

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 31 August 2010

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

Summary

The complainant requested the electronic template for passport photographs and the technical specifications for passport photograph measurements. Following the intervention of the Commissioner, the public authority disclosed the photograph template. In relation to the technical specifications for photograph measurements, the public authority cited the exemptions provided by sections 31(1)(a) (prejudice to the prevention or detection of crime) and 31(1)(e) (prejudice to the operation of the immigration controls). The Commissioner finds that these exemptions were applied appropriately and the public authority is not required to take any steps. However, the Commissioner also finds that the public authority did not comply with the requirements of sections 1(1)(b), 10(1), 17(1)(c) or 17(3)(b) in its handling of the request.

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. The complainant made the following information request on 16 May 2008:

“(1) Provision of electronic version of Post Office [passport] photo template

You have confirmed that you hold this information. Please send me the information requested as required under Section 1 of the Freedom of Information Act, otherwise issue me with a Exemption Refusal Notice.

If you are relying on the latter please let me know which exemption under the FOI Act you are relying on, and when you expect to publish the template on your website.

(2) Provision of technical specification for [passport] photo measurements

i) Please confirm or deny whether the [Identity and Passport Service] holds the information requested. Bear in mind that I have not asked for details of the ISO Standard itself, I requested a technical spec for IP&S's implementation of the ISO Standard.

ii) Either send me the information requested or issue me with a proper refusal notice specifying which exemption under the FOI Act you are relying on.”

3. The public authority responded to this on 16 June 2008. In response to request (1), the public authority cited the exemption provided by section 43(2) (prejudice to commercial interests). In response to request (2), the public authority cited section 31(1). Whilst no subsections of 31(1) were specified, it was evident from the wording of the refusal notice that the public authority believed sections 31(1)(a) (prejudice to the prevention or detection of crime) and 31(1)(e) (prejudice to the operation of the immigration controls) to be engaged. The public authority failed to adequately explain why either of the exemptions cited were believed to be engaged, or why the balance of the public interest was believed to favour these exemptions.
4. The complainant responded to this on 21 June 2008 and requested that the public authority carry out an internal review of its handling of his information request. After a grossly excessive delay and following the intervention of the Commissioner to ensure that the public authority

completed the internal review, the public authority responded with the outcome of the review on 25 September 2009. In relation to request (1), the public authority stated that section 43(2) had been cited in respect of a new version of the passport photo template that was in development at the time of the request. The public authority now withdrew the citing of section 43(2) in relation to this document, and instead cited section 22(1) (information intended for future publication) as the intention at the time of the refusal notice was that the new template would be published once it was finalised. The complainant was directed to where the new template was now available. In relation to the version of the template that was in use at the time of the request, the public authority stated that this had been publicly available at that time, but did not supply a copy of this template to the complainant, or provide any reasoning for not supplying this. In relation to request (2), the refusal was upheld with sections 31(1)(a) and 31(1)(e) now cited specifically. Whilst the response stated that an annex was attached which explained the application of these exemptions, this annex was not supplied to the complainant.

The Investigation

Scope of the case

5. The complainant initially contacted the Commissioner in connection with the failure by the public authority to carry out a timely internal review. As referred to above, the Commissioner intervened at that stage to ensure that the public authority completed the internal review. After having received the outcome of the internal review, the complainant contacted the Commissioner on 14 October 2009 and confirmed that he wished to complain about the refusal of his requests. The complainant specified the following grounds for complaint:
 - In relation to the version of the photo template that had been in place at the time of the request, the complainant felt that there was no reason why this could not now be disclosed to him.
 - In relation to the new version of the photo template, the public authority had not informed the complainant when this was made available on its website, which the complainant believed to be a failure by the public authority to abide by the duty to provide advice and assistance imposed by section 16(1).
 - The complainant did not believe that the public authority had carried out an adequate prejudice test in relation to sections 31(1)(a) and 31(1)(e) or public interest test when refusing the

request for the technical specification of the photo measurements.

- The complainant also raised the delay to the internal review and the quality of the refusal notice.
6. As noted above, the complainant was directed to where the new version of the template specified in request (1) was available online in the internal review response. At the time that the complainant contacted the Commissioner's office, he had not been provided with a copy of the template that was in use at the time of the request, despite the public authority having stated at internal review stage that its position was that this was not exempt by virtue of section 43(2). At the instigation of the Commissioner, the public authority provided to the complainant a copy of the template that was in use at the time of his request. Request (1) was resolved at that stage and so is not covered further in this Notice, save where the procedural breaches in the handling of this request are recorded.

