

Freedom of Information Act 2000 (Section 50)

Decision Notice

20 January 2009

Public Authority: UK Borders Agency (a shadow agency of the Home Office).
Address: Central Freedom of Information Team
5th Floor, Whitgift Centre Block C
15 Wellesley Road
Croydon
Surrey
CR9 3LY

Summary

The complainant requested information from the Border and Immigration Agency of the Home Office (the "public authority") about the Work Permit application of another individual. The public authority responded in accordance with the provisions of section 1(1)(a) (it confirmed or denied it held the information requested). The complainant asked for an internal review into the public authority's response to three parts of his initial request. The public authority maintained its previous position. After considering the case, the Commissioner finds that the public authority was excluded from its duty to respond to the request under section 1(1)(a) by virtue of the provisions of section 40(5)(b)(i) (exclusion from the duty to confirm or deny a public authority holds third party personal information) because in responding to the request, it would have to disclose, information which, if held would constitute the personal data of the third party and would breach a data protection principle. The Commissioner does not require the public authority to take any steps in relation to the complainant's 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 Commissioner notes that the request for information was made to the Borders and Immigration Agency (BIA). As a result of the Prime Minister's announcement dated 14 November 2007 the UK Borders Agency was set up.

This Agency has been designed to integrate numerous departments, including the BIA and that is why this notice has been issued on the UK Borders Agency.

3. The Commissioner notes that the UK Borders Agency is not a public authority itself, but is actually a shadow agency of the Home Office which is responsible for it and therefore, the public authority in this case is actually the Home Office not the UK Borders Agency. A shadow agency is what a department is called in its transitional period prior to becoming an executive agency. However, for the sake of clarity, this decision notice refers to the BIA as if it were the public authority.
4. On 14 May 2007 the complainant requested the following information from the public authority:
 - a. *Inform me the first date [Company A] was approved a work permit for [Mr D] (specifically was it as early as 2nd August 1999)?*
 - b. *Inform me on what date [Mr D] was provided with approval to work via the agency [Agency B] at [Company C] as an employee of [Company A] (was it only after 11/01/2000 as specified in the attached letter.*
 - c. *If [Mr D] was providing services via [Agency B], onsite at [Company C] as an employee of [Company A] as early as August 2nd 1999 is it your view this would have constituted a unlawful working and a breach of immigration rules, at the time?*
 - d. *Can you confirm whether the attached (undated) Agreement of Commissioned Software is in your files. If so, was it used by [Company A] to procure a valid work permit for [Mr D] (claiming there was a genuine contract for commissioned software)?*
 - e. *If the above, undated, agreement was submitted by [Company A] to claim that there was an agreement for Commissioned Software when in reality the supply was simply that of an agency supplying a contractor who worked via [Company A] is it your view that both [Agency B] and [Company A] would have been guilty of immigration fraud, at that time?'*

For ease of reference, these will be referred to as requests (a) to (e) throughout the rest of this Notice.

5. On 7 June 2007 the public authority responded in accordance with the provisions of section 1(1)(a) of the Act. In other words, it either confirmed or denied it held the information requested. The Notice does not detail the public authority's exact position under section 1(1)(a) due to the Commissioner's decision in this case.
6. On 7 June 2007 the complainant requested an internal review from the public authority and limited his request for internal review to requests (a), (b) and (d). On 3 July 2007 the public authority conducted an internal review in relation to this request. It reasserted its previous position and advised the complainant of his right to complain to the Commissioner.

The Investigation

Scope of the case

7. On 31 July 2007 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the public authority's response was correct in relation to its application of the Act. In his letter to the Commissioner the complainant only referred to requests (a), (b) and (d). Therefore the Commissioner has only considered the public authority's responses to these three requests.
8. The complainant also raised other issues about the public authority which are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

9. On 8 May 2008 the Commissioner wrote to the complainant and informed him that he intended to only investigate the public authority's responses to requests (a), (b) and (d). He noted the length of time that had passed and asked the complainant whether he still wished for him to proceed with the case. On 12 May 2008 the complainant confirmed that he did.
10. On 13 May 2008 the Commissioner wrote to the public authority and informed it of the scope of his investigation and asked a number of questions to assist him in his investigation. On 7 July 2008 the public authority provided detailed responses to all of his questions and information about the work permit process.
11. On 8 July 2008 the Commissioner wrote to the public authority again to ask some further questions. On 5 August 2008 the public authority provided additional information.

