

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 October 2011

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

Summary

The complainant requested information about the nationalities covered by a Ministerial Authorisation. The Home Office confirmed it held the information but withheld it citing the exemptions in sections 27 (international relations) and 31 (law enforcement). The Commissioner has investigated and has not found the exemptions engaged in respect of some of the information. He orders that information to be disclosed.

Background

1. The Authorisation referred to in the request is the *Race Relations (Northern Ireland) (Transit Visa, Entry Clearance, Leave to Enter, Examination of Passengers and Removal Directions) Authorisation 2011*. The Authorisation came into operation on 10 February 2011.
2. The Authorisation enables the UK Border Agency (UKBA) to give greater scrutiny or priority to particular nationalities in carrying out entry clearance, border control and removals functions than it does to others.
3. The nationalities covered by the Authorisation are reviewed each quarter by the UK Border Agency and submitted for ministerial approval.

The Request

4. The Commissioner notes that under the Act the UK Border Agency (UKBA) is not a public authority itself, but is actually an executive

agency of the Home Office which is the public authority responsible for the UKBA.

5. The complainant wrote to the UKBA on 5 April 2011 in relation to the *Race Relations (Northern Ireland) (Transit Visa, Entry Clearance, Leave to Enter, Examination of Passengers and Removal Directions) Authorisation 2011*.

"To this end are conscious that paragraph 7 of the Authorisation sets out the criteria (or conditions) for a particular nationality to be included on the list but does not set out the list of nationalities presently included on the list. we would therefore seek a copy of the present list of nationalities approved by the Minister and the accompanying evidence base for the same".

6. In its response of 5 April 2011, UKBA told the complainant:

"the lists of nationalities covered by the authorisation are not published for operational reasons".

7. It explained that publication could adversely affect the UK's bilateral and multilateral relations and could adversely affect UKBA's efforts to tackle organised immigration crime.
8. The complainant requested an internal review on 20 April 2011. The Home Office upheld UKBA's decision in its internal review correspondence which it sent to the complainant on 9 May 2011.

The Investigation

Scope of the case

9. The complainant contacted the Commissioner on 10 May 2011 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the issue of the public interest, in particular the complainant's ability to discharge its functions to review and advise on the Authorisation.
10. Notwithstanding any statutory functions the complainant may have concerns about, the Commissioner's investigation must take into account the fact that disclosure under the Freedom of Information Act is effectively an unlimited disclosure to the public at large. The wider public interest issues must therefore be considered when deciding whether or not the information requested is suitable for disclosure.

11. The Authorisation refers to a list of nationalities in Paragraphs 7 and 8. The wording of the complainant's request refers specifically to the information relevant to Paragraph 7.
12. The scope of the Commissioner's investigation, therefore, is with respect to whether the Home Office dealt with the request for information in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). Accordingly, he has considered the Home Office's citing of the international relations exemption and the law enforcement exemption in sections 27 and 31 of the Act respectively.

Analysis

Exemptions

13. The Home Office is relying on the exemptions in section 27 and 31 in relation to all of the withheld information in this case. The Commissioner has first considered its citing of section 27.

Section 27 (international relations)

14. Section 27(1)(a) provides that information is exempt if its disclosure would or would be likely to prejudice relations between the UK and any other State. In other words, it focuses on the effect of disclosure rather than the nature of the information itself.
15. The Commissioner considers that international relations of the UK cover a wide range of issues relating to, for example:
 - UK policy and strategic positioning in relation to other states;
 - diplomatic matters between states;
 - international trade partnerships; and
 - consular matters in relation to UK citizens abroad or visitors to the UK.
16. In the Commissioner's view, prejudice under this exemption can be real and of substance if it makes international relations more difficult or calls for a particular diplomatic damage limitation exercise.
17. In considering the matter of prejudice, the Commissioner has followed the three-stage process as set out in his guidance.
18. In this case, he accepts that the relevant applicable interests are in relation to the countries which appear on the list and evidence base.

