

Internal review of response to request under the Freedom of Information (Fol) Act 2000 (the Act) by UKBA (reference 12862)

Responding Unit: United Kingdom Border Agency

Chronology

Fol request received by UKBA:	23/09/09
Acknowledgement:	24/09/09
Request for 1 st internal review:	28/10/09
UKBA response to 1 st internal review request:	16/11/09
UKBA response to Fol request:	18/01/10
Request for 2 nd internal review:	05/02/10

Subject of request

1. On the 23 September 2009 Mr Sittampalam (the applicant) submitted a Fol request to UKBA seeking disclosure of *“all evidence gathered”* during the UKBA investigation into the alleged illegal employment by Patricia Mawhinney (Baroness Scotland) of an individual (Ms Tapui) alleged to lack permission to undertake full employment in the UK.
2. Mr Sittampalam further clarified the scope of his request by stating that his particular interest was focused on the disclosure of *‘evidence’* supporting the assertion that Baroness Scotland took steps to check the documentation of Ms Tapui prior to engaging her in employment.
3. As a caveat to his request, Mr Sittampalam stated that he recognised that the information requested may well constitute the personal data of Baroness Scotland and Ms Tapui. Nonetheless Mr Sittampalam believed that such concerns were overridden, given the status of Baroness Scotland and the volume of public commentary already made on the issue.
4. Furthermore, Mr Sittampalam stated he believed that given the UKBA investigation had been concluded, disclosure of the requested material would not be liable to cause prejudice to any *“ongoing proceedings whose outcome is still in doubt”*.

The response by UKBA

5. On 18 January 2010 UKBA responded to Mr Sittampalam. The response served to outline that whilst the requested information was

held it would not be communicated as it was seen to be exempt from disclosure pursuant to engagement of the exemptions under section 30 (1) (b) and section 40 (2) of the Act.

6. As the exemption under section 30 (1) (b) is a qualified exemption the requisite public interest balancing arguments were then outlined to Mr Sittampalam. Both the arguments for and against disclosure were stated and assessed. It was concluded however that in this instance the public interest favoured upholding the exemption engaged.
7. In the case of the absolute exemption under section 40 (2) of the Act, Mr Sittampalam was informed that UKBA policy prohibited the disclosure, to a third party, personal information of another individual. It was stated that disclosure of the material requested would breach the Data Protection Act, 1998, (DPA) on the grounds that such would violate the condition of fair and lawful processing as necessitated by the data protection principles. Accordingly the exemption under section 40 (2) was seen to be engaged.
8. As the exemption at section 40 (2) is an absolute exemption no public interest considerations were stated.

First internal review request by Mr Sittampalam

9. On 28 October 2009 Mr Sittampalam requested an internal review into the length of time taken by UKBA to respond to his Fol request. It is noted that at the point that Mr Sittampalam requested this internal review he had yet to receive a substantive response by UKBA to his initial Fol request.
10. On the 16 November 2009 UKBA wrote to Mr Sittampalam in response to his request for an internal review. UKBA apologised for the ongoing delay in resolving Mr Sittampalam's request and accordingly noted that the failure to provide him with a response by 21 November 2009 constituted a breach of section 10 (1) of the Act.
11. It should be noted that the date of 21 November 2009 quoted to Mr Sittampalam in this correspondence is seen to be incorrect and is accordingly presumed to be a typographical error. In actual fact the date by which a response had been due to Mr Sittampalam's Fol request was 21 October 2009.

Second internal review request by Mr Sittampalam

12. On 5 February 2010 Mr Sittampalam requested a second internal review of his Fol enquiry.
13. Mr Sittampalam qualified his request by highlighting three specific issues that he wished the internal review to address:

- (i) The validity of the exemptions cited in the UKBA response of 18 January 2010
- (ii) The length of time taken by UKBA to respond to his Fol request
- (iii) What actions UKBA are undertaking to improve future Fol performance

Refinement of Mr Sittampalam's second internal review request

14. The purpose of this review is to determine whether Mr Sittampalam's Fol request of 23 September 2009 was discharged in line with UKBA's statutory obligations under the Act. Namely, whether the response by UKBA was provided within an acceptable time frame and whether the exemptions cited were properly engaged.
15. Accordingly, with reference to such, it must be noted that point (iii) of Mr Sittampalam's correspondence of 5 February 2010 is seen to fall outside the scope of this review to answer. As such this point will not be formally addressed in the main body of this internal review.
16. This said, UKBA are keen to express that they take seriously the concerns raised by Mr Sittampalam. UKBA are fully committed to meeting their obligations under the Freedom of Information Act and it is recognised that in this instance the service provided fell short of the standards that Mr Sittampalam might reasonably expect. Moving forward, UKBA are committed to improving performance under Fol and hope to address such through better internal monitoring of Fol processes as well as more effective training and resource allocation.

