

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 December 2016

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant submitted two requests for information about refugees and unauthorised entry into the UK from France.
2. In relation to his first request, the Home Office stated that it was unable to establish whether it held all this information within the cost limit and therefore refused the request under section 12(2) (cost of compliance exceeds appropriate limit) of the FOIA. The Commissioner's decision is that the Home Office was entitled to rely on section 12(2) in relation to that request.
3. In relation to his second request for information, the Home Office refused to provide the requested information citing section 31(1)(e) of the FOIA (law enforcement). The Commissioner has determined that section 31(1)(e) was cited correctly and so the Home Office was not obliged to disclose this information.
4. The Commissioner has found, however, that the Home Office breached sections 10(1) (time for compliance with request) and 17(1) (refusal of request) of the FOIA by delaying its response to both requests.
5. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

6. On 8 September 2015 the complainant wrote to the Home Office and requested information of the following description:

- "1. In 2014-2015, how many persons have been apprehended either by the police or the Home Office Immigration authorities as allegedly having entered the UK unlawfully from France and in particular from Calais?*
 - 2. Of those persons who were apprehended, how many were released and are currently untraceable?*
 - 3. Of those persons who were apprehended, how many were released pending their applications for asylum to be assessed?*
 - 4. Of those persons who were apprehended, how many were detained in Immigration Detention Centres pending their applications for asylum to be assessed?*
 - 5. Of those persons who were apprehended, how many have been granted asylum in the UK?*
 - 6. In particular, how many persons have been apprehended who have allegedly unlawfully entered the UK via ferries from Calais or via the Channel Tunnel in 2015?*
 - 7. Of those persons who were apprehended, how many were released and are currently untraceable?*
 - 8. Of those persons who were apprehended, how many were released pending their applications for asylum to be assessed?*
 - 9. Of those persons who were apprehended, how many were detained in Immigration Detention Centres pending their applications for asylum to be assessed?*
 - 10. Of those persons who were apprehended, how many have been granted asylum in the UK?"*
7. The Home Office sought clarification on 6 October 2015. The complainant clarified his request on 8 October 2015. He told the Home Office:

"Regarding the question "how many persons have been apprehended who have allegedly unlawfully entered the UK unlawfully" I would request details of persons who were either detected in the tunnel itself or at the UK end, or at Dover Port of entry, such as hiding in lorries or cars etc. and also shortly after arrival i.e. in lorries or cars stopped later in other parts of the UK such as garages or motorway service stations etc. It would be helpful for each category to be clearly defined.

Regarding locations, the exact locations at Dover Port or the tunnel entrance or the specific motorway stations etc. aren't required".

8. For the purposes of this decision notice, that request will be known as Request 1.
9. After a delay, the Home Office provided its substantive response on 23 November 2015. It refused to provide the information requested at points (1) and (6) of the request, citing section 31(1)(e) of the FOIA. It

cited section 12(2) of the FOIA in respect of the remaining requested information.

10. The complainant requested an internal review of the Home Office's handling of Request 1 on 20 December 2015.
11. Also on 20 December 2015, with reference to its response to Request 1, the complainant wrote to the Home Office saying:

"I resubmit my request by reducing the time frame and amount of information accordingly.

1. In 2015, how many persons have been apprehended either by the police or the Home Office Immigration authorities as allegedly having entered the UK unlawfully from France and in particular from Calais?

2. Of those persons who were apprehended, how many have been granted asylum in the UK?

3. In particular, how many persons have been apprehended who have allegedly unlawfully entered the UK via ferries from Calais or via the Channel Tunnel in 2015?

4. Of those persons who were apprehended, how many have been granted asylum in the UK?"

12. For the purposes of this decision notice, that request will be known as Request 2.
13. After a delay, the Home Office provided its substantive response to Request 2 on 16 February 2016. It confirmed it held information within the scope of the request but refused to provide it, citing section 31(1)(e) of the FOIA.
14. The complainant requested an internal review of the Home Office's handling of Request 2 on 10 March 2016. In that correspondence, he reminded the Home Office that he had already requested an internal review of Request 1.
15. Following an internal review of its handling of both Request 1 and Request 2, the Home Office wrote to the complainant on 19 April 2016. It provided a combined response to its internal review of the two requests, upholding its original position in respect of them both.

