

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 April 2018

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

Decision (including any steps ordered)

1. The complainant requested from the Home Office the annual cost of chartered deportation flights for 2016. The Home Office withheld the information under Section 43(2) of the FOIA.
2. The Commissioner's decision is that the Home Office has incorrectly applied Section 43(2) of the FOIA.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the information requested by the complainant on 24 February 2017.
4. The public authority must take this step 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

5. On 24 February 2017, the complainant wrote to the Home Office and requested information in the following terms:

"... would like to request the following information under the Freedom of Information Act 2000.

Home Office charter operations January through December, there were a total of 35 flights.

What was the total cost of these flights?"

6. The Home Office acknowledged the request on the same day. It stated that it aimed to issue a full response by 27 March 2017.
7. On 27 March 2017 the Home Office wrote to the complainant and acknowledged that the request was for the cost of chartered flights between January and December 2016. It said the request was being considered under the exemption in Section 43 of the Act, relating to commercial confidentiality and that it needed to consider the public interest test fully as this was a qualified exemption. The Home Office then advised the complainant that it needed to extend the 20 working day response period and aimed to let him have a full response by 21 April.
8. The complainant contacted the Commissioner on 11 May 2017 to complain about the way his request for information had been handled.
9. Following receipt of the complaint, the Commissioner contacted the Home Office, reminding it of its responsibilities and asking it to respond to the complainant within 10 working days.
10. As the Home Office did not send a substantive response, the Commissioner issued a Decision Notice under reference FS50681072¹ dated 19 September 2017 ordering it to do so.
11. The Home Office wrote to the complainant on 2 October 2017 stating it was withholding the requested information (comprising of the global figure for chartered deportation flights from January 2016 to December 2016) under Section 43(1) of the FOIA.
12. On 3 October 2017 the complainant requested an internal review and pointed out that cost of chartered flights for the 5 years from 2011/12 and 2015/16 had already been made available through parliament in Hansard².

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014881/fs50681072.pdf>

² <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-06-24/41221/>

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-06-24/41223/>

13. The Home Office responded on 27 October 2017. It stated that its original response was not correct as Section 43(1) only applied to part of the requested information. It pointed out that as the figures for January 2016 to March 2016 had already been published by Hansard it was applying Section 21(1) to the remainder of the information as it was reasonably accessible to the complainant.

Scope of the case

14. The complainant contacted the Commissioner on 1 November 2017 to complain about the way his request for information had been handled.
15. The Commissioner contacted the Home Office on 12 January 2018 and requested a copy of the withheld information together with any further arguments it wished raise in support of its application of Sections 21 and 43 of the FOIA. The Commissioner also queried the Home Office's application of Section 21 and invited it to reconsider its position in view of the fact that the annual cost of chartered removal flights for previous years was already in the public domain.
16. The Home Office responded on 2 March 2018. It agreed that Section 21 was not engaged but said it remained of the view that it was entitled to withhold the entirety of the requested information under Section 43(2) of the FOIA.
17. Having been given a further opportunity to reconsider its position and raise additional arguments by the Commissioner, the Home Office responded on 12 March 2018 and stated it had nothing to add.

Reasons for decision

Section 43(2) of the FOIA – prejudice to commercial interests

18. The Home Office has argued in this case that disclosure of the requested information would be likely to prejudice its own interests and those of two separate third parties.
 19. Section 43 (2) of the FOIA states:
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"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)."

20. The Commissioner's FOIA Awareness Guidance No. 5 states that a 'person' may be an individual, a company, the public authority itself or any other legal entity.³

Is the exemption engaged?

21. The first question for the Commissioner to consider is whether the exemption at Section 43(2) has been engaged. In order to do this she considers that there are three criteria that must be met.
- Firstly, 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 – e.g., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
22. Furthermore, when a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, the

³ https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

Commissioner expects that arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.

Does the information relate to a commercial interest?

23. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case the withheld information relates to the annual cost to the Home Office of chartering departure flights for 2016. The Commissioner is satisfied that this information relates to a commercial activity.

Is there a causal link between disclosure of the requested information and prejudice to commercial interests?

The Home Office's commercial interests

24. The Home Office has argued that disclosure of the requested information would be likely to prejudice its commercial interests by making it more difficult or more expensive or both to manage the process of chartering aircraft for removal flights. It pointed out that deportations can be a sensitive issue and in some cases can attract media and other attention including demonstrations targeted at airlines. By way of an example, it referred to an article in the Independent⁴.