Procedural issues

17. Mr Sittampalam's request is recorded as having been received by UKBA on 23 September 2009. Accordingly the deadline for responding was calculated to be 21 October 2009.
18. Formal acknowledgement of Mr Sittampalam's Fol request was made by UKBA on 24 September 2009.
19. The final response provided to Mr Sittampalam's request was made by UKBA on 18 January 2010. This date is noted to be in excess of the statutory deadline by which Mr Sittampalam was entitled to receive a response.
20. In this respect UKBA are seen to have breached section 10 (1) of the Act by failing to provide a response compliant with section 1(1) of the Act within 20 working days of receipt of Mr Sittampalam's request.
21. Furthermore, in failing to notify Mr Sittampalam within 20 working days that additional time was required to consider the application of

the section 30 qualified exemption, UKBA are seen to have breached section 10 (3) of the Act.

22. It is noted though that when Mr Sittampalam was provided with a response to his FoI request both section 1 (1) and section 17 (1) of the Act were satisfactorily discharged. Specifically, Mr Sittampalam was informed that the requested information was held by UKBA, but would not be communicated to him, with detailed reasons being given as to why such was the case.
23. I am satisfied that the response of 18 January 2010 informed Mr Sittampalam in writing of his right to request an independent review of the handling of his request as allowed for in section 45 (2) (e) of the Act.
24. I am further satisfied that Mr Sittampalam was informed in writing of his right of complaint to the Information Commissioner as required by section 50 of the Act.

Consideration of the response

25. As noted in point 5 of this review, on 18 January 2010 UKBA responded to Mr Sittampalam's enquiry by informing him that although the requested information was held, such would not be communicated to him. The response served to explain that the requested information was seen to be exempt from disclosure as it was believed to engage exemptions at section 30 (1) (b) and section 40 (2) of the Act (each of which are detailed in **Annex A**).
26. For the purpose of clarity I will examine the application of each exemption in turn. I will consider whether the exemption was correctly engaged and furthermore whether the public interest was satisfied in all circumstances.

Section 30 (1) (b)

27. The UKBA response of 18 January 2010 stated that the exemption under section 30 (1) (b) of the Act was engaged on the grounds that the requested material was held by UKBA for the purposes of investigations that might lead to a decision to instigate criminal proceedings.
28. As the material specifically requested by Mr Sittampalam was characterised as being the '*evidence gathered*' by UKBA during their investigation of Baroness Scotland, I am satisfied that the exemption under section 30 (1) (b) was correctly applied.
29. Furthermore, having examined UKBA's consideration of the requisite public interest concerns necessitated by the exemption at section 30

(1) (b) of the Act, I am satisfied that this obligation has been fully discharged.

30. Specifically, I support the conclusion of UKBA that the genuine public interest in disclosure of the material this exemption applies to is outweighed in this instance by the necessity to safeguard the ability of UKBA to effectively and robustly pursue individuals suspected to be contravening laws on illegal working. To disclose information revealing the specific methodology of UKBA investigative procedures and the grounds on which subsequent penalties might be levied is seen to not only impact on current investigations being undertaken by UKBA, but also to undermine the ability to pursue similar proceedings on future occasions. As such the public interest is seen to be best served by keeping such sensitive information out of the public domain and denying any advantage to individuals seeking to avoid censure for breaching laws on illegal working and employment.

Section 40 (2)

31. The UKBA response of 18 January 2010 stated that the exemption under section 40 (2) of the Act was engaged on the grounds that the disclosure of the requested material would entail the unwarranted release, to a third party, sensitive personal information about another person.

32. The response detailed how, under the provisions of the DPA, personal data can only be processed if it meets the requirements of the data protection principles. UKBA then outlined how disclosure of the requested sensitive personal data would only be possible if such processing was fair, lawful and satisfied one condition each of both schedule 2 and schedule 3 of the DPA.

33. UKBA informed Mr Sittampalam that following careful consideration it had been determined that disclosure of the requested information would not constitute fair or lawful processing, nor meet any of the conditions of either schedule 2 or 3 of the DPA. As such Mr Sittampalam was informed that UKBA would not disclose the requested information as such would constitute a breach of the DPA

34. Having examined the content of the requested material I can confirm that such is seen to constitute the sensitive personal data of identifiable living individuals.

