

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2012

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

Decision (including any steps ordered)

1. The complainant requested guidance, procedures and manuals held by the UK Border Agency ('the UKBA') providing instruction to officers conducting their duties within the jurisdiction of the law of Scotland.
2. The Information Commissioner's ('the Commissioner') decision is that the UKBA (an agency of the Home Office) breached section 1(1)(a) and (b) of the FOIA in not determining by the time of the internal review that information is held within the scope of the request and not determining whether that information should be provided. In responding to the complainant after 20 working days the UKBA also breached section 10(1) of the FOIA.
3. The Commissioner requires the public authority to disclose the information held within the scope of the request in accordance with section 1 or provide a refusal notice in accordance with section 17(1).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as contempt of court.

Request and response

5. On 2 September 2011 the complainant sent the UKBA the following request via the WhatDoTheyKnow.com website:

"In a response to a request for information made under the Freedom of Information Act 2000 you released the sections of your guidance

manual that relate to interviews and cautions. I read through this with interest on the whatdotheyknow.com website. However, I noted that the guidance issued relates to PACE and PACE (NI) only.

You will be aware that in Scotland a different legal system operates and that criminal procedure is broadly governed by the Criminal Procedure (Scotland) Act 1995, as amended. I seek the release of all guidance, procedures and manuals held by the UKBA giving advice and/or instruction to officers conducting their duties within the jurisdiction of the law of Scotland.

The guidance should cover the following situations as a minimum:

- (a) detentions under s14 of the Criminal Procedure (Scotland) Act 1995
- (b) persons under arrest in Scotland
- (c) persons who have voluntarily attended a police station or other premises to be interviewed by the UKBA on suspicion of their involvement in criminal activities."

6. The UKBA responded twenty working days later on 30 September 2011 stating that the request was being considered under the exemption in section 31(1)(e) [Law Enforcement – immigration controls] of the FOIA and the UKBA would respond by 27 October 2011 when it had considered the public interest in disclosure of the requested information.

7. On 27 October 2011 the UKBA responded and stated that it was not relying on the exemption at section 31 of the FOIA to withhold information. The UKBA referred the complainant to two websites which hold published guidance relevant to his request and in respect of point (a) it advised the complainant that it did not hold the information and advised him to contact Her Majesty's Revenue and Customs ('HMRC') to request the information.

8. On the same day the complainant requested an internal review. He questioned the handling of his request stating:

"If the UKBA does not hold information then there can be no question as to whether it is in the public interest to uphold an exemption for an exemption cannot apply to information that does not exist. If the information is already in the public domain then the UKBA does not require to comply with the request, but would probably be expected to provide guidance as to where the information can be found under its duty to advise and assist. However, there can be no question as to whether there is a public interest in withholding information that is already in the public domain."

9. On 25 November 2011 the Home Office provided its review and supported the original response concluding that the UKBA did not hold any information within the scope of the request. However, the review also explained that the UKBA had approached the request by considering whether information could be obtained in order to respond to the request rather than considering only the information held by the UKBA within the scope of the request.

Scope of the case

10. The complainant contacted the Commissioner on 25 November 2011 to complain about the way his request for information had been handled. The complainant specified two elements about which he wished to complain. He stated:

"The first is the general competency of the PIT extension letter issued 30 September 2011..... In my view this was an unlawful extension of the twenty working day deadline as required by Section 10(1) of the FOIA.

The second element with which I have dissatisfaction relates to the advancement of Section 31(1)(e) of the FOIA. While I have not seen the information which the UKBA was considering (although a similar request has now been made to HMRC which might uncover the information in question if HMRC do not decide it should be withheld) I would find it hard to accept that it had anything to do with immigration controls given that the ultimate owner of the information appears to be HMRC."

11. The Commissioner strongly recommends that a public authority should accurately determine whether it holds information relevant to a request, before considering whether that information is subject to any of the exemptions to disclosure contained in the FOIA.
12. On 23 January 2012 the Commissioner contacted the complainant to determine whether, considering the substance of the complaint, it could be informally resolved. The complainant responded on 24 January 2012 explaining that he did not wish his case to be informally resolved and stated:

"I can envisage [sic] situations where informal resolution is appropriate, but in my view, a case which relates to simple technical failures would not be one such case."

Reasons for decision

13. Section 1(1) Right to information 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.”
14. During his investigation the Home Office informed the Commissioner that following further consideration it had established that the UKBA “technically” holds some of the information requested by the complainant. The Home Office went on to explain that HMRC “are the owners of the guidance identified as the ‘HMRC Enforcement Handbook’” however officers in the UKBA who carry out criminal investigations follow the procedures set out in the Handbook.
15. The Commissioner therefore concludes that information within the scope of the request is held by the UKBA and should have been considered in accordance with section 1(1).
16. Although the complainant did not question that the UKBA did not hold the requested information he did raise concerns in respect of the UKBA’s initial consideration of section 31(1)(e) as follows:
- “I would find it hard to accept that it had anything to do with immigration controls given the ultimate owner of the information appears to have been HMRC. As explained above the HMRC is concerned with taxation and customs regulations rather than immigration controls and it would therefore be rather odd that they owned and held information relating to the operation of immigration controls that the UKBA did not.”
17. The Home Office provided some historical background information in respect of paragraphs 15 and 16 which the Commissioner considers to be relevant in this case. It explained that the UKBA was formed on 1 April 2008 from the Border & Immigration Agency (BIA), UK Visas and the detection function of HMRC. The subsequent crossover of functions may have contributed to the confusion in the UKBA’s initial consideration of the request in regard of the ownership of and access to the guidance. The Handbook is made available to UKBA officers by different means; former HMRC officers now working in the UKBA have electronic access via their HMRC accounts, but as part of the merger provision was made for former BIA officers to have access to the

Handbook. Consequently all UKBA officers have access to the Handbook (which the Commissioner is satisfied that UKBA holds in its own right) and therefore information within the scope of the request is held by the UKBA.

18. The Commissioner's investigation resulted in the Home Office's determination that information is held which should have been considered in accordance with section 1(1) of the FOIA. The Commissioner accordingly finds the Home Office in breach of section 1(1).
19. The Commissioner is aware that the complainant, as directed by the UKBA, has made a request and a refined request for information from HMRC. However this application does not waive the duty of the UKBA to respond in accordance with the FOIA.
20. 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."
21. The Commissioner notes that in its internal review the Home Office acknowledges that it breached section 10(1) by stating:

"There was however a breach of section 10(1) of the Act as no information was held which required a public interest test of a qualified exemption under the Act to be considered. It is worth adding, however, that this was not a deliberate attempt to delay responding to [the complainant] but due to doubt existing as to the ownership of the information."
22. The Commissioner asked the Home Office for further explanation in respect of the actions of the UKBA and its change in approach. The Home Office explained that there had been a misunderstanding which resulted in the UKBA contacting HMRC to check if it held information within the scope of the request. Discussions between the departments resulted in consideration of section 31(1)(e) before the UKBA decided that it was not obliged to obtain information which it determined, erroneously, that did not hold. This resulted in the delay in response to the complainant.
23. The Home Office explained to the Commissioner that it was after its letter applying the public interest test extension provision that the UKBA determined that it did not hold information within the scope of the FOIA. The UKBA had therefore applied the extension to 40 working days inappropriately. This resulted in a breach of section 10(1) as a response in accordance with section 1(1)(a) was not provided.

Right of appeal

24. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

25. 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.
26. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Alexander Ganotis
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