

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2015

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

Decision (including any steps ordered)

1. The complainant requested information relating to the attendance of the Prime Minister and Home Secretary at an immigration raid. The Home Office refused to disclose this information and cited the exemptions provided by sections 36(2)(b)(ii) (inhibition to the free and frank exchange of views) and 23(5) (information relating to, or supplied by, security bodies) of the FOIA.
2. The Commissioner's decision is that the Home Office cited section 36(2)(b)(ii) correctly in relation to the majority of the information and so it was not obliged to disclose that information. He also finds that section 23(5) was engaged so the Home Office was not obliged to confirm or deny whether it held any further information. However, section 36(2)(b)(ii) was not engaged in relation to some of the information withheld and the Home Office is now required to disclose that information.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose the relevant paragraph from the 22 July 2014 email in relation to which section 36(2)(b)(ii) was not engaged.
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 31 July 2014, the complainant wrote to the Home Office and requested information in the following terms:

"Please reveal correspondence between Immigration authorities and other public bodies regarding David Cameron and Theresa May presence in Slough property during the Immigration raid on premises, as described in the article below:

<http://www.theguardian.com/politics/2014/jul/30/david-cameron-pr-stunt-suspected-illegal-migrants>"

6. After a lengthy delay, the Home Office responded substantively on 1 December 2014. The request was refused, with the exemption provided by section 31(1)(e) (prejudice to the operation of the immigration controls) of the FOIA cited. The Home Office also refused to confirm or deny whether it held any further information within the scope of the request and cited the exemption from the duty to confirm or deny provided by section 23(5) (information relating to, or supplied by, security bodies).
7. The complainant responded on 2 December 2014 and requested an internal review. The Home Office responded with the outcome of the internal review on 5 February 2015. The refusal of the request under sections 31(1)(e) and 23(5) of the FOIA was upheld, and the Home Office now also cited the exemption provided by section 36(2)(b)(ii) (inhibition to the free and frank exchange of views) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 5 February 2015 to complain about the refusal of his information request. The complainant argued that the public interest favoured disclosure of the information he had requested.

Reasons for decision

Section 17

9. Section 17(1) requires that a response refusing an information request must be sent within 20 working days of receipt of the request. Whilst section 17(3) allows that the time can be extended in order to consider the balance of the public interest where a qualified exemption is

engaged, the approach of the Commissioner is that the time to respond should be extended by a maximum of a further 20 working days.

10. In this case it took the Home Office five months to respond substantively to the request. In so doing, it breached the requirement of section 17(1) of the FOIA. The Commissioner comments further on this breach in the "Other matters" section below.

Section 36

11. The Home Office cited section 36(2)(b)(ii). This section provides an exemption in relation to information the disclosure of which would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation. This exemption can only be applied based on the reasonable opinion of a specified qualified person (QP), which for government departments is any Minister of the Crown.
12. This exemption is qualified by the public interest, which means that there are two stages when applying it. First, the exemption must be engaged as a result of having been cited on the basis of a reasonable opinion from a Minister. Secondly, the balance of the public interests must be considered. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
13. Covering first whether the exemption is engaged, the questions here are whether an opinion was given by a Minister and whether that opinion was reasonable. The Home Office has stated that James Brokenshire, Minister for Immigration and Security, acted as QP and that he gave an opinion on 5 February 2015. The Home Office supplied to the ICO a copy of a submission provided to the QP to assist in the formation of their opinion. This is dated 4 February 2015 and given this evidence the Commissioner accepts that this exemption was cited on the basis of an opinion from a Minister.
14. However, the Commissioner notes that the submission requested an opinion from the Minister only on one email, dated 29 July 2014. In correspondence with the ICO in connection with this case, the Home Office identified part of a second email, dated 22 July 2014, as within the scope of the request and stated that this had also been withheld under section 36(2)(b)(ii). As this email was not brought to the attention of the QP when his opinion was sought, the Commissioner does not accept that the opinion extends to that email. Section 36(2)(b)(ii) is not, therefore, engaged in relation to the relevant content from the 22 July 2014 email. No other exemption was cited in relation to that information and at paragraph 3 above the Home Office is now required to disclose it.