Scope of the case

16. The complainant contacted the Commissioner on 18 July 2016 to complain about the way his requests for information had been handled. He told the Commissioner:

"I sent a FOI request dated 8th September 2015 and a further narrowed down request dated 20th December 2015 to the Home Office regarding information concerning entry of Asylum seekers and refugees in Dover Port etc."

17. He disputed the Home Office's application of section 12 of the FOIA. With respect to its citing of section 31, he disputed whether disclosure would prejudice the immigration controls and disagreed with the Home Office's conclusion about the balance of the public interest. He told the Commissioner that he considered that the balance lies in favour of disclosure.
18. During the course of the Commissioner's investigation, having reviewed its handling of Request 1, the Home Office acknowledged that it should have applied section 12(2) to the request as a whole.
19. It also confirmed that it considered that section 31 applies to Request 2.
20. The analysis below considers the Home Office's application of section 12(2) of the FOIA to the information requested in Request 1 and its application of section 31(1)(e) (the operation of the immigration controls) of the FOIA to the information requested in Request 2.

Reasons for decision

Section 12 cost of compliance

21. Section 12(2) provides that a public authority is not obliged to confirm or deny whether requested information is held if it estimates that to do so would incur costs in excess of the appropriate limit. In other words, if the cost of establishing whether information of the description specified in the request is held would be excessive, the public authority is not required to do so.
22. The appropriate limit is set at £600 for central government departments by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations).
23. The fees regulations also provide that a cost estimate must be calculated at the rate of £25 per hour, giving an effective time limit of 24 hours, and specify the tasks that can be taken into account when forming a cost estimate as follows:
- determining whether the information is held;

- locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
24. Section 12(2) requires a public authority to estimate the cost of confirmation or denial, rather than to formulate an exact calculation. The question for the Commissioner here is whether the cost estimate by the Home Office was reasonable. If it was, then section 12(2) was engaged and the Home Office was not obliged to confirm or deny whether the requested information was held.
 25. During the course of the Commissioner's investigation, the Home Office was asked to provide more detail in respect of its application of section 12(2) to Request 1 as a whole.
 26. In support of its application of section 12(2), the Home Office confirmed what it had told the complainant - that to obtain the level of detail he had requested would require each individual case file to be manually assessed to determine the circumstances of each case. It also confirmed that the information is not held centrally.
 27. With respect to the number of cases that would need to be manually assessed, in correspondence with the complainant the Home Office referred to:

"an undetermined amount of cases for almost a 2 year period".
 28. Similarly, the Home Office told the Commissioner that even to confirm whether or not it held all the information within the scope of the request would exceed the time/cost threshold. It explained to the Commissioner that to obtain the level of detail requested would require a manual search of each individual case file to determine the circumstances of each case.
 29. The Home Office provided the Commissioner, in confidence, with further information about the searches it would need to undertake and the number of cases it would need to check in order to search for the requested information.
 30. The Commissioner is unable to state that number here without undermining the citing of section 31(1)(e) in relation to Request 2. However, she notes that, in order to comply with the request, the Home Office said that it would need to search multiple databases as well as hard copy files.
 31. The Commissioner recognises that there is no statutory requirement under section 17 for the refusal notice to include an estimate of the

costs involved, or any other explanation of why the cost limit would be exceeded. However, in the Commissioner's view, it is beneficial to a public authority to do so because, for example, it may enable the requestor to assess the reasonableness of the estimate.

32. In this case, although the Home Office told the complainant that it considered that complying with the request would exceed the cost limit, it failed to provide the complainant with an estimate of the actual work involved.
33. In the absence of an estimate of the work involved, or a detailed explanation as to why the exemption applies, the Commissioner considers it understandable that the complainant found the Home Office's response unsatisfactory.
34. However, from the evidence she has seen, and mindful of the wording of the request, the Commissioner is satisfied that the Home Office has now demonstrated that it had estimated reasonably that it would exceed the appropriate limit for it to confirm or deny whether it held all the information within the scope of Request 1. Section 12(2) therefore applied and the Home Office was not obliged to confirm or deny whether it held that information.