19. The Home Office submitted its arguments with respect to the effect of disclosure on the applicable interests. Having considered these arguments, and the withheld information, the Commissioner does not accept that the effect of disclosure will be detrimental or damaging in relation to all of the countries listed. He therefore does not find the exemption engaged with respect to those countries which for the purposes of this Decision Notice the Commissioner will refer to as the "non-detriment countries".
20. With respect to the entries where he does find the effect of disclosure detrimental or damaging - the "detriment countries" - the Commissioner accepts that disclosure of that information would be likely to have a prejudicial effect. The Commissioner therefore finds the international relations exemption engaged with respect to those countries. He has therefore gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

21. The Home Office recognised that disclosure would be in the interests of transparency:

"Disclosure of the lists would allow greater public scrutiny of UKBA's immigration control processes and as such could provide greater understanding for the public of how UKBA functions."

Public interest arguments in favour of maintaining the exemption

22. Arguing in favour of maintaining the exemption, the Home Office said that disclosure:

"has the potential to harm the relationship the UK Government has with some or all of the countries who are named on the list".

23. The complainant disagreed, stating:

"obviously if the UK targets the citizens of a particular country without setting out a reasonable and objective justification, that is likely to be met by objections by the state concerned..... However, if the UKBA genuinely believes it has a reasonable and objective justification for making the distinction, demonstrating this should mitigate against any such adverse impact".

Balance of the public interest arguments

24. When balancing the opposing public interests in this case, the Commissioner is deciding whether it serves the public interest better to

disclose the requested information or withhold it because of the interests served by maintaining the relevant exemption.

25. In reaching his decision in this case, the Commissioner accepts that the requester has strong reasons for wishing to pursue the requested information. He also accepts that there is clearly a public interest in the accountability and transparency of the Home Office for the decisions it takes, such as deciding which countries to include on the Authorisation's lists.
26. However, the Commissioner also considers that it is strongly in the public interest that the UK maintains good international relations. In this case, the Commissioner considers that the effective conduct of the UK's bilateral relations and international engagement in the sensitive issues surrounding migration and border security would be compromised if the requested information about the "detriment countries" were made known. He therefore finds the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 31 Law enforcement

27. As the Commissioner has concluded that the Home Office incorrectly applied the international relations exemption to the "non-detriment countries", he has gone on to consider the other exemption also cited by the Home Office with respect to that information.
28. The Home Office is relying on section 31(1)(e): that sub-section of the Act creates an exemption from the right to know if releasing the information would or would be likely to prejudice the operation of the immigration controls.
29. In correspondence with the complainant, the Home Office argued that disclosure would adversely affect its efforts to tackle organised immigration crime. It told him:

"If the lists were disclosed, organised criminal groups could seek to make greater use in their criminal operations of nationalities – or of false documentation for nationalities – not on the lists as they might thereby receive lesser scrutiny from the UK Border Agency".
30. In support of this argument, the Home Office provided the Commissioner with information about the number of false document detections made at visa posts in the financial year 2010/11. However, it did not provide any convincing evidence in support of its argument about the risk posed to UKBA's work by organised crime groups as a result of disclosure.

31. The Commissioner accepts that UKBA is responsible for securing the UK border and controlling migration in the UK. However, he does not consider that the Home Office has demonstrated sufficiently how prejudice to the operation of the immigration controls would result from disclosure of the information in this case. He therefore does not find the law enforcement exemption engaged. As he has reached this conclusion, it has not been necessary to go on to consider the public interest.

The Decision

32. The Commissioner's decision is that the Home Office correctly applied section 27 to the "detriment countries". However, he finds neither the international relations exemption nor the law enforcement exemption engaged with respect to the "non-detriment countries".

Steps Required

33. The Commissioner requires the public authority to provide the complainant with details of the "non-detriment countries" to ensure compliance with the Act. For the avoidance of doubt, these countries are listed in a Confidential Annex which will be provided to the Home Office only.
34. The Home Office must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Failure to comply

35. 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.

Other matters

36. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
37. UKBA's correspondence of 5 April 2011 did not provide the complainant with the explanation and details he was entitled to receive in a refusal notice. For example, UKBA did not clearly explain that it had handled his

request as a request for information under the Act. Nor did it provide him with details of its appeals process.

38. The Commissioner would remind all public authorities of his guidance on writing a refusal notice:

http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/writing_a_refusal_notice_v2_20100322.pdf

39. By way of explanation for the way in which it responded to the request, the Home Office brought to the Commissioner's attention the source of the request. It accepted, however, that it should have made it clearer whether the request was being refused formally under the Act.

Right of Appeal

40. 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

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 13th day of October 2011

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
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Cheshire
SK9 5AF**