15. Turning to whether the opinion was reasonable, the Commissioner's approach here is that an opinion must simply be objectively reasonable. This means that it must be an opinion that a reasonable person could hold, which will not necessarily be the most or only reasonable opinion that could be held.
16. The reasoning for the opinion of the QP was set out in the aforementioned submission and in correspondence from the Home Office. In its correspondence the Home Office specified that the opinion of the QP was that disclosure *would* result in inhibition, rather than *would be likely* to result. That the QP's opinion was that inhibition *would* result is borne out by the content of the submission.
17. When applying other prejudice based exemptions, the Commissioner takes the approach that in order for him to conclude that prejudice would result, it must be more probable than not that the predicted outcome would occur. Applying that test in this case, the question here is whether it was objectively reasonable for the QP to hold the opinion that inhibition to the free and frank exchange of views would be more probable than not to result through disclosure.
18. The submission records that the concern of the QP was about discussions between officials and Ministers and that these may be inhibited if they believed that the record of these could be subject to disclosure. In correspondence with the ICO the Home Office emphasised that the withheld information had been recorded recently prior to the date of the request and that it was on an issue of sensitivity.
19. The Commissioner has reviewed the content of the information, which consists of an email from an official reporting on the attendance of the Prime Minister and the Home Secretary at the immigration raid referred to in the request. This email reports on questions asked by the Ministers during that visit and views that they gave.
20. The Commissioner accepts that for the official in question reporting on the attendance at the immigration raid of these very senior figures would be a sensitive task. Following from this, he also accepts that inhibition is a possibility if an official in this scenario believed that their work could be subject to disclosure into the public domain. The Commissioner also recognises that it is reasonable to argue that Ministers may be circumspect in their comments if they believed that a record of them could be disclosed into the public domain, particularly where they are discussing sensitive issues.
21. For these reasons the Commissioner accepts that it was objectively reasonable for the QP to hold the opinion that disclosure would result in

inhibition relevant to section 36(2)(b)(ii). His conclusion is, therefore, that this exemption is engaged.

22. The next step is to consider the balance of the public interest. When forming a conclusion on the public interest in relation to section 36, the role of the Commissioner is not to reconsider his conclusion that the QP's opinion was reasonable. Instead, it is to consider the severity, extent and frequency of the inhibition that the QP believed would result through disclosure and weigh against that the public interest factors in favour of disclosure.
23. Covering first factors in favour of disclosure of the information, that the information relates to immigration is significant. Immigration is an issue that is currently at the top of the political agenda, with attempts to control illegal immigration at the heart of the debate on this issue. The information records the attendance of two Ministers of the very highest level at an operation intended to tackle illegal immigration and includes content on their views on this operation and related matters. The view of the Commissioner is that there is a very strong public interest in disclosure of this information owing to its subject matter and content.
24. The complainant argued that the public interest favoured disclosure as this was necessary in order to reveal the purpose for the Ministers attending this immigration raid, which he argued was a "PR stunt". Brief research reveals that the complainant is not alone in holding this view and the Commissioner agrees that there is a valid public interest in disclosure of this information in order to place further information into the public domain about the purpose of the Ministers' presence at this immigration raid.
25. Turning to factors in favour of maintenance of the exemption, having accepted as reasonable the QP's opinion that disclosure of the information in question would cause inhibition, the Commissioner must recognise that avoiding that outcome is a factor in favour of maintenance of the exemption. However, as referred to above, the weight that this should carry as a public interest factor depends on the severity, extent and frequency of that inhibition.
26. The significance of this information relating to immigration is covered above as a factor in favour of disclosure of the information. This is also relevant to the public interest in favour of maintenance of the exemption in that it is important that government can operate effectively in this area. Inhibition to officials and Ministers involved in immigration related work would be of considerable severity, extent and frequency. The Commissioner recognises, therefore, that the public interest in avoiding the outcome that the QP believed would occur is a factor in favour of maintenance of the exemption of considerable weight.

27. In conclusion, the Commissioner has recognised significant public interest in favour of disclosure of this information owing to its subject matter and content. However, having accepted that it was reasonable for the QP hold the opinion that inhibition would be more likely than not to result, he must give weight to the very strong public interest in avoiding that outcome. Having done so, his conclusion 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.
28. Having reached this conclusion, it has not been necessary to go on to also consider section 31.

Section 23

29. In addition to the information that it confirmed was held and for which it cited section 36(2)(b)(ii), 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.
30. The argument from the Home Office on this exemption was that if further information falling within the scope of the request did exist, it is possible that this could relate to section 23(3) and it wished to obscure which immigration operations involved section 23(3) bodies. Were it the case that absolute certainty of the connection with a section 23(3) body was required, this might mean that the possibility 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).
31. 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)

32. 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).
33. In this case, the Commissioner accepts the possibility that section 23(3) bodies will sometimes be involved in immigration raids. 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.

Other matters

34. As well as finding above that the Home Office was in breach of section 17(1) of the FOIA in failing to respond to the request promptly, the Commissioner has also made a separate record of that breach. This issue may be revisited if evidence suggests that the Home Office is consistently failing to respond to requests within statutory deadlines.

Right of appeal

35. 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>

36. 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.
37. 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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