Section 31(1)(e) law enforcement

35. The Commissioner has next considered the Home Office's application of section 31(1)(e) to Request 2.
36. Section 31(1)(e) provides that information is exempt where its disclosure would, or would be likely to, prejudice the operation of the immigration controls, which the Commissioner's published guidance on this exemption¹ refers to as "*physical immigration controls at points of entry into the United Kingdom*".
37. Consideration of this exemption is a two-stage process. First, in order for the exemption to be engaged it must be at least likely that prejudice would occur to the process specified in the relevant subsection - in this case paragraph (e) relating to the operation of the immigration controls.
38. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the

¹ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

maintenance of the exemption does not outweigh the public interest in disclosure.

The applicable interests

39. Covering first whether the exemption is engaged, the relevant applicable interests cited in this exemption are the operation of the immigration controls.

The nature of the prejudice

40. In correspondence with the Commissioner, the Home Office acknowledged that the requested information is statistical in nature and, in isolation, is not considered to prejudice law enforcement activity. However, it confirmed what it had told the complainant - that releasing the disputed information would set an important precedent.

41. It that regard it told him:

"In providing a response to one person, we are expressing a willingness to provide the same response to anyone, including those who might represent a threat to the UK".

42. With respect to the requested information in this case it explained:

"If the same information were to be requested from other ports or means of entry into the UK, it could allow a picture to be built of where individuals are most likely to be apprehended, via the 'mosaic effect' of requests, which could lead individuals to target locations where they believe they could more likely detection".

43. In its submission, the Home Office made reference to case reference FS50481406² and the Commissioner's finding in connection with that complaint.

44. In that case, the complainant had requested information on the number of foreign national offenders refused entry at Glasgow International Airport. The Commissioner's finding was that it was plausible that the release of the information at issue could be used by interested parties to exploit Border Force's enforcement capabilities and that the section 31 exemption was therefore engaged.

² https://ico.org.uk/media/action-weve-taken/decision-notices/2013/830160/fs_50481406.pdf

45. The Home Office told the complainant that it considers the same considerations that applied in that case also apply here.

The likelihood of the prejudice occurring

46. With respect to the likelihood of prejudice occurring, in its correspondence with the Commissioner the Home Office clarified that it considered that prejudice would result, as opposed to would be likely to result, if the information at issue was disclosed. In other words, it considered that the higher level of likelihood applies.

Is the exemption engaged? Would disclosure prejudice the operation of the immigration controls?

47. The information withheld by virtue of this exemption comprises information relating to individuals who attempted to enter the UK unlawfully from Calais, in particular by ferry and the Channel Tunnel.
48. The Commissioner accepts that the Home Office has argued above that the harm envisaged relates to the applicable interests in this exemption.
49. The Commissioner also recognises that the Home Office's argument is not that disclosure of this location specific statistical information would, on its own, prejudice law enforcement activity. Rather its argument is in relation to the mosaic effect - that disclosure of the same information over a period of time, or for different locations, would allow a wider picture to be built that could be used to prejudice the work of the agencies responsible for border control and law enforcement.
50. Essentially therefore, the danger from disclosure of this information is that a precedent of disclosure would be set.
51. While the Commissioner does not share the view that compliance with this request would clearly set a precedent for future cases, she accepts that it would at least make it more difficult in principle to refuse information in similar cases in future. The Home Office was therefore correct to consider the possibility of a mosaic effect - ie that the disclosure of the requested statistical information could be combined with other information already in the public domain, or with information the authority could be forced to subsequently reveal as a result, to target its operations.
52. Having duly considered the arguments put forward by the Home Office, the Commissioner is satisfied that the arguments are relevant to section 31(1)(e). She is also satisfied that the Home Office has made a valid argument about how a fuller picture of law enforcement efforts at ports could be built up through disclosure in response to this and other, similar, requests.