35. Accordingly the disclosure of such information would be seen to be unfair to the concerned data subjects who would have no expectation that their sensitive personal data would enter the public domain within their lifetimes.

36. Consequently, on these grounds I am satisfied that the exemption at section 40 (2) of the Act was correctly engaged.

37. As the exemption at section 40 (2) of the Act is an absolute exemption no public interest considerations apply.
38. With reference however to point 3 of this review (Mr Sittampalam's contention that data protection considerations should be overridden) it should be noted that the sensitive personal data under discussion pertains to multiple individuals, not only Baroness Scotland.
39. In light of such I must conclude that Mr Sittampalam's arguments do not support the presumption that the public interest in this matter is sufficient to override the legitimate expectation of private individuals - not otherwise in the public eye - that their sensitive personal data would not be unfairly disclosed within their lifetimes.

Consideration of Mr Sittampalam's request in light of developments regarding ongoing prosecution proceedings

40. As Mr Sittampalam may be aware, since submitting his initial Fol request there have been significant developments in the ongoing investigation of Ms Tapui's alleged ineligibility to undertake full time employment in the UK.
41. Specifically, as widely reported in the public domain, Ms Tapui appeared before Southwark Crown Court on 18 January 2010 whereupon she denied certain of the charges leveled against her. The consequence of such being that it was determined that Ms Tapui would face trial on 6 April 2010.
42. Though not initially falling within the scope of this internal review, I am obliged to note that the above developments are of a nature that the information requested by Mr Sittampalam under Fol is now seen to engage a different range of exemptions than those initially cited to him.
43. Specifically, the information requested by Mr Sittampalam on 23 September 2009, at this juncture, in addition to the exemption under section 40 (2), is also seen to engage the exemptions under section 31 (1) (c) and section 44 (1) (c) of the Act (each of which are detailed in **Annex A**).
44. It is important to note however that the additional exemptions now seen to be engaged were not applicable at the time of Mr Sittampalam's Fol request of 23 September 2009 and accordingly are not being engaged retrospectively.
45. This point is especially relevant to the engagement of the exemption under section 31 (1) (c).

46. The exemption under section 31 (1) (c) was not seen to be engaged on 23 September 2009 when Mr Sittampalam submitted his initial FoI request, but rather is only seen to be applicable in light of the court proceedings now brought against Ms Tapui.
47. However, the decision to now engage this exemption with regards to the information requested by Mr Sittampalam precludes the engagement of the exemption under section 30 (1) (b) already cited.
48. So in effect, although this internal review has determined that the section 30 (1) (b) exemption was correctly engaged in the response of 18 January 2010, such is presently seen to be supplanted by engagement of the exemption under section 31 (1) (c) of the Act.
49. For the purposes of clarity I will examine in turn with the exemptions under section 31 (1) (c) and section 44 (1) (c) now seen to be engaged. In each instance I will state the reason why each exemption is seen to be engaged and any requisite public interest considerations affecting such.

Section 31 (1) (c)

50. The exemption under section 31 (1) (c) of the Act allows for the exemption of the duty to communicate information if such would, or would be likely, to prejudice the administration of justice.
51. Having carefully examined the material requested by Mr Sittampalam in his FoI request of 23 September I can confirm that such pertains to the circumstances of the engagement of Ms Tapui in employment by Baroness Scotland.
52. As the court proceedings scheduled to be undertaken against Ms Tapui on 06 April 2010 are concerned with this specific issue, it is my determination that the release into the public domain of evidential material explicitly relating to such would be seen to inappropriately affect the 'ability' of such proceedings to effectively discharge the administration of justice.
53. Accordingly, with respect to the issues highlighted in points 40 and 41 of this review, it is my determination that the exemption under section 31 (1) (c) of the Act should be engaged as the disclosure of the material requested by Mr Sittampalam would be likely to prejudice the administration of justice.
54. As the exemption under section 31 (1) (c) of the Act is a qualified exemption, its engagement is contingent on demonstrating that the balance of public interest supports the argument for non-disclosure. Specifically, to engage this exemption requires the demonstration that the prejudice that disclosure would likely cause to the administration

of justice, in all circumstances of the case, outweighs the public interest that exists in the release of the requested information.

