



Home Office

Information Access Team

Information Management Service

Room No: Ground Floor, Seacole Building, 2 Marsham Street, London, SW1P 4DF

Switchboard 020 7035 4848

E-mail Info.access@Homeoffice.gsi.gov.uk www.homeoffice.gov.uk

Mr Colin Yeo
request-55371-
08d2ddb3@whatdotheyknow.com

Our Ref 17174
Your Ref
Date 5 May 2011

Dear Mr Yeo

Freedom of Information request (our ref.17174): internal review

Thank you for your e-mail of 20 December 2010, in which you asked for an internal review of our response to your Freedom of Information (FoI) request regarding all documents setting out the criteria to be applied to 'so called' legacy cases by UKBA officials when taking decisions on such cases.

I have now completed the review and would like to apologise and express our regret for the length of time it has taken.

I have examined all the relevant papers, including the information that was withheld from you, and have consulted the policy unit which provided the original response. I have considered whether the correct procedures were followed and assessed the reasons why information was withheld from you. I confirm that I was not involved in the initial handling of your request.

My findings are set out in the attached report. My conclusion is that the original response was incorrect.

I have found that some of the information was already in the public domain, and therefore section 21(1) of the FOI Act was engaged. In addition, some information should have been released and this is included with this response. However, a small amount of the requested information has been withheld under sections 31(1)(a), 31(1)(e) and 24(1) of the FOI Act. Please see paragraphs 20-41 for further information.

This completes the internal review process by the Home Office. If you remain

dissatisfied with the response to your FoI request, you have the right of complaint to the Information Commissioner at the following address:

The Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

Yours sincerely

Martin Riddle
Information Access Caseworker

Internal review of response to request under the Freedom of Information (Fol) Act 2000 by Mr Colin Yeo reference 17174

Responding Unit: UK Border Agency (UKBA)

Chronology

Original Fol request:	20 December 2010
Acknowledgement:	20 December 2010
UK Border Agency response:	12 January 2011
Request for internal review:	17 January 2011

Subject of request

1. Mr Yeo requested the following information:
'Please disclose any or all documents setting out the criteria to be applied to so called 'Legacy' cases by UKBA officials when taking decisions on such cases'.

The response by UK Border Agency

2. UKBA confirmed that it did hold the information requested however this information would not be disclosed under section 31(1)(e) which exempts information if disclosure would or would likely to prejudice immigration controls.
3. UKBA explained that disclosure of the information requested would allow criminals with convictions to use the information to their advantage and abscond from UKBA reporting requirements.

Mr Yeo's request for an internal review

4. On 17 January 2011 Mr Yeo requested an internal review of the response he had received from UKBA:

I do not believe that the reason given for refusing my request is a valid one.

1. All of the UK Border Agency's policies are made available online. The policy on 'Legacy' cases is in principle no different to any other policy made by UKBA in respect of immigration control. It is therefore impossible to imagine how this particular policy might prejudice the operation of immigration controls.

2. Further, there can be no link between publication of a policy of this nature that sets out the criteria for granting or refusing applications and prejudice to immigration control. The criteria are highly likely to be historic in nature relating to time spent in the UK, family links and lack of criminal convictions. It is highly unlikely that any individual could take active steps in order to bring themselves within or without such criteria. Publication therefore cannot prejudice the

operation of immigration control.

3. Finally, I dispute that section 31(1)(e) of the Act can apply to the publication of a policy (and in particular this policy) as opposed to, for example, details of a method of enforcement or detection. Section 31(1)(e) is not intended to protect policy information as opposed to operational information, which is why the words 'immigration control' are used rather than 'immigration policy'.

Procedural issues

5. Mr Yeo made his initial request on 20 December 2010 and a response was issued on 12 January 2011. This represents a period of 13 working days between receipt of the request and the final response being issued. This means that the response was within the target deadline of 20 working days as specified in section 10(1) of the Act.
6. An email was sent to Mr Yeo acknowledging receipt of his request and advising him when the deadline was. Although this is not a requirement of the Act, it is generally considered best practice to do so.
7. The 20 working day deadline is extendable by virtue of section 10(3) of the Act. Given that the response was issued within the time limit of 20 working days, it was not necessary to consider issuing a public interest test (PIT) extension letter.
8. Mr Yeo was informed in writing of his right to request an independent internal review of the handling of his request, as required by section 17(7) (a) of the Act.
9. The response also informed Mr Yeo of his right of complaint to the Information Commissioner, as set out in 17(7) (b) of the Act.

Consideration

Section 31 (Law enforcement)

10. UKBA informed Mr Yeo that information was held but was exempt from disclosure under section 31(1)(e) which exempts information if disclosure would be likely to prejudice the operation of immigration controls.
11. However as part of this internal review, I have re-considered all the information that is within the scope of the request. As a result I have found that some of the information requested falls under Chapter 53 of the immigration rules.
12. UKBA publishes most of its policies online, and following an examination of the UKBA website, I have found that the section that applies to this area of work is available here:
<http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/>
13. I have been informed that paragraph 395C is of particular relevance in this case, along with paragraphs 365-368. These paragraphs state the following criteria:

395C. Before a decision to remove under section 10 is given, regard will be had to all the relevant factors known to the Secretary of State including:

- (i) age;
- (ii) length of residence in the United Kingdom;
- (iii) strength of connections with the United Kingdom;
- (iv) personal history, including character, conduct and employment record;
- (v) domestic circumstances;
- (vi) previous criminal record and the nature of any offence of which the person has been convicted;
- (vii) compassionate circumstances;
- (viii) any representations received on the person's behalf.

