

Internal review of response to request under the Freedom of Information (Fol) Act 2000 (the Act) by UKBA (reference 13754)

## **Responding Unit: United Kingdom Border Agency**

### **Chronology**

Fol request received by UKBA:	14/01/10
Request acknowledged:	14/01/10
UKBA response:	04/03/10
Request for internal review:	04/03/10

### **Subject of request**

1. On 14 January 2010 Mr Sittampalam (the applicant) submitted a Fol request to UKBA seeking disclosure of “*all records and internal and external correspondence*” relating to UKBA’s handling of a previous Fol request (UKBA Ref: 12862) submitted by Mr Sittampalam on 23 September 2009. The original text of Fol request 12862 is included at **Annex A**.
2. Mr Sittampalam clarified his request of 14 January 2010 by outlining the particular format that he required UKBA to adopt when providing a response to his enquiry.
3. Specifically Mr Sittampalam stated that he wished any redactions to be kept to an ‘*absolute minimum*’ and furthermore that he be provided with not only the content of requested documents, but also information as to when such work was undertaken. Additionally, Mr Sittampalam also requested that he be provided with an indication of the seniority of the individuals involved in the handling of his request in the eventuality that it was not seen to be possible to disclose the identity of such parties.

### **The response by UKBA**

4. On 4 March 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 36 (2) (b) (i), section 36 (2) (b) (ii), section 36 (2) (c) and section 40 (2) of the Act. These exemptions are detailed in full in **Annex B**.
5. As the exemptions under section 36 (2) (b) (i), section 36 (2) (b) (ii) and 36 (2) (c) constitute qualified exemptions, the requisite public

interest balancing arguments for such were then outlined to Mr Sittampalam. Both the arguments for and against disclosure of the requested information were stated and assessed. It was concluded however that in this instance the public interest favoured upholding the exemptions engaged and withholding the requested information from disclosure.

6. 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, of 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 was seen to contain the personal details of other Fol requestors as well as junior Home Office officials.
7. As the exemption at section 40 (2) is an absolute exemption no public interest considerations were stated.

### **Mr Sittampalam's request for internal review**

8. On 4 March 2010 Mr Sittampalam requested an internal review into the handling of his Fol request.
9. In addition to challenging the outcome of his initial Fol request, Mr Sittampalam also stated dissatisfaction with two further aspects of the UKBA response, namely:
  - (i) That the identity of the 'qualified party' who authorised the engagement of the exemptions under section 36 of the Act was not disclosed.
  - (ii) That no consideration appeared to have been given to his request that UKBA respond to him in the manner detailed in points 2 – 3 of this review.

### **Procedural issues**

10. Mr Sittampalam's request is recorded as having been received by UKBA on 14 January 2010. Accordingly the deadline for responding to such was calculated to be 11 February 2010.
11. Formal acknowledgement of Mr Sittampalam's Fol request was made by UKBA on 14 January 2010.
12. On 12 February 2010 UKBA contacted Mr Sittampalam to inform him that due to the nature of material requested it would be necessary to consider the engagement of qualified exemptions under section 36 of the Act to such.

13. UKBA informed Mr Sittampalam that under section 10 (3) of the Act a further 20 working days may be granted to a public body in order to conduct the requisite public interest considerations entailed by the engagement of a 'qualified' exemption. The revised deadline for responding to Mr Sittampalam was stated as being 11 March 2010.
14. Whilst I am satisfied that UKBA were correct to inform Mr Sittampalam of the intention to extend the response deadline by reference to section 10 (3) of the Act, I must note that this clarification was provided following expiration of the initial deadline of 11 February 2010. Though only in excess of such by one working day, this oversight nonetheless constitutes a technical breach by UKBA of section 10 (1) of the Act.
15. As previously noted, the final response to Mr Sittampalam's request was dispatched by UKBA on 4 March 2010.
16. It is noted that the response then provided served to satisfactorily discharge section 1 (1), section 17 (1) (a) and section 17 (1) (b) of the Act. 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.
17. I am satisfied that the response of 4 March 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.
18. 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**

19. As noted in point 4 of this review, on 4 March 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 on the grounds that multiple exemptions of the Act were engaged.
20. I will now examine whether the response by UKBA was satisfactory with regards to whether the exemptions cited were correctly engaged and furthermore whether any corresponding public interest balancing exercises were properly conducted.

### **Engagement of the exemption under section 36 of the Act**

21. The UKBA response of 4 March 2010 stated to Mr Sittampalam that it was believed that multiple limbs of the exemption under section 36 of

the Act were engaged with regards to the information he had requested.

