial interests of the Home Office was real or significant as regards publishing details of operating performance by the service providers of IRCs.
36. The Commissioner noted HO's operating standards for IRCs and decided that there is a very strong public interest in HO disclosing the



performance of individual IRCs against the published universal standards. He noted that this information overlaps with information already published by HMIP for IRCs and by MOJ for prisons. HO sought to distinguish the publication of performance information by these public authorities from that of its IRCs. The Commissioner accepts that IRCs differ from prisons in their purpose but he did not accept that the differences are such as to prevent publication of IRC operating performance information and HO did not provide a reasoned case to support making a distinction.

37. The Commissioner believes that there is a very strong public interest in the disclosure of the information about the operating performance of the IRCs, along with the withheld information about performance points that did not disclose parts of the business models used by HO and the service providers. He also decided that the performance points information and information about the performance payments resulting from performance failures should be disclosed where doing so would not disclose parts of the business models used by HO and its service providers.
38. However he did recognise that some disclosures were likely to result in prejudice to the commercial interests of private sector contractors if they led to the disclosure of parts of the business models the contractors and HO had arrived at and that such disclosures could lead to a less favourable environment for public authorities seeking to contract with private sector contractors. He decided that avoiding that outcome was in the public interest.
39. In conclusion, the Commissioner has recognised that it is in the public interest for HO to disclose the operating performance information along with the performance points information and performance payments information to the extent that doing so does not also disclose parts of the business models used by HO and its service providers. The detail of his decision is set out in the confidential schedule issued to HO alongside this decision notice.
40. HO said that, in the event of the Commissioner not accepting its case for applying the section 43(2) FOIA exemption, it would wish to rely on the section 41(1) FOIA exemption. The Commissioner gave no further consideration to the information he had already decided had been correctly withheld relying on the section 43(2) exemption.
41. For the information the Commissioner decided had been wrongly withheld under the section 43(2) FOIA exemption, and for that information only, he proceeded to consider the application of the section 41(1) exemption.



## **Section 41 Information provided in confidence**

42. Section 41(1) of FOIA provides that:

*'Information is exempt information if-*

*(a) it was obtained by the public authority from any other person (including another public authority), and*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.'*

*Was the withheld information obtained from another person?*

43. The information was provided to HO by its contractors, therefore the Commissioner is satisfied that the information was obtained by HO from a third party.

*Would disclosure of the withheld information constitute an actionable breach of confidence?*

44. In order to determine whether disclosure would constitute an actionable breach of confidence the Commissioner considered the following questions:

(i) Does the withheld information possess the necessary quality of confidence?

(ii) Was the withheld information imparted in circumstances importing an obligation of confidence?

(iii) Would unauthorised disclosure cause a detriment to the party providing the information or to another party?

(iv) If parts (i)-(iii) are satisfied, would the public authority nevertheless have a defence to a claim for breach of confidence based on the public interest in the disclosure of the withheld information?

*Does the withheld information possess the necessary quality of confidence?*

45. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and is more than trivial.

46. Having reviewed the withheld information, the Commissioner is satisfied that it is clearly more than trivial in nature as it concerns the operational performance of individual IRCs and the conditions in which the detainees are held within them.

47. With regard to whether the information is otherwise accessible, the Commissioner has seen that the performance of IRCs is not currently disclosed by HO. He noted however that the Ministry of Justice (MOJ) publishes similar information in respect of HM prisons. When he put this to HO, it accepted that MOJ had chosen to disclose similar information in respect of its contracts but maintained, although without further supporting argument or explanation, its view that similar disclosures by

HO would put it at a commercial disadvantage. The Commissioner has seen too that HMIP publishes performance information obtained during its unannounced visits to both prisons and IRCs.