In the case of family members, the factors listed in paragraphs 365-368 must also be taken into account.

14. Paragraphs 365-368 state the following criteria that applies to family members:

Deportation of family members

365. Section 5 of the Immigration Act 1971 gives the Secretary of State power in certain circumstances to make a deportation order against the spouse, civil partner or child of a person against whom a deportation order has been made. The Secretary of State will not normally decide to deport the spouse or civil partner of a deportee where:

- (i) he has qualified for settlement in his own right; or
- (ii) he has been living apart from the deportee.

366. The Secretary of State will not normally decide to deport the child of a deportee where:

- (i) he and his mother or father are living apart from the deportee; or
- (ii) he has left home and established himself on an independent basis; or
- (iii) he married or formed a civil partnership before deportation came into prospect.

367. In considering whether to require a spouse or child to leave with the deportee the Secretary of State will take account of all relevant factors, including, as well as the following:

- (i) the ability of the spouse or civil partner to maintain himself and any children in the United Kingdom, or to be maintained by relatives or friends without charge to public funds, not merely for a short period but for the foreseeable future; and
- (ii) in the case of a child of school age, the effect of removal on his education; and
- (iii) the practicality of any plans for a child's care and maintenance in this country if one or both of his parents were deported; and
- (iv) any representations made on behalf of the spouse or child.

368. Where the Secretary of State decides that it would be appropriate to deport a member of a family as such, the decision, and the right of appeal, will be notified and it will at the same time be explained that it is open to the member of the family to leave the country voluntarily if he does not wish to appeal or if he appeals and his appeal is dismissed.

15. All these paragraphs can be located at this link: <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part13/>
16. It is therefore reasonable to argue that the information requested is already in the public domain. as the information derived from the link appears to answer the request. Based on this assessment section 21 (information accessible to the applicant by other means) could therefore have been applied in this case, at least in part.
17. As stated, the original response cited section 31(1)(e) as grounds for withholding the requested information. I have already established that this exemption does not apply to some of the information within the scope of the request as it was already in the public domain. Having now examined the information this exemption was applied to, I have concluded that the exemption applies to some but not all of the information within the scope of the request. My findings are included below.
18. Mr Yeo cited 3 main arguments relating to his internal review request, one of which refers to policy. To help determine what information is within scope and where section 31(1)(e) has been applied, I have included the following definition as to what is meant by the term 'immigration controls'.
19. The scope of the term 'immigration controls' may be considered as defined by sections 4 (2) (c) and (d) of the Nationality, Immigration and Asylum Act 2002 (Juxtaposed Controls) Order 2003 (No. 2818) which qualify such as:
- (c) the exercise by immigration officers of their powers in relation to entry into the United Kingdom, and the removal from the United Kingdom of persons refused leave to enter or entering or remaining unlawfully; and
 - (d) the detention of persons pending examination or pending removal from the United Kingdom
20. Section 31(1)(e) is a qualified exemption which means that information can only be exempt from disclosure if the public interest in favour of withholding it outweighs the public interest in release. UKBA stated in its response that it had conducted a public interest test, the conclusion of which was that while it recognised there was a public interest in disclosure, release would prejudice the government's ability to maintain efficient law enforcement.
21. The response from UKBA outlined arguments in favour of disclosing the information. These turned upon the very real public interest that exists regarding the work of UKBA and the need for transparency. UKBA acknowledged that releasing the information could inform and educate the public about the role of the UKBA and recognised that there is a public interest in ensuring public confidence in United Kingdom's immigration controls is maintained.