Findings of fact

12. The public authority issues work permits to UK based employers wanting to employ a worker from outside the European Economic Area (EEA).
13. Work permits are issued for a specific individual to work in a specific job. They are only issued for certain types of work and only when an employer has been unable to recruit a suitable employee from within the EEA. To apply for a Business and Commercial work permit the employers must be based in the UK, prove they have a genuine vacancy for the employee and that the employer will be responsible for the post, the delivery of any project or piece of work.
14. When an employee is based with a third party, the public authority needs to see relevant parts of the contract between the employer and the client to ensure the employer making the work permit application is responsible for a particular job,

project or piece of work whether it is based at a client site or at the employer's own premises.

15. The UK Border Agency's Intelligence Unit has been established as the point of contact for members of the public who believe there is an abuse of the work permit system. They have the capability to carry out investigations and, if appropriate, inform the relevant authorities of their findings. Each allegation is treated in strict confidence and information can be withheld from the concerned party so that the issue can be fairly investigated.

Analysis

Section 40(5)(b)(i) (Exclusion from the duty to confirm or deny)

16. The information was requested in the belief by the complainant (and it is irrelevant whether this was right or wrong) that [Mr D] had been working illegally. This therefore prompted the Commissioner to consider whether the public authority would have been excluded from the duty imposed on it by the provisions of section (1)(1)(a) by virtue of the provisions of section 40(5)(b)(i).
17. From the outset, it is important to point out that the Act except in very few scenarios (none of which are applicable in this case) is applicant blind. In other words, a disclosure made under the Act is in effect to the world at large, as every other applicant would be entitled to that information upon request.
18. Generally, the provisions of section 40 subsections 1 to 4 exempt 'personal data' from disclosure under the Act. In relation to a request which constitutes the personal data of individual(s) other than the applicant(s), section 40(5)(b)(i) further excludes a public authority from complying with the duty imposed by section 1(1)(a) if complying with that duty would contravene any of the data protection principles or section 10 of the DPA or would do so if the exemptions in section 33A(1) of that Act were disregarded.
19. The nature of the request meant that the public authority's response in accordance with the duty under section 1(1)(a) inevitably disclosed whether or not [Mr D] had a work permit .
20. The Commissioner is of the general view that whether or not an individual has been issued a work permit is information which constitutes the personal data of that individual.
21. In order for section 40 to be applicable, the information being requested must constitute personal data as defined by section 1 of the DPA. Full copies of both sections are contained in the legal annex of this notice.
22. Section 1 of the DPA defines personal data as:

'...data which relate 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 is 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 to the individual'.

23. The Commissioner is satisfied that the requested information, if held, would be [Mr D]'s personal data in this case. The Commissioner accepts that the information relating to the work permit application of [Mr D] (if held), including the date which he received one and the basis on which he obtained one, clearly falls within the term 'personal data' as defined by the DPA because it is information about a living individual, who can be identified from that data. He is also satisfied that, if there was information held, there was no possibility of information falling within the scope of the requests without it being the individual's personal data.
24. The complainant argued that the information, if held, should not be the personal data of the employee as the employer would have prepared it. The Commissioner does not agree with this argument as he sees the issue of whether information is personal data as not an issue of origin but rather what the information is about.
25. The complainant also argued that the information, if held, was available to the employer and therefore should not be personal data under the Act. The Commissioner does not find this argument persuasive. As explained above information is personal data when it satisfies the definition of section 1(1) of the DPA. How widely information is disseminated, if held, is not a relevant consideration.
26. At the time the request was made, the Commissioner is satisfied that [Mr D] was alive. This is a relevant consideration as information cannot be personal data under section 1(1) of the DPA if it is not information about a living individual.
27. In light of the above findings, the Commissioner considers that the proper approach would be to first consider whether or not in responding to the request, the public authority would have been excluded from the duty imposed by section 1(1)(a).
28. In line with the provisions of section 40(5)(b)(i), the Commissioner therefore first considered whether or not confirming or denying whether a person had a work permit would contravene any of the data protection principles.