*Was the withheld information imparted in circumstances importing an obligation of confidence?*

48. HO said that its contracts contained a confidentiality clause and that disclosure of performance measure information could have financial consequences. HO said that it had contacted its suppliers who had said that they viewed the withheld information as sensitive and that disclosure would prejudice their commercial interests.
49. HO has explained that the relevant information was provided to it in confidence. The Commissioner notes that HO's contractors are receiving public money in return for the services they provide. He considers that those entering into contracts with public authorities such as HO know, or should have known, that they are subject to FOIA and that information about their contractual performance is likely to be disclosed.
50. The Commissioner noted that much of the performance information contained in the withheld information bears a close resemblance to performance information that has already been published about these establishments by HMIP in its inspection reports not all of which are recent. It is also similar to the reports that MOJ publish about prisons; there are differences in the detail of the information that MOJ publish and that which is being withheld by HO but the nature and purpose of the establishments is different. The complainant said that he had not been given any explanation of what HO saw as the significant differences. The Commissioner invited HO to explain the significance of these differences and say how these differences affect the need to withhold information but it did not do so.
51. The Commissioner has seen that the 2009 Detention Services Operating Standards manual for IRCs made clear HO's wish to be transparent about the way in which it expected detainees to be treated and how IRCs should operate more generally. He has also seen that HMIP has published a set of expectations (*Version 3, 2012*), setting out its criteria for assessing the conditions for, and treatment of, immigration detainees.
52. With regard to performance points the Commissioner has seen evidence from the complainant that these were formerly published by HO in 2003 (*Hansard 6 May 2003 Column 601W*) in respect of its then service providers.
53. The Commissioner believes that HO's contractors could reasonably expect, or should have expected, to report widely from time to time on

the conditions prevailing within the IRCs for which it is responsible and receiving public money. He decided that HO and its contractors could not reasonably expect that it would keep confidential the performance and performance points and all of the performance payments information.

*Would unauthorised disclosure cause a detriment to any party?*

54. HO argued that the disclosure of the information would mean that HO and its contractors would suffer detriment. It argued that commercially sensitive information would be made public, that publication would be actionable, and that there was a real risk of action being taken in the event of disclosure.
55. The Commissioner has seen that MOJ in respect of prisons, and HMIP in respect of both IRCs and prisons, already publishes similar performance information and he has seen no evidence that this publication results in detriment to the service providers. He therefore decided that HO has not provided evidence to demonstrate that there would be an actionable breach of confidence if it disclosed the information.
56. In the light of the information already being published by other public authorities, and in the past by HO itself in respect of some prisons, the Commissioner decided that the relevant information did not possess the necessary quality of confidence, was not imparted in circumstances bearing an obligation of confidence and would be likely to lead to detriment. The Commissioner therefore decided that the section 41 exemption is not engaged.

#### **Section 40 Personal information**

57. The Commissioner decided that a small quantity of personal information within the information to be disclosed should be withheld under the section 40(2) FOIA exemption, either because it was the personal information of HO employees or because it could lead to the identification of individual detainees. As both HO and the complainant accepted this, he has not set out the case for doing so in this notice. The relevant information is specified in the Commissioner's confidential schedule.

#### **Summary of conclusions**

58. The Commissioner upheld HO's application of the section 43 FOIA exemption to information the disclosure of which would reveal parts of the business models used by HO and its contractors; he also decided that the balance of the public interest favoured maintaining the exemption for this information.

59. The Commissioner did not uphold HO's application of the section 43(2), or the section 41(1) FOIA exemption, to the performance information and also to the performance points information except that which he decided had been correctly withheld under the section 43(2) FOIA exemption.
60. The Commissioner decided that a small amount of personal information should be redacted from the information to be disclosed where not doing so would disclose personal information properly withheld under the section 40(2) FOIA exemption.
61. HO provided the Commissioner with the requested information concerning three IRCs - those at Colnbrook, Brook House and Yarl's Wood - for him to consider as a 'test case' which he has done. He now requires HO to apply the disclosure principles set out in this Decision Notice to the corresponding information held by HO for its other IRCs, both publicly and privately operated without further delay.
62. For the avoidance of doubt, the Commissioner has identified the information to be disclosed in a confidential schedule issued to HO only.

### **Other matters**

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63. HO took over three months to review its decision in this matter which was far too long; HO offered no explanation or apology. 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 addition, HO delayed consideration of the matter on several occasions during the course of the Commissioner's own investigation.
64. HO should ensure that internal reviews are carried out promptly and that there is no repetition of the delays that occurred in this case.
65. A record has been made of the delays in this matter and the issue of delay may be revisited if evidence from other cases suggests that this is a recurrent concern.

## Right of appeal

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66. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

67. 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.
68. 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** .....

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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