

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 August 2014

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

Decision (including any steps ordered)

1. The complainant requested information from the Home Office relating to communications and correspondence relating to Hillsborough involving the Home Secretary and two members of the Hillsborough Independent Panel Secretariat, for the period 3-15 September 2012.
2. The Commissioner's decision is that the Home Office correctly withheld the requested information under the exemptions provided by sections 31 and 36 of FOIA but that it breached the statutory time for compliance at section 10(1) of the FOIA.
3. The Commissioner does not require the Home Office to take any steps to ensure compliance with the legislation.

Background

4. With respect to the individuals named in the request, they were Ken Sutton, the Director of the Hillsborough Independent Panel Secretariat (a cross Government secretariat established to support the Independent Panel) and a Senior Executive Officer working to Ken Sutton.
5. The Hillsborough Independent Panel (the Panel) was established by the UK government in January 2010 to oversee the release of documents related to the 1989 Hillsborough football disaster. Its report was published on 12 September 2012.

Request and response

6. On 18 December 2012 the complainant wrote to the Home Office and requested information in the following terms:

"Please disclose all internal communications and correspondence involving Theresa May, including emails, letters, notes of telephone calls etc, from September 3 to September 15 which relate to Hillsborough.

Please disclose all internal communication and correspondence involving Ken Sutton, including emails, letters etc, from September 3 to September 15 which relate to Hillsborough;

Please disclose all internal communication and correspondence involving [name redacted], including emails, letters etc, from September 3 to September 15 which relate to Hillsborough;

Please disclose all external communications and correspondence involving Theresa May, Ken Sutton and [name redacted] from September 3 to September 15 which relate to Hillsborough".

7. The Home Office responded on 23 April 2013. It provided some information within the scope of the request – with names redacted by virtue of section 40 (personal information) - but refused to provide the remainder. It cited the following exemptions as its basis for doing so:
- section 35(1)(a) and (b) (formulation of government policy and ministerial communications); and
 - section 36(2)(b)(i) and (ii) (prejudice to the free and frank provision of advice and exchange of views).
8. On 29 April 2013, the complainant requested an internal review of the Home Office's withholding of information by virtue of sections 35 and 36. He did not dispute the Home Office's application of section 40(2).
9. The outcome of the Home Office internal review is dated 28 June 2013 although the Commissioner understands that the complainant may not have received it until 1 July 2013. The Home Office review upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 2 July 2013 to complain about the way his request for information had been handled. Referring to the timeframe specified in his request, he told the Commissioner:

"These dates are key because they relate to the period shortly before the report was published to shortly afterwards...."

11. On two occasions during the course of the Commissioner's investigation the Home Office provided the complainant with further information within the scope of his request. The Home Office ultimately told the Commissioner that it:

"has disclosed a significant proportion of the information in scope to him".

12. In its substantive response, only provided after the Commissioner had issued an Information Notice, the Home Office also confirmed that it was no longer relying on section 35. However, it stated that it continued to withhold the remainder of the requested information by virtue of the following exemptions:

- section 36(2)(b)(i) and (ii) and 36(2)(c) (other prejudice to effective conduct of public affairs);
- section 40(2) (personal information); and
- section 31(1)(a) (prejudice to the prevention or detection of crime).

13. With the agreement of the complainant, the Commissioner considers the scope of his investigation to be the Home Office's application of sections 31 and 36 to the information the Home Office continued to withhold by virtue of those exemptions after the disclosures referred to in paragraph 11 above had been made

14. He has also considered the time taken to respond to the request and conduct the internal review.

15. The Commissioner is mindful that, at the time of writing this decision notice, there has been a considerable passage of time since the request was first made. He is also aware of developments relating to Hillsborough, for example the commencement of the inquests, that have occurred since the date of the request. Notwithstanding that, the

Commissioner's investigation must take into account the circumstances at the time of the request.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

16. Section 36(2) states:

"Information to which this section applies is exempt information if in the reasonable opinion of a qualified person disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".

17. During the course of the Commissioner's investigation, the Home Office confirmed that it considers that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) all apply in this case.

18. The Commissioner notes that the Home Office considers the exemptions apply as follows:

- section 36(2)(c) to specific exchanges, representing a small part of the withheld information;
- section 36(2)(b)(i) and (ii) to most of the withheld information; and
- section 36(2)(b)(i) and (ii) and section 36(2)(c) to the remainder.

19. Consideration of the section 36 exemption is a two-stage process. First, the exemption must be engaged on the basis of a qualified person having provided a reasonable opinion. Secondly, the exemptions are 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.