22. The arguments against disclosure of the information explained that release of the information would provide individuals the opportunity to assess UKBA immigration criteria which could be used to subvert immigration controls.
23. This in turn would afford individuals the opportunity to appraise the capabilities of the UKBA and relative strength of its operational protocols. As a result, this would serve to provide an advantage to individuals involved in UKBA immigration procedures. If the information requested was disclosed it would be used by unscrupulous individuals to remain in the UK.
24. The arguments around the use of section 31, seem plausible, however before a decision is made on whether to maintain the exemption under section 31(1)(e) we must first begin by re-examining the original request.
25. As stated previously in paragraph 4, Mr Yeo has cited 3 main arguments against the refusal to disclose the requested information. I will now examine each one in turn to assess its validity.
26. The first item to note in his internal review request is that Mr Yeo makes repeated references to the policy in this case. However his original case, does not reference policy. In fact the original case talks about the criteria to be applied to so called 'Legacy' cases. This therefore places the scope of the request beyond policy and into operational areas.
27. Mr Yeo's argument is that all of the UK Border Agency's policies are made available online. He argues that the policy on 'Legacy' cases is in principle no different to any other policy made by UKBA in respect of immigration control. He therefore considers it impossible to imagine how this particular policy might prejudice the operation of immigration controls.
28. As previously indicated in paragraphs 12-16, the policy criteria relating to 'Legacy' cases is already in the public domain. What is not in the public domain is the internal guidance that UKBA uses to process these cases.
29. As the criteria Mr Yeo's asked for in his original request is already in the public domain, it therefore mitigates much of the context around the arguments he cited for his internal review. However some of these points need addressing to place them in the correct context and this section will deal with this.
30. Clarifying Mr Yeo's second argument cited in paragraph 4 above, he argues that he finds it hard to believe that the argument cited to withhold the information holds weight. He cannot see how an individual could take active steps in order to bring themselves inside or outside of the criteria, when it 'highly likely' relates to logical concrete factors such as time spent in the UK, family links and criminal convictions. He argues that 'Publication of the information therefore cannot prejudice the operation of immigration control.'
31. As previously stated much of the criteria Mr Yeo has listed, is already in the public domain. Paragraphs 12-16 detail which criteria is already in the public domain and covers the points Mr Yeo raises. The guidance documentation

mentioned above and being released as part of this review contained specific examples as to circumstances that would result in deportation. It is one point to release the criteria and another to release scenarios. The criterion is ambiguous and advises what is considered, while the examples actually depict circumstances, which unscrupulous individuals could use in any attempt to circumvent immigration controls. Hence their exemption from disclosure under section 31(1)(e).

32. Mr Yeo's final point disputes whether section 31(1)(e) can apply to the publication of a policy. He points out that he could understand it applying to details of a method of enforcement or detection, but not to protect policy information.
33. Again this argument is largely redundant as the main criteria are already in the public domain. Additionally, Mr Yeo's argument does not mitigate the possibility around whether section 31(1)(e) could apply. As stated in paragraph 26, this request does not solely revolve around policy. The scope of the original request applies to both policy and operational material as it asks for the disclosure of any or all documents setting out the criteria to be applied, not solely the policy. The criteria features in both the policy and the operational material and therefore both sides must be considered for release. By Mr Yeo's own admission he argues that 31(1)(e) does apply in instances of operational information and as such this therefore means that section 31(1)(e) should indeed have been considered.. I refer back to paragraphs 22 and 23 above.
34. However, Mr Yeo's argument does hold some weight and it would be remiss of the Home Office not to re-examine all the information that is within the scope of this case to fully appraise whether the correct response was given.
35. Mr Yeo's original request asked for 'any or all documents setting out the criteria' for Legacy cases and as such internal guidance must be considered. The internal guidance that is within the scope of the request has now been re-assessed and some of it is to be released with this internal review. However, I have established that sections 31(1)(a), 31(1)(e) and 24(1) applies to some of the information within these documents and therefore some sections have been redacted.
36. The PIT arguments for the use of section 31(1)(e) for these redactions are the same as in the original response and as mentioned above in paragraphs 20-24. Section 31(1)(e) applies to several instances within the requested information.
37. One of the slides within the presentation engages all three of the exemptions listed in paragraph 35. Section 31(1)(a) refers to law enforcement and in particular the prevention and detection of crime. Section 24(1) refers to the purpose of safeguarding national security. PIT arguments for the following two exemptions can be found below.
38. Releasing the requested information would add to the public knowledge of the internal handling of 'Legacy case'. It would provide the public with knowledge of the IT system used to track Asylum seekers and reassure the public that

individuals are being tracked. Additionally the release of this slide would increase understanding and transparency in this area and inform the public debate.

39. In this instance, withholding the release of this information is required for the purpose of safeguarding national security. Electronic attacks are directed at government organisations globally, including in the UK. If the department were to release the information it would provide unscrupulous individual's necessary information that could be used to hack and amend the IT system used for tracking Asylum cases.
40. Law enforcement is also affected in this way as the release of the information would provide inner working knowledge of the IT system used to track asylum seekers. It could encourage attacks by unscrupulous individuals with the intent and knowledge to amend the IT system used to track asylum seekers. It could therefore mean that individuals do not get deported when they should, which also interferes with immigration controls.
41. I have therefore determined that safeguarding both national security and law enforcement interests is of paramount importance and that in this circumstance, the public interest in withholding this information contained in this slide is of high importance.

Conclusion

42. There was no procedural breach of section 10(1). The reply was issued within the 20 working day deadline.
43. There was no procedural breach of section 1(1) (a) as the response stated that information requested was held.
44. Some of the information requested was already in the public domain, and as such section 21 should have been applied to some of the information in this case.
45. The decision to use the exemption under section 31(1)(e) to all the requested information has been overturned. Some information has been determined as releasable and as such any releasable information relating to the criteria applied to 'legacy' cases not currently in the public domain is now to be released.
46. Sections 31(1)(e), 31(1)(a) and 24(1) are engaged in relation to some of the information in this case.
47. I am satisfied there was no procedural breach of section 17(7) (a) and 17(7) (b).

**Information Access Team
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