22. These limbs were identified as being section 36 (2) (b) (i), section 36 (2) (b) (ii) and section 36 (2) (c); more commonly known as, *'inhibition of free and frank advice'*, *'inhibition of free and frank advice for the purposes of deliberation'* and *'prejudice to the effective conduct of public affairs'*.
23. These three limbs of the exemption under section 36 between them address two broadly distinct issues; that of inhibition being likely to occur to the provision of advice, and that of prejudice being likely to occur to the effective conduct of public affairs.
24. It should be noted that the arguments for engaging these dual aspects of the section 36 exemption must be substantively distinct. Though both overlap, in so much as they relate to specific concerns raised within the context of the consideration of Mr Sittampalam's former FoI request, they must nonetheless be articulated separately with clear reasons being advanced as to why such are seen to be engaged.
25. To this extent I am satisfied that the response of 4 March 2010 sufficiently demonstrated distinct arguments and reasoning as to why the varying limbs of the exemption under section 36 were seen to be engaged.
26. Accordingly, on consideration of the arguments outlined by UKBA in the response of 4 March 2010, and establishment that the material requested by Mr Sittampalam is seen to constitute information detailing the consideration and discussion of a previous FoI request, I am content that limbs (2) (b) (i), (2) (b) (ii) and (2) (c) of the section 36 exemption were correctly engaged.

#### Public interest considerations entailed by the exemption under section 36 of the Act

27. Having established that the exemptions under section 36 (2) (b) (i), section 36 (2) (b) (ii) and section 36 (2) (c) are indeed engaged with regard to the requested information, the issue then is whether the requisite public interest considerations favour upholding the stated exemptions.
28. Having examined carefully the UKBA response of 4 March 2010 it is my determination that the public interest arguments advanced both for and against disclosure of the requested information are comprehensive, well structured and logically compelling.
29. Specifically, the range of arguments expressed are seen to have adequately addressed the fundamental tension between the two

positions; namely that of providing a balanced assessment of the competing merits of disclosing into the public domain details of the 'mechanism' by which government departments (namely UKBA) determine how best to respond to FoI requests and subsequent appeals.

30. I concur with UKBA that there are strong arguments to be made as to the advantage of transparency and accountability that might be secured by disclosure of the requested information. Furthermore I also recognise the general public interest that exists regarding the manner in which UKBA discharges FoI requests pertaining to high profile matters such as the investigation of the Attorney General, Baroness Scotland of Asthal.
31. However it is my determination, in this specific instance, that these considerations are outweighed by the necessity to ensure that UKBA are able to consider, debate and robustly assess the suitability of information that might potentially be disclosed into the public domain without concern that their discussions around such will be subject to public scrutiny before the appropriate consultation period has elapsed.
32. This argument is not advanced *prima facie*, but rather with explicit reference to the further consideration that the timing and nature of the material requested by Mr Sittampalam, entails.
33. As was expressed by UKBA in the response of 4 March 2010, Mr Sittampalam had already initiated an internal review of the handling of his previous FoI request (Ref: 12862); submitted with the expressed intent of assessing the substance and procedural correctness of the handling of such.
34. The argument made by UKBA is therefore that the exemptions under section 36 were seen to be upheld not simply because Mr Sittampalam had submitted an FoI request concerned with the handling of a previous FoI request, but rather because a request of such scope was submitted whilst an internal review of the handling of the initial request was already ongoing.
35. Accordingly, with particular reference to limbs (2) (b) (i) and (2) (b) (ii) of the exemption under section 36, the free and frank exchange of ideas and the free and frank exchange of ideas for the purposes of deliberation would likely be inhibited in the respect that the premature disclosure of such candid information would serve to adversely affect the frankness with which officials communicate during the ongoing appeal process.
36. On these grounds therefore, I am satisfied that UKBA correctly engaged the exemption under section 36 of the Act and furthermore sufficiently demonstrated that the public interest favoured the

decision not to communicate to Mr Sittampalam the information he had requested.