53. Furthermore, the Commissioner is satisfied that the likelihood of prejudice occurring if the withheld information were to be disclosed is more probable than not. Accordingly the Commissioner accepts that, in the circumstances of this case, the higher threshold of likelihood is met.
54. As the Commissioner accepts that the outcome of disclosure predicted by the public authority would occur she is therefore satisfied that the exemption provided by section 31(1)(e) is engaged.

The public interest test

55. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

56. In favour of disclosure, the complainant argued that:

"...immigration controls and its enforcement is a matter of public interest and concern by all shades of political opinion in the UK".

57. The Home Office acknowledged the public interest in operational matters at ports of entry, and that activity at the Calais border has received significant media attention. It recognised that there is a genuine public interest in the response of the UK government and that disclosure of the requested information:

"..would assure the public that Border Force is committed to protecting the UK border by preventing individuals from entering the UK unlawfully, which would ultimately increase public confidence in the work of Border Force".

Considerations in favour of withholding the information

58. In favour of withholding the requested information, the Home Office said that disclosure in this case:

".. would provide the number of individuals who attempted to enter the UK unlawfully from France, particularly by ferry from Calais and via the Channel Tunnel".

59. It argued that providing such information would enable individuals, including criminals, to deduce how successful ports of entry into the UK are in detecting those attempting to enter the UK illegally or if their attempts to enter illegally had been detected or not.

60. Arguing that it was important to protect information it described as 'sensitive', the Home Office told the complainant that releasing the numbers he had requested:

"would assist in testing the effectiveness of specific ports and would provide potential offenders with information about security checks at specific ports".

61. The Home Office argued that there is a strong public interest in ensuring the integrity of UK borders and that it would not be in the public interest to compromise it.

Balance of the public interest

62. In reaching her decision in this case, the Commissioner has taken into account the general public interest in the transparency of the Home Office as well as factors that apply in relation to the specific information in question.
63. She is also mindful of the fact that matters of immigration, including illegal immigration, and border control are issues of concern and interest to the public. She therefore gives some weight to the argument that disclosure in this case would further the understanding of, and participation in, public debate of issues of the day, notably the operation of the immigration controls in relation to curbing illegal immigration.
64. The Commissioner acknowledges that the requested information would give some insight into the effectiveness of the process and work of the Home Office relating to border security. This is a valid public interest factor in favour of disclosure.
65. However, she also recognises the strong public interest in preventing individuals intending to circumvent immigration controls from having access to information which could assist those seeking to evade the border entry controls. Clearly it would not be in the public interest to prejudice the ability of the Home Office to operate the immigration controls. The public interest in the exemption is a valid factor in favour of maintenance of the exemption which carries considerable weight.
66. Having considered all the factors applicable to this case, the Commissioner has recognised that there is some public interest in disclosure. However, the prejudice to the process inherent in section 31(1)(e) would need to be outweighed by sufficiently weighty factors in favour of disclosure. In this case the Commissioner does not consider that the public interest in favour of disclosure is sufficiently weighty. Her finding, therefore, is that the public interest in the maintenance of section 31(1)(e) outweighs the public interest in disclosure. This means that the Home Office was not obliged to disclose the information requested by the complainant.

Section 10 time for compliance

67. Sections 10(1) and 17(1) of the FOIA require that a response to an information request is sent within 20 working days of receipt of the request. In this case the Home Office did not respond within 20 working days of receipt of either request and in so doing breached the requirements of sections 10(1) and 17(1) of the FOIA.

Other matters

68. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA. However, the Commissioner has issued guidance in which she has stated that in her view internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.
69. In this case, the internal review that the complainant requested on 20 December 2015 in relation to Request 1 was not completed in accordance with that guidance.
70. The Commissioner expects the Home Office to ensure that the internal reviews it handles in the future adhere to the timescales she has set out in her guidance.

Right of appeal

71. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

72. 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.

73. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jon Manners
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF