

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 17 August 2009

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

Summary

The complainant requested information about an internal review of security surrounding the use of photographic evidence to verify the identity of people taking the Life in the UK Test. The public authority refused this request, citing the exemption provided by section 31(1)(e) (prejudice to the operation of the immigration controls). The Commissioner concludes that the likelihood of prejudice to the operation of the immigration controls resulting through disclosure of the information in question is not sufficiently high for the exemption to be engaged and that the public authority breached sections 1(1)(b) and 10(1) in failing to disclose the information requested within 20 working days of receipt of the request. The Commissioner also finds that the public authority failed to comply with section 17(1)(c) in that it did not provide to the complainant an adequate explanation as to why the exemption was believed to be engaged. The public authority is required to disclose to the complainant the information in question.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 5 February 2007, the complainant made the following information request:

"I would be grateful if the Home Office would provide copies of the internal reviews of security carried out regarding the use of photographic evidence for people taking citizenship tests."

3. The public authority responded to this on 5 March 2007. The public authority confirmed that it held information falling within the scope of the request, but refused to disclose this, citing the exemption provided by section 31(1)(e) (prejudice to the operation of the immigration controls). The refusal notice stated incorrectly that this exemption applies to information that *relates* to the immigration controls and did not address how disclosure would, or would be likely to, result in prejudice. The public authority briefly addressed why it considered that the public interest favoured the maintenance of the exemption.
4. The complainant contacted the public authority again on 5 March 2007 and requested that it carry out an internal review of the decision to refuse the request. The public authority responded, after a lengthy delay, with the outcome to this review on 30 July 2007 and stated that the information it held that fell within the scope of the request was a report dated 26 January 2006 that included detailed information about the security measures in place at citizenship test centres.
5. The review concluded that parts 1 and 2 of the January 2006 report should be disclosed as this would not result in prejudice to the immigration controls. In relation to the remainder of the report the refusal under section 31(1)(e) was upheld. The public authority again did not address how or why it believed prejudice would, or would be likely to, occur, although when addressing why it believed that the public interest favoured the maintenance of the exemption, it did suggest that the knowledge of security procedures provided through the withheld information may assist in circumventing these procedures.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner initially on 30 July 2007. The complainant did not agree that the exemption cited by the public authority was engaged. He pointed to the existence of the report reviewing the security of immigration controls being public knowledge; he also noted that the public authority had referred to shortcomings in the security of the immigration controls having been addressed since this review.
7. During the investigation the public authority provided to the Commissioner's office a copy of the report titled "*Life in the UK Security Assessment*" dated 26 January 2006 (the "report"). This is the report that the public authority referred to when responding to the request. The stance of the public authority was that the entirety of parts 3, 4 and 5 of the report fell within the scope of the complainant's request.
8. Having noted that the wording of the request specifies photographic evidence, the Commissioner does not agree that the entirety of parts 3, 4 and 5 of this report do fall within the scope of the request (parts 1 and 2 of this report were disclosed at internal review stage). Instead, having reviewed the content of the report, the Commissioner concludes that the following parts of the report refer to

photographic evidence and are within the scope of the request:

- Page 10, first, second and third paragraphs of section 3.3.1.
- Page 13, fifth, sixth and seventh paragraphs of section 4.1.1.
- Page 15, seventh and eighth bullet points of section 5.1.

9. The Analysis section of this Notice relates solely to these parts of the report. The content of the remainder of the report is not considered to fall within the scope of the complainant's request.

Chronology

10. Unfortunately, due to a backlog of complaints at the Commissioner's office, there was a considerable delay before the investigation into the complaint began. The Commissioner contacted the public authority on 21 January 2009. The public authority was asked to respond stating why it believed that the exemption provided by section 31(1)(e) was engaged, including the form that the prejudice would take and why it believed that this prejudice would, or would be likely to, result through disclosure of the information in question. The public authority was also asked to address why it believed that the public interest favoured the maintenance of the exemption and to provide a copy of the information in question to the Commissioner.
11. The public authority responded on 26 March 2009. The public authority specified that it believed that prejudice *would* result through disclosure, rather than that it *would be likely* to result. The basis for this stance was that the public authority believed that disclosure would highlight weaknesses in the security of citizenship testing. This would lead to these weaknesses being targeted by those attempting to pass citizenship tests fraudulently. The public authority believed that providing details of existing security measures would assist in fraudulent applications and that, even if all the weaknesses in the report have since been addressed, it would be possible to "*estimate*" the new security measures. The public authority also addressed the balance of the public interest and concluded that the public interest in ensuring that weaknesses to immigration security are not revealed outweighed that in favour of disclosure.

Analysis

Procedural matters Section 17

12. At neither the refusal notice nor internal review stage did the public authority provide an adequate explanation as to how disclosure would, or would be likely to, result in prejudice to the operation of the immigration controls and, therefore, why the exemption was engaged. In failing to provide this explanation, the public authority did not comply with the requirement of section 17(1)(c). This section of the Act is set out in full in the attached legal annex, as are all other sections of the Act referred to in this notice.

Exemption Section 31(1)(e)

13. This provision provides that information the disclosure of which *would*, or *would be likely to*, prejudice the operation of the immigration controls is exempt. This exemption is qualified by the public interest. This means that the information should be disclosed if the public interest in disclosure is not outweighed by that in withholding the information, however clear it is that the exemption is engaged.

Prejudice to the operation of the immigration controls?

14. The public authority has been specific that its stance is that prejudice *would* result through disclosure, rather than that it *would be likely to* result. The test that the Commissioner applies when considering whether prejudice would result is that the possibility of prejudice occurring must be at least more probable than not.
15. Where the Commissioner concludes that this test is not met he will go on to consider whether prejudice would be likely to result. The test applied here is that the risk of prejudice must be real and significant and more than hypothetical or remote.
16. These tests are in line with the approach taken in the case *R (on the application of Lord) v Secretary of State for the Home Office* [2003] where Mr Justice Munby stated:

"Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not."

17. In *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) the Information Tribunal took a similar approach when stating:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (paragraph 15)

18. Also, in the case of *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 and EA/2005/0030) the Tribunal stated the following:

"[the] prejudice test is not restricted to 'would be likely to prejudice'. It provides an alternative limb of 'would prejudice'. Clearly this second limb of the test places a much stronger evidential burden on the public authority to discharge." (paragraph 36)

19. Section 31(1)(e) refers to *"the immigration controls"*. The first step in establishing whether this exemption is engaged is to establish whether the process to which the information in question relates, citizenship testing, does form part of the immigration controls.

20. The citizenship testing referred to by the public authority and within this notice is the *"The Life in the UK Test"*. The website www.lifeintheuktest.gov.uk states that this test is:

"...now required for settlement (indefinite leave to remain) in the UK or British citizenship".

21. The Commissioner notes the following definition of immigration control in Statutory Instrument 2003 No. 2818 The Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003:

"immigration control" means arrangements made in connection with the movement of persons into or out of the United Kingdom or another State".

22. This wording suggests that the term "immigration controls" can safely be read broadly. In reliance on this broad definition of "immigration controls" and on the basis that the test to which the information in question relates is a requirement for immigrants seeking to remain indefinitely in the UK or to acquire British citizenship, the Commissioner accepts that this test is part of the immigration controls referred to in this exemption.

23. The next step is to establish whether disclosure of the information in question would prejudice the operation of the test. The public authority has advanced two main arguments. First, disclosure would expose weaknesses in the security of the testing system and encourage exploitation of these weaknesses. Secondly, disclosure would reveal the measures taken or planned to mitigate security risks and would assist in counteracting these measures. The contention of the public authority through both of these arguments is that disclosure would assist in completing the test through fraudulent means.

24. In connection with the first argument, the Commissioner notes that the information in question does refer to security vulnerabilities in the testing system. The Commissioner does not, however, accept that it is more probable than not that this information about vulnerabilities would assist in fraudulently completing the test for the following two reasons.

25. First, the internal review response refers specifically to signed photographs no longer being accepted as proof of identity. As to whether this was the case by the time of the refusal notice, the Commissioner notes that the internal review response refers to this security step having been taken in response to a report issued in January 2006 (presumably the report containing the information in question). Given that this is in excess of a year prior to the date of the request, the Commissioner considers it reasonable to surmise that this security step had been taken by the time of the request. The fact that this step to mitigate this particular security vulnerability had been taken by the time of the request reduces the likelihood that the withheld information about this security vulnerability could be successfully used to fraudulently complete the test.

26. The Commissioner anticipates that the public authority may argue that, whilst this

- step to improve security had been taken by the time of the request, other security vulnerabilities are mentioned within the withheld information. In relation to these other security vulnerabilities, the public authority may state that it had not taken any remedial action by the time of the request. The Commissioner would accept that this may indeed be the case, and notes that the internal review response refers to other work to improve security being ongoing at the time of that response. However, he would maintain that the fact that action had been taken to mitigate one of the security risks outlined within the withheld information reduces the likelihood of prejudice arising through disclosure of the withheld information.
27. Turning to the second argument, the Commissioner notes that the information in question does include references to steps taken or planned in order to improve security. However, again the Commissioner does not accept that it is more probable than not that disclosure of these steps would assist in fraudulently completing the test. The reasoning for this conclusion is first that, as mentioned above, the step of no longer accepting signed photographs as proof of identity was referred to in the internal review response, suggesting that the fact that this step had been taken was public knowledge at the time of the request.
28. Secondly, in relation to other steps planned, the public authority has not described how disclosure would assist in counteracting these newly introduced security techniques. These steps detail the more rigorous process of establishing the identity of applicants to be used in future. The Commissioner notes that applicants are made aware of the security requirements for verification of their identity at www.lifeintheuktest.gov.uk. This is relevant here in that it demonstrates that disclosure through the Act is not the only means by which the details of the security requirements would be disseminated.
29. Having concluded that the test for *would* prejudice has not been met, the Commissioner has also considered whether the probability of prejudice is sufficiently high that the test of real and significant risk for *would be likely* to prejudice has been met. On this point the Commissioner concludes that for the same reasons as set out above there would not be a real and significant likelihood of prejudice to the immigration controls through disclosure of the information in question.
30. The overall conclusion of the Commissioner is, therefore, that the exemption provided by section 31(1)(e) is not engaged. This conclusion is reached on the basis that the Commissioner does not agree with the public authority that disclosure of the information in question either would, or would be likely to, prejudice the operation of the immigration controls. As this conclusion has been reached at this stage, it has not been necessary to go on to consider the balance of the public interest.

The Decision

31. The Commissioner's decision is that the public authority concluded incorrectly that the exemption provided by section 31(1)(e) was engaged and in failing to

disclose the information requested within 20 working days of receipt of the request breached sections 1(1)(b) and 10(1). The Commissioner also finds that the public authority failed to comply with the requirement of section 17(1)(c) in that it did not provide to the complainant an adequate explanation of its reasoning as to why the exemption was engaged.

Steps Required

32. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act.

- Disclose to the complainant the withheld information falling within the scope of his request; that is the information set out above at paragraph 8.

The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Other matters

33. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that it took considerably more than 40 working days to complete the internal review in this case and would stress to the public authority that it should ensure that internal reviews are carried out promptly in future.

Failure to comply

34. Failure to comply with the steps described above 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.

Right of Appeal

35. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk

36. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 17th day of August 2009

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 10

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 17

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Section 31

Section 31(1) provides that –

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,

- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."