The qualified person's opinion

20. To engage section 36, the qualified person must give an opinion that the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur. However, that in itself is not sufficient - the opinion must be reasonable.
21. In determining whether section 36(2) was correctly engaged, the Commissioner must:
 - establish that an opinion was given;
 - ascertain who was the qualified person or persons;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
22. The Home Office explained that the qualified person in this case is the Home Secretary. The Commissioner is satisfied that this is in accordance with the requirements of section 36(5), which sets out who constitutes a 'qualified person' and specifies that for a government department this is any minister of the Crown.
23. The Commissioner understands that, further to the opinion that was sought at the time of the original refusal, a further opinion was sought in this case on 30 April 2014. In other words, the further opinion was sought during the Commissioner's investigation into the Home Office's handling of the request for information and following his issuing of an Information Notice. The second opinion applies to the information that the Home Office continues to withhold taking into account the disclosures made during the course of the Commissioner's investigation.
24. With respect to the timing of that submission, the Home Office told the Commissioner:

"As the position of the Home Office has changed, a separate submission was sent to the Home Secretary to confirm the opinion of the qualified person".
25. The Home Office provided the Commissioner with a copy of that submission to the qualified person and her confirmation that she agreed the engagement of section 36. The Commissioner notes that the opinion, having been sought on 30 April 2014, was given on 20 May 2014.

Is the opinion reasonable?

26. The next step is to consider whether this opinion was objectively reasonable. The approach of the Commissioner here is simply whether it was an opinion that a reasonable person could hold.
27. The Commissioner notes that the submission records that the basis of the opinion was that disclosure of this information *would* – as opposed to *would be likely to* – cause inhibition and prejudice. The Commissioner notes that the opinion covered all limbs of the exemption being relied on in this case – namely 36(2)(b)(i) and (ii) and 36(2)(c).
28. In correspondence with the Commissioner, the Home Office confirmed its view that the qualified person's opinion was that inhibition and prejudice *would*, rather than *would be likely to*, result. For example, with respect to section 36(2)(b) it said:

"Sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged as releasing the information in question would inhibit the free and frank provision of advice and the candid exchange of views".
29. With respect to sections 36(2)(b)(i) and (ii), the Commissioner considers that they concern future inhibition that may or may not be directly related to what is contained within the withheld information itself. A key issue is whether disclosure could inhibit the processes of providing advice or exchanging views. Section 36(2)(c), on the other hand, refers to the prejudice that would *otherwise* apply. The Commissioner considers that if section 36(2)(c) is used in conjunction with any other exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by sections 36(2)(a) or (b).
30. As to whether the advice provided in the submission appears to be relevant to the content of the withheld information, the Commissioner notes first that the discussions recorded within the withheld information were on a sensitive matter. He also accepts that this information reflects that the discussion was free and frank and, therefore, that it was relevant for the qualified person to take into account that disclosure might discourage a similar level of openness by officials in future.
31. With respect to the information withheld by virtue of section 36(2)(c), the Commissioner accepts that the qualified person was provided with relevant arguments on what the effects of disclosure would be, albeit in his view the arguments in the submission refer to the public interest test

- an issue which properly falls to be considered when, or after, the decision has been taken that the exemption is engaged.

32. Notwithstanding his concerns about the quality of the submission to the qualified person, the Commissioner is satisfied that the overall conclusion of the process was correct. In his view it is not unreasonable to engage section 36(2)(b)(i), (ii) and (c) given the range and nature of the communications.

Public interest test

33. The fact that the exemption is engaged by the qualified person's opinion does not automatically mean that the information should be withheld. The public interest test is separate from the qualified person's opinion.
34. The Commissioner has gone on to consider, in accordance with section 2(2)(b) of FOIA, whether the public interest requires disclosure, despite the valid application of the exemption.

Public interest arguments in favour of disclosing the requested information

35. In favour of releasing the information at issue, the complainant said that in his view the public interest can only be served by full disclosure:

"It is clearly in the public interest to know how the Home Office and the government prepared for the panel's report ..."

36. He also stated:

"It is said by the Home Office that the public interest "would not be served in this instance by prejudicing the ability of public inquiries to conduct and record such thorough and candid discussions".

The Home Office's arguments go against the very idea of the panel and the panel's report, which was about the maximum disclosure of documentation on the Hillsborough disaster (transparency) and what that documentation adds to the public understanding of what happened.

