

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 June 2021

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

Decision (including any steps ordered)

1. The complainant has requested statistics regarding people deported under the UK Borders Act 2007 from the Home Office. The Home Office refused to disclose the requested figures citing the exemptions at sections 27(1)(a) (International relations) and 31(1)(e) (Law enforcement) of the FOIA.
2. The Commissioner's decision is that neither exemption is engaged.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information.
4. The Home Office must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. During the course of her investigation, the Commissioner located some related information about deportations online. She made further enquiries about the published data and was advised as follows:

"The information on deportations that appear in this link
<https://homeofficemedia.blog.gov.uk/2020/11/30/deportation-and->

[charter-flights-factsheet/](#), the stats below refers to **enforced returns** to EU countries and Jamaica. The **enforced returns** data is already published in the [Immigration statistics quarterly release - GOV.UK \(www.gov.uk\)](#), broken down by nationality and country of destination, is available to the public.

- **In the year ending June 2020 there were 5,208 enforced returns**, of which 2,630 were to EU countries and 33 were to Jamaica

- **In the year ending June 2019 there were 7,895 enforced returns**, of which 3,498 were to EU countries and 55 were to Jamaica

The term '**deportations**' refers to a legally-defined subset of returns, which are enforced either following a criminal conviction, or when it is judged that a person's removal from the UK is conducive to the public good. The number of "**deportations**" refers to foreign nation offenders (FNOs) which is also published in the above release as an aggregate figure **only** (i.e. not by nationality or country of destination), which is what [the complainant] is asking for. The majority of "deportations" would be a subset of enforced returns, which will also include a number of voluntary returns".

Request and response

6. On 20 February 2020, the complainant wrote to the Home Office and requested information in the following terms:

"Can you give the cumulative total number of people deported to other countries under the UK borders [sic] Act 2007 in the period 7 May 2015 to 20 February 2020, with a breakdown of how many people from each nationality were deported".

7. The Home Office responded on 9 March 2020. It refused to provide the requested information citing sections: 27(1)(a) (International relations) and 31(1)(e) (Law enforcement) of the FOIA.

8. Following an internal review, the Home Office wrote to the complainant on 16 June 2020 revising its position. It referred to the cost limit in gathering the requested information but also still relied on the previous exemptions cited; its final position was therefore unclear. It also advised that:

" ... the cumulative total of deportations, without the breakdown of nationality, is publicly available in the 'Returns tables' at the following link¹".

9. During the Commissioner's investigation, following the issuing of an Information Notice, the Home Office clarified its position. It advised that it wished to maintain reliance on sections 27(1) and 31(1)(e) of the FOIA only, ie not section 12(1).

Scope of the case

10. The complainant contacted the Commissioner on 16 September 2020, to complain about the way his request for information had been handled.
11. Within his grounds of complaint he stated the following:

"I am a news journalist. My reason for seeking the deportation information was to compare the Home Office deportation figures to data I received from the Ministry of Justice about the number of custodial sentences of 12 months or more received by foreign nationals from various countries over the same period, which is the usual trigger for deportation. I wanted to see whether people from certain countries are being disproportionately targeted for deportation after serving such a jail sentence.

If comparing the MoJ and Home Office figures showed that some nationalities are significantly more likely to be deported post-jail than others, that could uncover structural failings, potentially based on institutional racism or prejudice. To highlight this would be overwhelmingly in the public interest. It could also make for a fairer immigration system ...".

12. As the Home Office directed the complainant to the cumulative total of deportations, and he has not expressed any dissatisfaction with this, the Commissioner has not further considered this element of his request. The Commissioner will therefore consider the citing of exemptions in respect of the remainder of the request below.

¹ <https://www.gov.uk/government/publications/immigration-statistics-year-ending-march-2020/list-of-tables>

Reasons for decision

Section 27 – international relations

13. The Home Office is relying on section 27(1)(a) of the FOIA. This provides that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice – (a) Relations between the United Kingdom and any other State".