55. The arguments in favour of disclosing the requested information turn upon the very real public interest that exists regarding the specifics of Ms Tapui's case and the need to be reassured that this individual is being dealt with in a fair and balanced manner.
56. Given the high profile nature of this case and the involvement of such a senior government official as Baroness Scotland, it may be argued that there is legitimate public interest in ensuring this party is properly dealt with by the courts in an entirely non-partisan fashion. Something that might be assured by public scrutiny of the material requested by Mr Sittampalam.
57. Furthermore it may reasonably be argued that disclosure of the requested material would increase public understanding of immigration law and the obligations that employers have under such.
58. The arguments against disclosure of the requested information are concerned with the prejudice that would be liable to occur to the administration of justice were the requested information released.
59. Specifically, it is argued that disclosure of the requested information, at this juncture, would be likely to prejudice the ongoing legal proceedings that Ms Tapui is party to. This is because materials requested by Mr Sittampalam are likely to be relevant to the conduct of these proceedings.
60. The right to a fair trial is a cornerstone of UK law and fundamental to the conduct of a free and democratic society. Accordingly, irrespective of the legality of Ms Tapui's immigration status, this individual has the right to expect that she would be guaranteed the same opportunity of a fair trial as any other member of the UK population.
61. As such, for UKBA to disclose materials prior to the commencement of Ms Tapui's trial that may be seen to have a bearing on the outcome of such would be wholly inappropriate and contrary to the purpose of the legal proceedings themselves – namely to ensure that justice is properly administered.
62. Accordingly, following careful consideration of the above public interest considerations I conclude that the public interest arguments in favour of withholding the requested information are substantially more compelling than those in favour of release. I am therefore content that the material requested is exempt from disclosure under the exemption at section 31 (1) (c) of the Act.

Section 44 (1) (c)

63. The exemption under section 44 (1) (c) of the Act states that requested information is exempt from disclosure if such would constitute or be punishable as a contempt of court.
64. As noted in point 40 of this review Ms Tapui will be subject to court proceedings on 06 April 2010. Consequently the disclosure of any information by UKBA pertaining to such might reasonably be seen to constitute an inappropriate interference with these proceedings.
65. As the Contempt of Court Act 1981 and associated common law prohibit the disclosure of material that would create a risk of prejudice to imminent or pending proceedings, it is my determination that disclosure to Mr Sittampalam of the material he has requested would be seen to stand in breach of such.
66. Consequently, on these grounds I am satisfied that the exemption at section 44 (1) (c) of the Act is engaged.
67. As the exemption at section 44 (1) (c) of the Act is an absolute exemption no public interest considerations apply.

Advice and assistance

68. Having considered the body of correspondence between UKBA and Mr Sittampalam it is my determination that UKBA satisfactorily discharged their obligations with regard to section 16 (1) and section 16 (2) of the Act.
69. Specifically, in their correspondence with Mr Sittampalam, UKBA are noted to have complied with all relevant requirements of the Secretary of State's code of practice as outlined in section 45 of the Act.

Conclusion

70. UKBA are noted to have failed to respond to the applicant's Fol request within the statutory limit of 20 working days. Accordingly, UKBA are seen to stand in breach of section 10 (1) of the Act.
71. In addition, by failing to inform Mr Sittampalam within 20 working days that additional time would be required to consider the application of a qualified exemption to the requested material UKBA are also seen to stand in breach of section 10 (3) of the Act.
72. However, the exemptions under section 30 (1) (b) and section 40 (2) of the Act cited to Mr Sittampalam in the correspondence of 18 January 2010 are seen to have been correctly engaged at this point in time. In addition the public interest test required under section 30 (1) (b) of the Act is seen to have been correctly conducted.

73. Accordingly as this review has outlined, UKBA are seen to have correctly discharged their obligations under section 1 (1) (a) and section 17 (1) (a), (b) and (c) of the Act.

74. Finally, with respect to points 4 and 43 of this review, it is noted that the information initially requested by Mr Sittampalam is now seen to be exempt from disclosure pursuant to the exemption under section 40 (2), as well as the additional exemptions under section 31 (1) (c) and section 44 (1) (c) of the Act.

Annex A

Section 30 (1) (b)

Investigations and proceedings conducted by public authorities

(1) Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of—

(b) any investigation which is conducted by the authority and in the circumstances may lead to a decision by the authority to institute criminal proceedings which the authority has power to conduct, or

Section 31 (1) (c)

Law enforcement

(1) 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—

(c) the administration of justice,

Section 40 (2)

Personal information

2) Any information to which a request for information relates is also exempt information if—

(a) it constitutes personal data which do not fall within subsection (1), and

(b) either the first or the second condition below is satisfied.

Section 44 (1) (c)

Prohibitions on disclosure

(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it—

(c) would constitute or be punishable as a contempt of court.

Information Access Team
Home Office
22/03/10