Would complying with section 1(1)(a) contravene the first data protection principle?

29. The Commissioner believes that the relevant principle in relation to this matter would be the first data protection principle: the requirement that processing should be fair and lawful.

30. The first data protection principle has two stages, which need to be satisfied together for the principle not to be contravened when releasing any information. These are outlined below:
1. The personal data should be processed fairly and lawfully, and
 2. Personal data shall not be processed unless one of the conditions in Schedule 2 of the DPA is met.

Is complying with section 1(1)(a) fair?

31. In considering whether it would be fair to comply with section 1(1)(a) in this case, the Commissioner has considered:
- the means by which the information would have been obtained, if held,
 - the likely expectations of **[Mr D]**, if information was obtained by the public authority, and
 - the effect that disclosure could have upon **[Mr D]** or others.
32. In assessing the means by which the information would have been obtained, the Commissioner looks to the guidance about the application of the first data protection principle that is set out in Schedule 1, part II, paragraph 2(3) of the DPA. This states that for processing to be fair the public authority must ensure that the data subject has available to him information as to the identity of the data controller (including those representing the controller); the purpose(s) for which the data will be processed and any other relevant information that is necessary for the processing to be fair.
33. The public authority includes a Data Protection declaration on its application forms, which outlines to anyone who applies for a work permit the purposes for which the data is going to be processed. The declaration is worded as below:

'The information provided by the applicant to the Border and Immigration Agency will be treated in confidence but it may be disclosed to other law enforcement agencies, government departments, agencies, local authorities, foreign governments and other bodies for immigration or research purposes or to enable them to perform their functions. The Border and Immigration Agency may request information from other law enforcement agencies, government departments, or Agencies, local authorities, the Police, foreign governments and other bodies for immigration or research purposes or to enable them to perform their functions. The Border and Immigration Agency may use the information provided by the applicant for training and research purposes.'

For ease of reference this will be referred to as the DP declaration throughout the rest of this Notice.

34. The public authority has informed the Commissioner that while the requests do not directly relate to information that may have been provided within the application form it feels that the statement should be taken to cover the potential applicant's expectations about all details surrounding any application.
35. Examining the DP declaration the Commissioner notes that it states processing would be allowed '*... to enable them to perform their functions*'. He believes that this could be read to include the public authority's possible obligations under the Act. In any case, the Commissioner is of the view that omitting to mention disclosures under the Act in its DP declaration would not in itself mean a disclosure contravened the DPA, as it would not necessarily have been an event that the public authority envisaged. However the presence of the DP declaration will in this case have gone some way into shaping the expectations of the data subject.
36. The Commissioner has focussed his consideration of fairness on what the expectations of **[Mr D]** would be in relation to the disclosure of this information, if held. The Commissioner considers that there is a general and reasonable expectation that information of this sort, if held, will remain private between the public authority, employer and employee. The expectation is consistently engendered by the literature of the department and the Commissioner feels that on an objective reading of the all the relevant material, any potential applicant would have this expectation. The Commissioner believes that the disclosure of any information to the public against this expectation is unfair to **[Mr D]**. The information, if held, would have great importance to **[Mr D]** as it directly concerns whether or not he can work in the United Kingdom.
37. The Commissioner has considered the possibility that this unfairness may have been mitigated by two possible factors. The first factor is the possible competing expectation of the applicant who has been successful that this will be publicised, so it is clear that they have a legitimate work permit. Here the Commissioner believes that the choice should be left to the applicant and the possibility that some applicants may favour disclosure in some circumstances would not make disclosure by the public authority any less unfair to the applicant in this case. The second factor is that the applicant may expect that the public authority will need to satisfy the public that it has followed its procedure. The Commissioner believes that this can be achieved by the public authority in a way that is less intrusive to **[Mr D]**. The public authority publishes a large amount of information on the Home Office's website about the process and the public has the chance to raise any concerns about possible abuses of the system through the process outlined in paragraph 15 of this notice.
38. Having considered the issue of fairness the Commissioner has determined that confirming or denying whether information was held would be unfair and he has therefore not gone onto to consider whether it would be lawful. He has also not gone onto to consider whether a condition would be satisfied in Schedule 2 of the DPA.
39. The Commissioner is satisfied that any response provided to requests (a), (b) and (d) in line with the provisions of section 1(1)(a) of the Act would contravene the first data protection principle. As the Commissioner is satisfied that complying

with section 1(1)(a) would in this case contravene the first data protection principle, he has not gone on to consider the other data protection principles.