Chronology

7. The Commissioner's office contacted the public authority in connection with this case on 27 January 2010. The public authority was asked to respond with further explanations for the exemptions cited and to supply to the Commissioner's office a copy of the withheld information.
8. The public authority responded to this on 24 February 2010 and explained that the information it held that fell within the scope of the request was in two locations; some information was held by the Identity and Passport Service (IPS), a Home Office agency, and other information was held by a private company that acted as a supplier to IPS. The public authority stated that it had approached the information held by the supplier as held on its behalf for the purposes of section 3(2)(b) of the Act. The public authority provided to the Commissioner's office the information held by IPS, which was in the form of computer code, and explained that the information held by the supplier was also in the form of computer code. A copy of this information was not provided to the Commissioner's office.
9. The public authority confirmed that it believed this information to be exempt by virtue of sections 31(1)(a) and (e). In explanation for the citing of these exemptions, the public authority provided the annex referred to in the internal review response, but that had been omitted from the response sent to the complainant.

Analysis

Substantive Procedural Matters

Section 3

10. The public authority has stated that information falling within the scope of the request is held on its behalf by a supplier and therefore section 3(2)(b) provides that this information is held by the public authority for the purposes of the Act. The Commissioner accepts these representations from the public authority and agrees that the information in question is held on the behalf of the public authority. In line with section 3(2)(b), this information is, therefore, considered held by the public authority for the purposes of the Act. The analysis in this Notice covers both the information held by the public authority and that held by a supplier on behalf of the public authority.

Exemptions

Section 31

11. The public authority has cited sections 31(1)(a), which provides an exemption for information the disclosure of which would, or would be likely to, prejudice the prevention or detection of crime, and 31(1)(e) which provides the same in relation to the operation of the immigration controls. Consideration of these exemptions is a two stage process; first, the exemption must be engaged, meaning that disclosure of the information in question must be at least likely to result in prejudice to the process described in the exemption. Secondly, this exemption is qualified by the public interest. This means that the information in question must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
12. Turning first to whether the exemptions are engaged, the public authority has specified that it believes that prejudice *would* result, rather than *would be likely* to result. The test that the Commissioner applies when considering whether prejudice would result is that this must be at least more probable than not. If the Commissioner concludes that prejudice would not be more probable than not, he will go on to consider the test for would be likely to prejudice, which is that the possibility of prejudice must be real and significant and certainly more than hypothetical or remote. The Commissioner believes that applying these tests is in line with the approach taken by the Information Tribunal in the following cases:

"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005) (paragraph 15);

"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." Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 and EA/2005/0030) (paragraph 36)

13. The Commissioner has taken a three step approach to determining whether the exemptions are engaged. First, he has considered whether the arguments advanced by the public authority are relevant to the prejudice described in sections 31(1)(a) and (e). Secondly, he has considered whether it is possible that the outcome of disclosure predicted by the public authority could result and, finally, he has considered whether the likelihood of this outcome occurring as a result of disclosure is more probable than not, or real and significant.
14. The public authority believes that prejudice would result through disclosure as this would enable the production of 'spoof' passport photographs. This could then lead to passport fraud through enabling the manipulation of passport photographs resulting in, for example, multiple people being able to match to a single photograph, or assist a single person is applying for multiple passports under different identities. The Commissioner accepts that this prejudice predicted by the public authority would impact upon the prevention of crime by facilitating the crime of passport fraud, and upon the operation of the immigration controls by disrupting the security of the passport system, a central part of the immigration controls. The arguments advanced by the public authority are, therefore, relevant to sections 31(1)(a) and (e).
15. As to whether it is possible that this prejudice could arise through the disclosure of this information, as covered above, the Commissioner has viewed the part of the information that falls within the scope of the request that is held by the public authority. This consists of computer programming code. Whilst the Commissioner has not viewed the information held on behalf of the public authority by a supplier, he understands that this also consists of code. The Commissioner accepts that this code would provide sufficient information to enable manipulation by an appropriately skilled individual of the system for verification of passport photographs, and so also accepts that the prejudice predicted by the public authority is possible.