And please note that the timescale for my request relates to September 3 - September 15. The report had been finalised by these dates and the venue and timing decided for its release and publication..... It can only be in the public interest for the Home Office's discussions pre and immediately after the panel's report to be released, so the public - and families - have confidence that was is [sic] being said in public matches what is said in private and that

the discussions held were fair and balanced. It is also of note that the Home Office is trying to protect the content of these discussions because of their candidness”.

37. In correspondence with the complainant, the Home Office acknowledged:

“The work of the Home Office in considering what caused serious incidents such as the Hillsborough disaster, and whether there is a need for changes to how police forces and emergency services operate is of significant public interest. It can therefore be argued that it is in the best interests of the public to release information that helps demonstrate how the Department is taking effective action in relation to the findings of the Panel, to secure justice for those affected by the disaster”.

Public interest arguments in favour of maintaining the exemption

38. In favour of maintaining the exemption, the Home Office told the complainant:

“The ability of the Hillsborough Panel to ascertain the truth in relation to the disaster is dependent on the ability to exchange free and frank views and opinions within the Department and with all of those involved; police, ambulance service, survivors, and the families of victims. Ministers, officials and partners such as the police service need to be able to undertake rigorous and candid discussions. Much of the information has been generated in an environment where views have been expressed in a ‘free and frank’ manner. They would not have done so if they suspected that, only a few months later those views would be publicly disclosed. The public interest would not be served in this instance by prejudicing the ability of public inquiries to conduct and record such thorough and candid discussions. Premature disclosure would undermine the relationships which were built up between the Panel and the families, or even between the families themselves”.

Balance of the public interest arguments - section 36(2)(b)

39. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

40. 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.
41. The Commissioner notes that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, he must give weight to that opinion as a valid piece of evidence in his assessment of the balance of the public interest.
42. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner must consider the severity, extent and frequency with which prejudice to the effective conduct of public affairs will, or may, occur.
43. In the Commissioner's view, the fact that this information relates to the Hillsborough disaster is a significant factor in favour of disclosure. It remains the case that matters relating to Hillsborough are a topic of considerable public interest.
44. With respect to the timeframe covered by the withheld material, the Commissioner acknowledges that it covers the lead up to publication of the Panel's report and immediately after its release. He therefore gives weight to the public interest in maintaining the space for the free and frank discussions relating to the work of the Panel around that time – a significant event in the life of the Panel.
45. The Commissioner recognises that those individuals concerned would want to ensure that suitable arrangements were made in the lead up to the report and after its release. In the Commissioner's view, there is limited public interest in the disclosure of detailed email traffic regarding administrative arrangements. Similarly, he considers that there is no useful purpose served by external scrutiny of that email traffic.
46. For other information within the withheld material, the Commissioner acknowledges that the public interest - both in favour of maintaining the exemption and in disclosure - is more substantial. In that respect, the Commissioner accepts that the requested information relates to issues that were recent at the time of the request. In balancing the public interest, he considers that this adds weight to the public interest arguments in favour of maintaining the exemption.
47. The Commissioner recognises the need for a safe space to develop ideas and reach decisions away from external interference and distraction. For example, he considers that the ability to 'fine tune' briefing papers could

be compromised if officials did not feel able to provide full and frank information relating to such matters.

48. Furthermore, the Commissioner has taken into account that the approach taken in relation to the Hillsborough disaster - with respect to the setting up of an independent panel to oversee the disclosure of information - represented a new approach. He recognises the public interest in maintaining the integrity of the panel process in future.
49. Having accepted that the qualified person's opinion that prejudice would result was reasonable, the Commissioner has concluded that, in this instance, the public interest in avoiding that prejudice outweighs the public interest in disclosure. Therefore the public interest in maintaining the exemption outweighs that in the disclosure of the withheld information and so the Home Office was not obliged to disclose the information withheld by virtue of section 36(2)(b)(i) and (ii).

Balance of the public interest arguments - section 36(2)(c)

50. The Commissioner has next considered the balance of the public interest in respect of the small amount of information withheld only by virtue of section 36(2)(c).
51. As above, the Commissioner accepts that there will always be some public interest in there being transparency in the ways public authorities conduct their business. He recognises that disclosure could increase confidence in how the Panel was supported in its work.
52. He is also mindful that, both at the time of the request and still at the time of writing, the withheld information relates to sensitive and live issues.
53. Having accepted that the qualified person's opinion that prejudice would otherwise result was reasonable, the Commissioner has concluded that, in this instance, the public interest in avoiding that prejudice outweighs the public interest in disclosure. Therefore, the public interest in maintaining the exemption outweighs that in the disclosure of the withheld information and so the Home Office was not obliged to disclose the requested information withheld by virtue of section 36(2)(c).