14. The exemption focusses on whether UK interests abroad, or the international relations of the UK, would, or would be likely to be, prejudiced through the disclosure of the information relating to the issue.
15. In order for a prejudice based exemption, such as section 27, to be engaged, the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely to occur if the withheld information was disclosed, has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
16. The Commissioner has been guided by the view of the Information Tribunal which considered that, in the context of section 27(1), prejudice can be real and of substance *'if it makes relations more*

difficult or calls for a particular damage limitation response to contain or limit damage which would not otherwise have been necessary'².

17. The Home Office has explained:

"The return of offenders from the UK is a sensitive subject for many countries and levels of information sharing between countries would be damaged if this information was published. Relationships with many countries are based on trust and other countries have a legitimate expectation that the UK Govt will not release this type of information. For that reason, we do not release country-specific information on returns of foreign national offenders (FNOs), as we consider there is a real risk that disclosing such information in isolation could undermine returns agreements with individual countries and impact adversely on important diplomatic relations".

18. In respect of demonstrating a causal relationship it added:

"The UK's ability to remove FNOs depends on agreement with other countries and such co-operation is in many cases hard won and susceptible to being withdrawn. The ability to reach agreements and maintain cooperation with other countries on returning FNOs is an important consideration and disclosing the nationality of FNOs could affect future agreements with foreign governments the UK actively try to pursue.

Furthermore, there are a number of nationalities where the returns figures are shown as less than 5 and therefore those FNOs that have been returned could be identifiable, if the figures by nationality are released".

19. The Commissioner does not agree that the issue of low figures potentially leading to the identification of individuals is of any relevance to this exemption, so this submission has been disregarded. In respect of the other harm identified by the Home Office, she accepts that this is relevant to the applicable interest relied on, ie relations between the United Kingdom and any other State.

20. However, in respect of the causal link, the Commissioner finds the arguments to be vague and without any actual context. Whilst the Home Office alludes to harm occurring were the figures to be disclosed it does not explain why, or evidence how, such harm would actually occur.

² Campaign Against the Arms Trade v The Information Commissioner and Ministry of Defence (EA/2006/0040), paragraph 81.

21. Having stated that prejudice *would* occur, ie the higher level of likelihood, the Home Office also advised:

"In this particular case, the requestor is asking for data on the nationalities of all those deported. Given the breadth of this request, we consider that the release of the nationality specific information would definitely prejudice international relations and impact adversely on our ability to deport FNOs.

The likelihood of the prejudice occurring is very high. The incidents of diplomatic 'rows' between countries and states where we operate are well documented in the public domain. There are examples of host countries reacting to actions by HMG by frustrating the UK government, affecting HMG's ability to operate effectively in that location. We should not seek to test this further by ignoring these known risks".

22. The requested figures are a subset of information which is already published. Therefore, all the countries which are subject to the requested information are already known, ie it is known that their citizens have been returned from the UK for varying reasons including deportation. The Commissioner accepts that deportation figures themselves have not been disclosed, however, the Home Office has failed to detail why provision of this level of detail would be harmful to the current process. Whilst she understands that there may be agreements in place with some countries where the UK has guaranteed non-disclosure, no supporting evidence of this being the case here has been provided by the Home Office. It has simply made generic comments about the need to tread sensitively when dealing with other countries. There may also be countries which refuse to cooperate with deportation requests and disclosure may somehow evidence this. However, again, no such arguments to that effect have been presented by the Home Office.
23. The Commissioner will not accept at face value assertions made by a public authority that, in her view, require a proper and fuller explanation. In this instance the Commissioner considers that the Home Office has had ample opportunities to justify its position, including at the time of its initial response, at the internal review stage, during her investigation and in response to the Information Notice which was issued. In cases where a public authority has failed to provide adequate arguments in support of the application of an exemption, the Commissioner does not consider it to be her responsibility to generate arguments on its behalf.
24. On the basis of the available evidence, the Commissioner has concluded that the Home Office has failed to demonstrate that this exemption is engaged.

