

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 November 2013

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

Decision (including any steps ordered)

1. The complainant has requested information about a Certificate of Application, in relation to immigration.
2. The Commissioner's decision is that the Home Office has applied section 40(2) appropriately.
3. The Commissioner does not require the Home Office to take any further steps.

Request and response

4. On 7 February 2013, the complainant wrote to the Home Office (HO) and requested information about a Certificate of Application (CoA) - please see annex 1 for the full request.
5. The HO responded on 6 March 2013. It noted that the complainant had referred to a request for information submitted by somebody else. The HO also explained that it would not be dealing with this aspect of his request as it was up to the individual concerned to complain if he was unhappy with the HO's handling of his request.
6. The HO also explained that it had treated questions 1, 6, 7, 8, 9 and 10 of the complainant's request as requests for information under the FOIA and that it was treating questions 2, 3, 4 and 5 as routine enquiries.
7. Regarding question 1 the HO confirmed that it held an internal 'desk guide' for UK Border Agency staff, for use when deciding whether to issue a CoA and whether any CoA issued would confirm a right to reside

and work in the UK while awaiting a decision (a 'full' CoA) or simply a right to reside (a 'short' CoA). It also provided the guidance. With regard to questions 6 to 9 the HO cited section 12 and explained that compliance would exceed the appropriate cost limit of £600. It also explained that it could not provide any advice on how to bring the request within the cost limit.

8. However, regarding question 9, the HO did explain that the question referred to appeals against a decision to issue a 'short' CoA and that the use of a 'full' or 'short' CoA did not constitute a decision or outcome on an application and did not attract the right of appeal.
9. Regarding question 10, the HO noted that the complainant had asked for "*guidance issued to the European office staff for the issue of whether to confirm a person's right to work or not*". It explained that it had provided the desk top guide for CoAs in response to question 1 of his request.
10. The HO confirmed that this was all the guidance which advised on whether a CoA would confirm the right of a person to take employment while their application for a document confirming a right of residence under the Immigration (European Economic Area) Regulations 2006 was under consideration.
11. Following an internal review the HO wrote to the complainant on 15 May 2013. It stated that it had identified further information in relation to his request. The information was disclosed, with redactions made under both sections 31(1)(e) and 40(2).

Scope of the case

12. The complainant contacted the Commissioner on 21 May 2013 to complain about the way his request for information had been handled.
13. The Commissioner notes that the complainant has not complained about the application of section 12 to questions 6 – 9, and he will therefore not be considering this any further. Furthermore, during the Commissioner's investigation, the HO disclosed the information (in this case template letters) which it had previously withheld under section 31(1)(e) (operation of immigration controls), but still withheld some information under section 40(2) (personal information). Therefore, the Commissioner will consider the HO's application of section 40(2) to staff names.

Reasons for decision

Section 40 – personal information

14. Section 40(2) of FOIA is an absolute exemption which relates to the personal information of anybody other than the requester. Information is exempt information if disclosure of information falling within the definition of personal data would breach any of the data protection principles. Personal data is defined by the Data Protection Act 1998 (DPA) section 1(1) as:

"data which relates to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

15. The Commissioner must consider whether the withheld information is personal data.

Is the requested information personal data?

16. The two main elements of personal data as defined in section 1(1) of the DPA are that the information must relate to a living individual and that the individual must be identifiable. Information will relate to a living individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus, or impacts on them in any way. The information can be in any form, including electronic data, images and paper files or documents.
17. In this case, the HO has withheld the names of members of staff. The Commissioner is satisfied that staff names constitute 'personal data' as set out in section 1(1) of the DPA.

Will disclosure breach one of the data protection principles?

18. The Commissioner has considered whether disclosure of the requested information would breach any of the data protection principles as set out in schedule 1 of the DPA. The HO explained that it considered that disclosure would breach the first data protection principle:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met."

Would it be fair to disclose the requested information?

19. Regarding fairness, the Commissioner recognises the importance of considering whether the data subject has consented to disclosure and/or whether the data subject has actively put some or all of the requested information into the public domain. The Commissioner will also consider the consequences of any disclosure and the reasonable expectations of the data subject.

Has the data subject consented to the disclosure?

20. In his guidance '*Personal information (section 40 and regulation 13)*' the Commissioner notes that with regard to consent, data subjects must give their consent freely to the specific disclosure, with the understanding that their personal data will be disclosed to the requester and to the world at large.
21. The Commissioner asked the HO whether it had asked the staff concerned whether they would give consent to disclosure of their names. The HO confirmed that it had not asked the staff concerned whether they consented to the disclosure of their names, as it considered it would be unfair for junior staff names to be disclosed. In support of this contention, it pointed to the First-tier Tribunal (the tribunal) decision in *Home Office v IC EA/2011/0203*, which held that the names of staff at the same grade as the staff in question in this case did not have to be disclosed as there was no public interest in doing so.

Has the data subject actively put some or all of the requested information into the public domain?

22. Where the data subject themselves have put some or all of the requested information into the public domain, the Commissioner considers that this weakens the argument that disclosure would be unfair.
23. In this case the Commissioner has not seen any evidence to suggest that the members of staff concerned have actively placed their names in the public domain at the time of the request. The Commissioner notes that the staff names in question were included in the reports originally. However, the Commissioner considers that such circumstances cannot be deemed as active disclosure by the named members of staff.