16. Turning to the likelihood of this prejudice occurring, the Commissioner has considered here what likelihood there is of any person attempting to utilise the information in question to manipulate the passport photo verification system. On this point the Commissioner notes that in a press release¹ the public authority stated that there were 6,500 detected attempts to commit passport fraud during 2006. The Commissioner takes this as evidence that passport fraud (actual or attempted) is widespread and commonplace. On this basis the Commissioner accepts that it is probable that there would be those who would seek to utilise the information in question to attempt passport fraud and that it is more probable than not that prejudice relevant to sections 31(1)(a) and (e) would occur as a result of disclosure of the information in question here. The conclusion of the Commissioner is, therefore, that the exemptions provided by sections 31(1)(a) and 31(1)(e) are engaged.

The public interest

17. Having found that the exemptions are engaged, it is necessary to go on to consider whether the balance of the public interest favours the maintenance of these exemptions. In forming a conclusion on the public interest, the Commissioner has taken into account the public interest inherent in the exemptions, that is the public interest in avoiding prejudice to the prevention or detection of crime and to the operation of the immigration controls that the Commissioner has accepted would occur as a result of disclosure of the information in question. He has also taken into account those factors that relate to the specific information in question, as well as the general public interest in favour of disclosure on the basis that this would improve the transparency of the public authority.
18. The security of the borders of the UK was a current issue at the time of the request with all major political parties espousing policies designed to control illegal immigration. The Commissioner believes that this is relevant to the balance of the public interest here in the following ways. First, it can be cited as an argument in favour of the maintenance of each exemption (which are sufficiently closely related that the Commissioner believes that the same factors apply in relation to both) in that disclosure of the information in question could harm attempts to control illegal immigration, contributing to the likelihood of the prejudice described in each exemption. This would be counter to the public interest and so is a valid public interest argument in favour of maintenance of the exemptions.

¹ <http://press.homeoffice.gov.uk/press-releases/target-passport-fraud>

19. However, this factor can also be cited in favour of disclosure. That the security of the UK borders was a live issue at the time of the request means that there was a valid public interest in understanding the measures that were in place to ensure border security, which obviously included passports. Disclosure of the information in question would serve this public interest.
20. The complainant has advanced an argument that the public interest favours disclosure as this would improve public understanding of the steps taken to improve border security on the specific ground that this would reveal what steps have been taken to ensure compliance with the International Civil Aviation Organisation (ICAO) standard for passports. The ICAO standard is publicly available and provides for worldwide consistency of machine readable passports. The Commissioner accepts that there is a valid public interest in disclosure on the basis that this will improve public understanding as to whether the technical specifications requested are appropriate and in line with the relevant standards, including the ICAO standard.
21. The conclusion of the Commissioner is that the public interest in the maintenance of the exemptions outweighs the public interest in disclosure. The Commissioner has recognised valid public interest in the disclosure of the information in question on the grounds that this would provide for public understanding of the steps that have been taken to ensure security of the UK borders and to ensure that the technical specifications requested are in line with the relevant standards. However, having concluded that disclosure of the information in question would be more probable than not to lead to prejudice relevant to sections 31(1)(a) and (e), the public interest inherent in the exemptions is a factor in favour of maintenance of the exemptions of considerable weight. Whilst there are valid public interest factors in favour of disclosure, the Commissioner believes these to be outweighed by the public interest in avoiding the prejudice described in these exemptions.

Procedural Requirements

Sections 1 and 10

22. In failing to disclose the version of the information falling within the scope of request (1) that was in use at the time of the request, the public authority did not comply with the requirements of sections 1(1)(b) and 10(1).

Section 17

23. In failing to adequately explain the reasoning for the citing of sections 31(1)(a) and (e) and why the public interest was believed to favour the maintenance of these exemptions, the public authority did not comply with the requirements of sections 17(1)(c) or 17(3)(b).

The Decision

24. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it cited the exemptions provided by sections 31(1)(a) and (e) correctly in relation to request (2). However, the Commissioner also finds that the public authority failed to comply with sections 1(1)(b) and 10(1) in relation to request (1) by not disclosing to the complainant the information falling within the scope of this request, despite having given no reason as to why this information could not be disclosed, and sections 17(1)(c) and 17(3)(b) by failing to provide adequate explanations in relation to sections 31(1)(a) and (e).

Other matters

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

The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that it took the public authority approximately 15 months to provide the outcome of the review. The public authority should ensure that internal reviews are carried out promptly in future and should note that the Commissioner, as previously mentioned, considers a 15 month delay to be grossly excessive.

Right of Appeal

26. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

27. 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 31st day of August 2010

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 3

Section 3(2) provides that –

“For the purposes of this Act, information is held by a public authority if–

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”

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 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

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"