Section 31 – law enforcement

25. Section 31 of the FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.
26. In order for a prejudice based exemption, such as section 31, to be engaged, the Commissioner considers that the three criteria listed in paragraph 15, above, must be met.
27. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
28. In this case, the Home Office is relying on section 31(1)(e) of the FOIA. This states that information is exempt if its disclosure would, or would be likely to, prejudice the operation of the immigration controls.
29. In its refusal notice, the Home Office advised the complainant:

"Section 31(1) (e) of the Act allows us to exempt information where its disclosure would or would be likely to prejudice the operation of immigration controls. This is because it would potentially damage diplomatic relations and affect our ability to remove or deport FNOs and to maintain control of the UK border.

... releasing this information would be likely to affect our ability to deport or remove foreign national offenders as releasing such sensitive information has the potential to undermine existing Border controls and agreements with other countries, with the possibility of their reducing their willingness to co-operate with the UK".

30. At internal review it relied on the arguments it had provided for section 27 and added:

"... this is related to the prejudice to international relations, in that damage to relations with other countries would be likely in this context to prejudice the process whereby individuals are returned, which in turn would prejudice immigration controls".

31. In response to the Commissioner's investigation enquiries it advised:

"The exemptions in this case under S27 and S31 are inextricably linked because the damage to diplomatic relations ... would impact on the returns process for FNOs, if certain countries are consequently unwilling to accept returns of FNOs. This in turn

would adversely affect the operation of the immigration controls by preventing the Home Office from removing FNOs.

... disclosure of nationality specific information would drastically affect our ability to deport foreign national offenders, as the damage to diplomatic relations would undermine agreements with other countries and reduce their willingness to co-operate with the UK”.

32. The Commissioner considers that, in its correspondence with both the complainant and herself, the Home Office has relied to a large degree on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis.
33. The Commissioner does not consider that the Home Office has met the first threshold of identifying how disclosure relates in any way to the limb of section 31 being relied on. Put simply, it has not actually explained how disclosing the figures could directly affect immigration control.
34. As with the exemption above, in cases where an authority has failed to provide adequate arguments in support of the application of an exemption the Commissioner does not consider it to be her responsibility to generate arguments on its behalf. She therefore concludes that this exemption is not engaged.

Section 40 – personal information

35. Although not relied on by the Home Office, it did allude to the possibility of low figures allowing for identification of individuals (see paragraph 18). As the regulator for data protection matters, the Commissioner will therefore consider whether or not disclosure of the requested figures would involve the disclosure of any personal data.
36. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
37. In this case the relevant condition is contained in section 40(3A)(a)³. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

³ As amended by Schedule 19 Paragraph 58(3) DPA.

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

38. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
39. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

40. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

41. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
42. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
43. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

The Commissioner's view

44. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of reidentification of an individual from information which, on the face of it, appears truly anonymised.
45. The ICO's Code of Practice on Anonymisation notes that: "*The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA*".

46. In summary, the motivated intruder test is that if the risk of identification is “*reasonably likely*” the information should be regarded as personal data.
47. The information being considered here is low numbers of deportations assigned to various countries over a period of nearly five years.
48. Whilst it is technically possible that one of the individuals concerned may be able to identify themselves from the disclosure of the withheld information, because they know when and where they were deported, the Commissioner is satisfied that this would not be a disclosure of new information to them – they would already know that information.
49. The Commissioner has been unable to determine how any other person would be able to identify an individual from the disclosure.
50. Consequently, she has decided that the withheld information does not constitute personal data and that the exemption in section 40(2) is not applicable.

Other matters

51. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Information Notice

52. As the Home Office failed to respond to the Commissioner’s enquiries in a timely manner it was necessary for her to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on the Commissioner’s website.
53. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy⁴ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁵.

⁴ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁵ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

54. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

55. 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.

56. 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

Carolyn Howes
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