Third parties interests

25. The Home Office has said it only uses selected third party carriers for removals from the UK and has argued that they would not wish to draw attention to the fact as it would be likely to damage their commercial interests. The Home Office explained that they mainly used two third parties one of which they had already approached for its comments.

26. The third party approached by the Home Office commented;

'Our position on this would be that this is sensitive information that would not be in the public interest and we would not be comfortable in releasing it.....We have experienced first-hand the disruption that any information relating to charters can have when it gets into the public

⁴ <https://www.independent.co.uk/news/uk/home-news/samim-bigzad-man-deportation-pilot-stopped-campaigners-target-airlines-afghanistan-home-office-a7921076.html>

domain (the protesters that broke into Stansted⁵ and (redacted) phone network being taken down by the sheer amount of calls they received from campaign groups opposed to deportation charters). These are two very real examples where under different circumstances, could have had a profound effect on our ability to operate these flights'.

27. The Commissioner contacted the Home Office on 5 March 2018 and pointed out that the above statement from the third party did not explain why disclosure of the requested information would have a profound effect on its ability to operate deportation flights. The Commissioner pointed out that the requested information does not reveal anything about the Home Office's contract with its third parties, the identity of the third parties, the departure airports, the airlines used, the flight destinations or the identity of any of the deportees. The Commissioner therefore invited the Home Office to ask the third party it had approached to explain why the requested information comprising of a single figure representing the total annual cost of chartered departure flights for 2016 would be likely to prejudice its commercial interests.
28. The Commission noted that the Home Office had not sought any evidence of prejudice to commercial interests from the other third party it had named.
29. The Commissioner pointed out to the Home Office that very similar information to that requested by the complainant for 2011/12, 2012/13, 2013/14, 2014/15 and 2015/16 had been in the public domain as a result of questions answered in Parliament and recorded in Hansard⁶. The Commissioner therefore asked the Home Office whether it or its third parties had experienced any greater difficulty or expense in managing the process of chartering aircraft for removal flights since this information had been placed in the public domain in July 2016.
30. The Home Office responded to the Commissioner's questions as described above on 12 March 2018 stating that it had nothing further to add to its position and awaited the ICO's decision. However, it did state in an earlier communication that different considerations applied in relation to answering Parliamentary questions on the one hand and answering requests under the FOIA on the other. It pointed out that it

⁵ <http://www.dailymail.co.uk/news/article-4363384/Police-charge-17-people-Stansted-runway-protest.html>

⁶ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-06-24/41223/>

could not cite FOIA exemptions in answering parliamentary questions even if it considered that publication of the information would or would be likely to cause prejudice. If it did consider this to be the case and that an FOIA exemption was engaged (as in the present case) it believed the correct course of action would be to apply it after considering the balance of the public interest. The Home Office accepts this would not be the case if the exact information had already been published in response to a parliamentary question. In such a case it would cite Section 21(1) of the FOIA (information reasonably accessible to the requestor).

31. The Commissioner accepts that deportation can be a sensitive issue and is aware that in some cases it has attracted media and other attention. However, the Commissioner is not persuaded by the arguments advanced by the Home Office that there is a causal link between disclosure of the requested information and prejudice to its commercial interests and those of its third parties. The requested information consists of a single figure for the total annual cost of chartered departure flights for 2016. It does not reveal the Home Office's contract with its third parties, the identity of the third parties, the departure airports, any of the airlines used, the flight destinations or the identity of any of the deportees. Furthermore, similar information for previous years has been in the public domain since at least July 2016 and the Home Office has not been able to explain whether this has caused any prejudice its commercial interest and/or those of its third parties.

32. The Commissioner is therefore not satisfied that the prejudice alleged by the Home Office is real and of substance, and there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect. Even if a causal link can be established she must still establish whether disclosure would, or would be likely to result in the prejudice alleged (e.g. the third criterion).

Would disclosure of the requested information result in or be likely to result in prejudice to commercial interests?

33. The Home Office has argued that disclosure of the requested information would be likely to prejudice its commercial interests.
34. With regard to the Home Office's two identified third parties, it has stated that disclosure would be likely to damage their commercial interests.
35. With regard to the third criterion, the Commissioner has considered the Home Office's submissions and the statement given by one of its two third parties. However, she is not persuaded from these submissions that the possibility of prejudice occurring is real and more than a hypothetical possibility.
36. Therefore, the Commissioner finds that the exemption was not correctly engaged.

Right of appeal

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

38. 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.

39. 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

**Deborah Clark
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Cheshire
SK9 5AF**