Section 31 law enforcement

54. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. In this case the Home Office considers that section 31(1)(a) applies to a small amount of information.

55. Section 31(1)(a) states:

"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".

56. In order for the exemption to be engaged, the Home Office must show that the prejudice it is envisaging affects the particular interest that the exemption is designed to protect.

57. In applying this exemption, the Home Office told the complainant:

"We have also made some minor section 31 (Law Enforcement) redactions regarding details and capability of some IT systems".

58. With respect to the nature of the prejudice, the Home Office told the Commissioner that disclosure "would give insight to those that might wish to damage or bring down" relevant IT systems.

59. In correspondence with the Commissioner, the Home Office confirmed its view as to which of the two limbs on which a prejudice-based exemption might be engaged is relevant. In this case it considers that the higher level of likelihood - would prejudice - applies.

Is the exemption engaged? Would disclosure prejudice law enforcement?

60. The Commissioner accepts that the Home Office's arguments relate to the law enforcement activity that the exemption is designed to protect – the prevention or detection of crime.

61. The information withheld by virtue of this exemption comprises information relating to IT systems and the online publication of the report. While not providing an expert opinion on technical matters such as these, having considered the information at issue, the Commissioner is satisfied that prejudice would result through its disclosure.

62. In the circumstances of this case the Commissioner is satisfied that the exemption is engaged.

The public interest test

63. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

64. The Home Office did not put forward any arguments in favour of disclosing the requested information.

Public interest arguments in favour of maintaining the exemption

65. The Home Office argued that it would not be in the public interest to release information that could, for example, make Home Office systems a target for crime.

Balance of the public interest arguments

66. The Commissioner acknowledges that there are public interest arguments for disclosure in this case based on the general principles of accountability and transparency. He also recognises the public interest in this information to the extent that it relates to the Hillsborough Report. In contrast, however, in the Commissioner's view, there will always be strong grounds for protecting information that may result in the prevention and detection of crime.
67. Having given due consideration to the opposing public interest factors in this case, the Commissioner's decision is that the public interest in avoiding prejudice to the prevention and detection of crime outweighs the public interest in disclosure in all the circumstances of this case.

Section 10 time for compliance

68. The complainant submitted the request for information to the Home Office on 18 December 2012.
69. In bringing his complaint to the Commissioner's attention, the complainant explained:

"I was subsequently sent a series of delaying letters stating that the Home Office required more time to consider the public interest in disclosure".

70. Requests for information should normally be dealt with within 20 working days. However, section 10(3) enables an authority to extend the 20 working day limit up to a 'reasonable' time in any case where it requires further time to consider whether the balance of the public interest favours maintaining an exemption or disclosing the requested information.
71. The FOIA does not define what might constitute a 'reasonable' extension of time. However, the Commissioner's view is that a public authority

should take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days.

72. The Commissioner is aware that the Home Office wrote to the complainant on at least two occasions, namely 17 January 2013 and 26 February 2013, to extend the time for responding in order to consider the public interest test. However, it was not until 23 April 2013 that the Home Office provided its substantive response to the complainant.
73. Asked to explain why it took so long to respond to the request, the Home Office told the Commissioner that the request:
- "captured a broad range of information, requiring detailed and wide consideration regarding it's potential disclosure".*
74. The Commissioner acknowledges that the request in this case was broad in nature, that the information within the scope of the request comprises a significant volume of correspondence and covered a high profile subject matter. Nevertheless, he considers that the Home Office failed to respond to the complainant in a timely manner.
75. Because the Home Office issued a public interest extension notice and then took unreasonable time to communicate the outcome of the public interest test, the Commissioner finds the Home Office breached sections 10(1) and 17(3) of the FOIA.

Other matters

76. Following the Commissioner's intervention, the Home Office told the complainant:
- "The wording of your request was quite broad and therefore caught a significant amount of information in scope (requiring some broad considerations)".*
77. The Home Office also referred to *"the volume of material requested and the number of interested parties"* as a reason for the length of time taken in its handling of this request.
78. Although he acknowledges the complexities of this case, the Commissioner is disappointed with the level of engagement shown by the Home Office during its handling of the request.

79. The Commissioner would expect the Home Office to have due regard to the statutory time limits for responding in its future handling of requests.

Right of appeal

80. 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: www.justice.gov.uk/tribunals/general-regulatory-chamber

81. 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.
82. 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

Graham Smith
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