Reasonable expectations

24. When considering compliance with the first data protection principle, the Commissioner considers that it is necessary to consider what the reasonable expectations of that party would be in relation to how their information would be used and to whom it may be disclosed.
25. The HO explained that there would be no expectation from junior staff that their names would be placed in the public domain. The HO confirmed that the staff in question were all below Senior Civil Service grade. It also confirmed that the context of the work to which their names are associated in the documents is not publicly known.
26. The HO explained that it considered that disclosure would be neither fair nor lawful and would be contrary to the reasonable expectations of the data subjects. It also explained that it considered none of the conditions at schedule 2 of the DPA are met.
27. Taking the above into account, the Commissioner is satisfied that they would have a reasonable expectation that their names would not be released into the public domain.

Consequences of disclosure on the data subjects

28. The Commissioner will now consider whether disclosure would cause any unnecessary damage or distress to the data subjects.
29. The Commissioner notes that disclosure under the FOIA is to the world at large. He considers that whilst the staff names would be known within the HO as they were included in the original reports, this is not the same as disclosure under the FOIA. Furthermore, the HO explained that it considered that disclosure would not be fair and would constitute an unwarranted interference in the staff's privacy, particularly as immigration issues generate strong reactions among the public.
30. The HO also explained that disclosure of junior staff's identities would provide an unfair level of exposure and would potentially make it more difficult for them to fulfil their roles without unnecessary intrusion or scrutiny.
31. With regards to condition 6(1) of schedule 2 of the DPA, the HO explained that it did not see a strong public interest in disclosing this information.
32. Taking the above into account, the Commissioner is satisfied that disclosure in this case would cause distress.

Balancing the rights and freedoms of the data subject with legitimate interests

33. Despite the reasonable expectations of individuals and that damage or distress could result from disclosure, it may still be fair to disclose personal data if it can be argued that there is a compelling public interest in disclosure, that is, if there are any legitimate interests in disclosure.
34. Legitimate interests can include interests such as accountability and transparency as well as specific interests. When balancing legitimate interests with the rights of the data subject, the Commissioner's view is that a proportionate approach should be taken.
35. The Commissioner notes in this case that the HO has left the grades of the staff concerned in the redacted reports. He considers that leaving the grades in ensures that there is transparency as it shows the grading level of the staff involved. The Commissioner considers that even if the complainant's interest in knowing the names of the staff was legitimate, his private interest does not equate to a legitimate public interest.

Conclusion

36. The Commissioner considers that the data subjects would hold a reasonable expectation that their names would not be released into the public domain and that disclosure would therefore be unfair. As the Commissioner has concluded that it would be unfair to the staff in question to disclose their names and that to do so would contravene the first principle of the DPA, he has not gone on to consider whether disclosure is lawful or whether one of the Schedule 2 DPA conditions is met.
37. As section 40 is an absolute exemption there is no need to consider the public interest in disclosure.

Other matters

38. The complainant requested an internal review on 6 April 2013 and the HO responded on 15 May 2013.
39. Part VI of the section 45 Code of Practice makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information. He considers that the procedure should encourage a prompt determination of the complaint.

40. As he has made clear in his '*Good Practice Guidance No 5*', the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

41. The Commissioner is concerned that it took over 20 working days for the internal review to be completed. However, he is also aware that the complainant has made several requests to the HO regarding immigration issues.

Right of appeal

42. 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

43. 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.
44. 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

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex 1

"Further to the information request (under the FOI Act 2000) made by "Zee" (the known name for a person who applied for information from yourself) on 7th Jan 2013 ---quote--- Can you please explain what a COA is?

Does anyone who submits an EEA application on the basis of being a family member of an EU national exercising his treaty rights automatically receive one? Even if that someone is an overstayer?

Would a COA enable an overstayer to temporarily seek employment in the UK? Many thanks in advance ---end of quote ---. I am writing to inform you that you have failed to answer the questions raised in this request.

If there was a problem, understanding that request of the person who asked for the information which you hold on the "COA" (also commonly known as a "Certificate of Application"), can you please provide all information you have available in reference to a Certificate of Application. The information requested is (but not entirely limited to:

1) all guidance issued to UKBA staff for the issuing of a COA.

2) what a COA actually represents?

3) would an overstayer of a Visa still be issued with a COA?

4) does a COA confirm the right of an applicant to work?

5) if an overstayer is issued with a COA under EEA law, would that person then be allowed to seek employment?

[Personal information removed] stating "At this point we are unable to confirm your right to work within the UK" I am aware that A COA can either Confirm the right of the person to work, or will be unable to confirm the right of the person to work.

Can you please provide information on the following:

6) How many COAs issued have confirmed the right to work of the applicant?

7) How many COAs have been unable to confirm the right to work of the applicant?

8) How many COAs have refused the applicant outright the right to work?

9) If any of 6-8 have been appealed and reissued altering the status, please provide these figures separately (IE: six COAs were originally issued without confirming the right, this was altered to confirm the right to work ETC). I would like the information to disclose ALL issues of COA from the very first certificate issued. Should this cause problems with costings, then I would revise my request to cover the last two full years (I will allow you to choose either Annual, or Financial, whichever is easier for yourselves, but please state the dates represented) and also

10) please provide guidance issued to the European office staff for the issue of whether to confirm a person's right to work or not.

-Which persons have their right to work confirmed

-which persons right to work cannot be confirmed?

-which person's right to work are refused ETC."