#### Section 40 (2)

37. The UKBA response of 4 March 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, personal information about another person.
38. As the UKBA response outlined, the requested documentation was seen to include detailed discussions regarding FoI requests submitted by individuals other than Mr Sittampalam as well as the personal details of junior Home Office officials.
39. It was subsequently stated to Mr Sittampalam that whilst he had the right to request personal data about himself contained in the specified documentation, the disclosure of personal data pertaining to other parties would not be possible as such would breach UKBA's departmental obligations under the Data Protection Act, 1998 (DPA).
40. Consequently, for the reasons outlined above I am satisfied that the exemption at section 40 (2) of the Act was correctly applied.
41. As the exemption at section 40 (2) of the Act is an absolute exemption no public interest considerations apply.
42. It is to be noted however that UKBA failed to specify precisely why the Data Protection Principles would be breached were the requested information disclosed. This is noted to constitute a breach of section 17 (1) (c) of the Act. It may be presumed however that UKBA intended reference to 'fair and lawful processing' as defined within section 1 of schedule 1 of the DPA.
43. However, I am content that the material requested is exempt from disclosure under the exemption at section 40 (2) of the Act. This contention is advanced on the grounds that the material in question is considered to be personal data, the disclosure of which is not seen to be warranted by any condition under schedule 2 of the DPA.

#### **Response to issues raised by Mr Sittampalam in request for internal review**

44. I shall now address the further issues raised by Mr Sittampalam in his internal review request of 4 March 2010. The nature of these further issues are detailed in points 9 (i) and 9 (ii) of this review.
45. With respect to the matter outlined at point 9 (i), UKBA are not obliged to disclose to Mr Sittampalam the identity of the qualified

person on whose reasonable opinion the exemption under section 36 of the Act was engaged.

46. However, it may be noted that subsection (5) (a) of the exemption under section 36 specifies that in order for the exemption under section 36 to be engaged to information held by a government department, it is necessary that the qualified person must be a Minister of the Crown.
47. Having examined documentation addressing this matter I can confirm to Mr Sittampalam that this requirement was satisfactorily discharged.
48. With respect to the matter outlined at point 9 (ii), it may be concluded that the UKBA response of 4 March 2010 was intended to tacitly address the arguments raised by Mr Sittampalam in his initial request.
49. I appreciate that it might have been helpful to Mr Sittampalam if he had been provided with a detailed explanation as to why it was felt that his suggested approach to responding to his FoI request was not appropriate.
50. However it is my determination that the response provided by UKBA, and the arguments advanced within the context of such, may be seen to subsume within them the concerns raised by Mr Sittampalam in his initial FoI request.
51. As already stressed, the decision taken by UKBA was based on awareness of the internal review of Mr Sittampalam's previous FoI request (Ref: 12862) being live at the time. Accordingly as outlined in points 31 – 36 of this review to disclose *any material* relevant to such whilst it was still being conducted was firmly believed as to be likely to inhibit the intended function of such.

### **Advice and assistance**

52. 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.
53. 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**

54. Regarding procedural issues, it may be concluded that UKBA did not fully satisfy its statutory obligations with regard to the time taken to

resolve Mr Sittampalam's request. 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 seen to stand in breach of section 10 (3) of the Act.

55. However, it is noted that when a response to Mr Sittampalam's request was forthcoming it was provided within the limit of the extended deadline outlined to him by UKBA in the correspondence of 12 February 2010.
56. Concerning the substance of the response provided to Mr Sittampalam, it may be concluded that UKBA satisfactorily discharged their statutory obligations under the Act. UKBA informed Mr Sittampalam that certain relevant information was held and furthermore the reasons why such material was exempt from disclosure.
57. Specifically, it is my determination that the exemptions under section 36 (2) (b) (i), section 36 (2) (b) (ii), section 36 (2) (c) and section 40 (2) of the Act cited to Mr Sittampalam in the response of 4 March 2010 are seen to have been correctly engaged at this point in time. In addition, the public interest tests required under section 36 of the Act are seen to have been correctly conducted.

Robert Clifford  
Information Access Team  
7 April 2010

**Annex A**  
**Original text of FOI request 12862**

Dear UK Border Agency,

Please pass this on to the person who conducts Freedom of Information reviews.

I am writing to request an internal review of UK Border Agency's handling of my FOI request 'Baroness Scotland investigation'.

I do not agree with your application of either exemption and I refer you to the comments about these exemptions in my initial request, which you have not addressed.

I am also unhappy about the huge length of time it took you to respond to the request and would like a proper explanation for why it happened and details of what you are doing to prevent a recurrence, especially given your past failures to deal with FOI requests in a timely fashion.

A full history of my FOI request and all correspondence is available on the Internet at this address:  
[http://www.whatdotheyknow.com/request/baroness\\_scotland\\_investigation](http://www.whatdotheyknow.com/request/baroness_scotland_investigation)

Yours faithfully,

Ganesh Sittampalam

**Annex B**  
**Exemptions cited in UKBA response of 4 March 2010**

Section 36 exemption: Prejudice to effective conduct of public affairs

(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 40 exemption: 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.