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Kitty Falls

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FOI Reference: 49761

Date: 29 August 2018

Dear Kitty Falls,

Thank you for your e-mail of 9 August, in which you ask for the:

'...release of any Home Office policy or notes to caseworkers or similar on implementing the CJEU judgment in the case of Banger C-89/17'

Your request has been handled as a request for information under the Freedom of Information Act 2000.

I can confirm that the Home Office does hold the information that you have requested. However, after careful consideration we consider that the information is exempt from disclosure under section 35 of the Freedom of Information Act. This provides that information can be withheld if it relates to the formulation or development of government policy.

Section 35 of the Act is a qualified exemption and requires consideration of the public interest test. Arguments for and against disclosure in terms of the public interest with the reasons for our conclusion, are set out in the attached Annex A.

In addition, after careful consideration we have also decided that the information is exempt from disclosure under section 22 of the Freedom of Information Act. This provides that information can be withheld if it is intended for future publication.

Section 22 of the Act is also a qualified exemption and requires consideration of the public interest test. Arguments for and against disclosure in terms of the public interest with the reasons for our conclusion, are also set out in the attached Annex A.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to foirequests@homeoffice.gsi.gov.uk, quoting reference 49761. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

As part of any internal review the Department's handling of your information request would be reassessed by staff who were not involved in providing you with this response. If you were to remain dissatisfied after an internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the FOIA.

Yours sincerely

D Thomas

Border, Immigration and Citizenship System and Europe Group

Annex A

Section 35(1)(a) – formulation of Government policy Section 22 – information intended for future publication

Some of the exemptions in the FOI Act, referred to as ‘qualified exemptions’, are subject to a public interest test (PIT). This test is used to balance the public interest in disclosure against the public interest in maintaining the exemption. We must carry out a PIT where we are considering using any of the qualified exemptions in response to a request for information.

The FOI Act is ‘applicant blind’. This means that we cannot, and do not, ask about the motives of anyone who asks for information. In providing a response to one person, we are expressing a willingness to provide the same response to anyone.

Section 35(1) of the Act provides that information is exempt if it relates to (a) the formulation or development of Government policy.

This exemption is engaged because the information you have requested is concerned primarily with the development of Government policy in the context of immigration and free movement of European Union (EU) citizens, as well as the UK’s relationship with the European Union.

Section 22(1) of the Act provides that information is exempt if it is held with a view to publication at a future date.

The use of these exemptions requires us to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The “public interest” is not the same as what interests the public. In carrying out a public interest test, we consider the greater good or benefit to the community as a whole if the information is released or not. The “right to know” must be balanced against the need to enable effective government and to serve the best interests of the public. Considerations for and against disclosure are considered below.

Considerations in favour of disclosing the information

There is a general public interest in the disclosure of information to ensure departmental transparency and accountability. There is also a general public interest in providing information to enable the public to understand decisions which may affect them.

The Court of Justice of the European Union (CJEU) has recently promulgated its judgment in the case of *Banger (C-89/17)*. This case concerns whether a Member State is obliged to facilitate applications from extended family members under the *Surinder Singh* route.

The CJEU found that there is such an obligation on Member States

We recognise that there will be interest from EEA nationals as well as their non-EEA family members concerning this case. In particular from those individuals whose applications are pending and who are awaiting a decision.

Immigration and free movement of EU citizens are matters of considerable public interest, particularly in the light of the EU referendum. There is therefore a strong public interest in releasing the information, as it would provide greater transparency on the workings of

Government, how important policy decisions are made, and the quality of advice received by the then Prime Minister from her Ministers.

Disclosure of this information may also help reassure the public that their concerns about important policy matters, such as immigration, are taken seriously by the Government and discussed in detail at a senior level. This can help to inform public debate and to increase public confidence that decisions are properly made.

Considerations in favour of maintaining the exemption

It is in the public interest to ensure that the publication of official information is a properly planned and managed process. The Home Office must ensure that the information intended for publication meets the standards and requirements set for departmental publications. It would not be in the public interest for the Home Office to release this information prior to meeting such standards.

We are currently considering how best to implement the effects of *the Banger* judgment. Further information will be published in due course.

There is a clear public interest in withholding the information concerned as Ministers need a safe space in which to discuss important policy matters, consider all options and weigh up the risks of particular proposals, without the prospect of their ideas being held up to criticism in the public domain. It is also considered that disclosure of the information may, in future, inhibit Ministers from setting out their views in writing, or challenging existing policy. This, in turn, may prevent important policy issues and proposals from being thoroughly explored, thus harming the policy-making process in the long run.

Conclusion

I have concluded that the balance of the public interests identified lies in favour of maintaining the exemption. There is a greater overall public interest in ensuring that Ministers have the necessary space to discuss and formulate Government policy relating to the judgment in *Banger* and ensure that applicants, and the general public are informed at the appropriate time.