40. He therefore finds that the public authority was not obliged to respond to the complainant's request in accordance with the duty imposed on it by the provisions of section 1(1)(a) of the Act by virtue of the provisions of section 40(5)(b)(i). The Commissioner will not proactively seek to apply exemptions in all cases before him. However in cases where personal data is involved, the Commissioner believes he has a duty to consider the position of data subjects. The rights of data subjects are set out in the DPA and are closely linked to Article 8 of the Human Rights Act. The Commissioner could be in breach of his obligations under the Human Rights Act were he to order public authorities to confirm or deny whether information was held under section 1(1)(a), or to disclose information under section 1(1)(b) , without having considered the position of data subjects, even if the public authority had not cited the correct section of the exemption.

The Decision

41. The Commissioner's decision is that the public authority did not have a duty to comply with section 1(1)(a) of the Act on the basis of the exclusion contained in section 40(5)(b)(i).

Steps Required

42. The Commissioner requires no steps to be taken.

Right of Appeal

43. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 20th day of January 2009

Signed

**David Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1 - General right of access to information held by public authorities

Section 1 provides that:

- (1) 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 40 – Personal information

Section 40 provides that:

- (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.
- (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.
- (3) The first condition is—
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the [1998 c. 29.] Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the [1998 c. 29.] Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.
- (4) The second condition is that by virtue of any provision of Part IV of the [1998 c. 29.] Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject’s right of access to personal data).
- (5) The duty to confirm or deny-
- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
 - (b) does not arise in relation to other information if or to the extent that either-

(i) he giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or

(ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed).

(6) In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.

(7) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.

Data Protection Act 1998

Section 1 - Basic interpretative provisions

(1) In this Act, unless the context otherwise requires—

- "data" means information which—
 - (a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,
 - (b) is recorded with the intention that it should be processed by means of such equipment,
 - (c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or
 - (d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;
- "data controller" means, subject to subsection (4), a person who (either alone or jointly or in common with other persons) determines the purposes for which and the manner in which any personal data are, or are to be, processed;

- “data processor”, in relation to personal data, means any person (other than an employee of the data controller) who processes the data on behalf of the data controller;
 - “data subject” means an individual who is the subject of personal data;
 - “personal data” means data which relate 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 is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;
 - “processing”, in relation to information or data, means obtaining, recording or holding the information or data or carrying out any operation or set of operations on the information or data, including—
 - (a) organisation, adaptation or alteration of the information or data,
 - (b) retrieval, consultation or use of the information or data,
 - (c) disclosure of the information or data by transmission, dissemination or otherwise making available, or
 - (d) alignment, combination, blocking, erasure or destruction of the information or data;
 - “relevant filing system” means any set of information relating to individuals to the extent that, although the information is not processed by means of equipment operating automatically in response to instructions given for that purpose, the set is structured, either by reference to individuals or by reference to criteria relating to individuals, in such a way that specific information relating to a particular individual is readily accessible.
- (2) In this Act, unless the context otherwise requires—
- (a) “obtaining” or “recording”, in relation to personal data, includes obtaining or recording the information to be contained in the data, and
 - (b) “using” or “disclosing”, in relation to personal data, includes using or disclosing the information contained in the data.
- (3) In determining for the purposes of this Act whether any information is recorded with the intention—
- (a) that it should be processed by means of equipment operating automatically in response to instructions given for that purpose, or
 - (b) that it should form part of a relevant filing system,

it is immaterial that it is intended to be so processed or to form part of such a system only after being transferred to a country or territory outside the European Economic Area.

(4) Where personal data are processed only for purposes for which they are required by or under any enactment to be processed, the person on whom the obligation to process the data is imposed by or under that enactment is for the purposes of this Act the data controller.