

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2022

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

Decision (including any steps ordered)

1. The complainant has requested, from the Home Office, information about aerial surveillance of migrants. The Home Office provided a copy of a contract, withholding some content under sections 40(2) (Personal information) and 43(2) (Commercial interests) of FOIA. At a late stage, it added reliance on sections 31(1)(a) (Prejudice to prevention or detection of crime) and section 31(1)(e) (Prejudice to operation of the immigration controls) of FOIA.
2. The Commissioner's decision is that a late disclosure of information satisfied section 40 so this was not considered. He also found that the Home Office was entitled to rely on sections 43(2) and 31(1)(a) and (e) to withhold the remaining information. The Commissioner does not require the Home Office to take any steps.

Request and response

3. On 18 August 2020, the complainant wrote to the Home Office and requested information in the following terms:

"I'm a freelance journalist and would like to make a request under the Freedom of Information Act for the following documents:

 - all of the contracts relating to the aerial surveillance of migrants signed since 01/01/2018.
 - all of the active contracts relating to the aerial surveillance of migrants

In particular this includes the contract for the companies that operates the aircrafts with registrations [number redacted] and [number redacted].

The aerial surveillance includes that which is performed over the English Channel as described in several articles, including this one:

<https://www.wired.co.uk/article/uk-drones-migrants-english-channel>

Just to clarify: I'm looking for contracts regarding aerial surveillance anywhere, including over the English Channel".

4. On 22 October 2020, the Home Office responded. It advised that some information was already in the public domain, citing section 21 of FOIA and providing a link. In the refusal notice it made reference to a contract with Tekever Ltd. It also said that it was unable to advise whether or not aircraft with the specified registrations were being used.
5. On 26 October 2020, the complainant requested an internal review. Following this, the Home Office wrote to the complainant on 7 January 2021. It revised its position, advising that the contract was not available via the link it had provided. It provided a copy of the contract, withholding some information under sections 40(2) and 43(2) of FOIA.
6. At a late stage of the Commissioner's investigation, following the issuing on an Information Notice, the Home Office responded to his enquiries and revised its position; it added reliance on sections 31(1)(a) and (e) of FOIA.
7. On 11 February 2022, during the Commissioner's investigation, the Home Office disclosed further information to the complainant.

Scope of the case

8. The complainant contacted the Commissioner on 11 January 2021, to complain about the way his request for information had been handled. He stated as follows:

"The redaction of names is explained, however the redaction of crucial passages relating to the processing of data is not justified ... [The withheld information] does not appear to be related to commercial interest or privacy which is what the review mentioned. For clarity: I also oppose all the other redactions".

9. Regarding personal information, he advised the Commissioner:

"I don't oppose the redaction of names of low-level employees. The names of the companies and high-ranking civil servants should however be disclosed".

10. The Commissioner viewed the withheld information in this case which consists of a managed service contract and two annexes (a proposal and a specification). As part of his investigation, the Commissioner considered the content of these documents and made suggestions to the Home Office as to what he thought might be disclosed from within them; this was done in an effort to informally resolve the case.
11. As part of his considerations, the Commissioner searched online for details of the named parties within the documentation in order to ascertain whether they were sufficiently "high ranking" so as to fall within the scope of the complainant's request. He found four parties in the public domain who were named in association with relevant, senior roles. The Commissioner advised the Home Office regarding this and suggested that it would be fair to disclose these details. The Commissioner also made further suggestions regarding other parts of the contract and annexes.
12. The Home Office engaged with the Commissioner's suggestions and further liaised with Tekever regarding the withheld information. As a result of this, the Home Office made a further disclosure to the complainant on 11 February 2022, which was largely in line with the Commissioner's suggestions.
13. This disclosure included the names of the "high ranking" personal that the Commissioner had identified. The Commissioner has therefore removed this element from the scope of his investigation as he considers that the Home Office has now complied with that element of the grounds of complaint.
14. Following the late disclosure, the Commissioner contacted the complainant and asked whether he had any further comments to add to his earlier complaint.
15. The complainant provided some detailed arguments which included links to information in the public domain on a similar subject matter.
16. Regarding financial information, he was dissatisfied that all of this was redacted and he drew attention to an entry within a spreadsheet which gave details of Home Office spending over £25,000 and included one entry which made reference to Tekever.
17. He also advised that the actions of monitoring the UK border had been the subject of heated public debate and the cost had been subject to scrutiny in Parliament. He drew attention to a Parliamentary question and a Defence Committee evidence session (both of which postdate this

request) and provided links to this publicly available information, also including a press article as a further example. He said that: "disclosure of the cost of this contract and its components clearly have public interest".

18. He provided further examples of specific redactions which he believed to be excessive, adding that he believed the redactions were made as "an effective way to avoid further FOIAs or scrutiny".
19. The Commissioner put some of his concerns directly to the Home Office, specifically where he said they were evidenced by information in the public domain, and asked for its views. Where relevant, they are included in the decision-making.
20. The Commissioner will consider the citing of exemptions below.

Reasons for decision

Sections 31 - (Law enforcement)

21. The Home Office has relied on sections 31(1)(a) and (e) to withhold some of the information. This includes a small amount of technical data within the main contract as well as all of the redactions in the two annexes (other than pricing which will be considered later).
22. Section 31(1) of FOIA states that: "Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-
 - (a) the prevention or detection of crime, ...
 - (e) the operation of the immigration controls".
23. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but also that it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
24. In order for section 31 to be engaged, the following criteria must be met:
 - the actual harm which the public authority claims would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in this case, the prevention or detection of crime and the operation of the immigration controls);

- 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,
 - 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.
25. The first point for the Commissioner to consider is whether the arguments provided by the Home Office relate to the relevant applicable interests, namely the prevention or detection of crime and/or the operation of the immigration controls, in each instance where section 31(1) has been cited.
26. With respect to law enforcement activities, the Commissioner recognises in his published guidance¹, that section 31(1)(a) will cover all aspects of the prevention and detection of crime. With respect to section 31(1)(e), he recognises that this subsection will be engaged if: "disclosure would, or would be likely to, prejudice physical immigration controls at points of entry into the United Kingdom".
27. The Commissioner accepts that there is clearly some overlap between these subsections. As joint arguments have been submitted in respect of subsections (a) and (e), the Commissioner has considered these together.

The applicable interests

28. The first point for the Commissioner to consider is whether the arguments provided by the Home Office relate to the relevant applicable interests, namely the prevention or detection of crime and the operation of the immigration controls.
29. The Home Office advised that the specification provides detailed information about the Home Office's maritime surveillance requirements and capabilities. It explained:

"You will be aware that people trafficking in small boats across the English Channel is a significant and pressing problem and was so at

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

the time of the request. Fishery protection in the Channel is also a significant issue. People trafficking is carried out by organised criminals to whom detailed information about the UK's maritime surveillance capabilities would be invaluable. Such groups would be able to use the [withheld information] to plan their operations so as to maximise their chances of circumventing surveillance measures.

... We therefore consider that disclosure would prejudice the prevention or detection of crime, by making it easier for people traffickers or smugglers to avoid detection and by prejudicing the ability of the Home Office and law enforcement agencies to investigate the organised crime groups linked to people smuggling. We conclude that section 31(1)(a) of FOIA is engaged. Because maritime surveillance is a key element of border control, we consider disclosure would prejudice the operation of the immigration controls by making it easier for those trying to enter the country illegally to do so without detection and that section 31(1)(e) is also engaged".

30. The Home Office also submitted the following arguments which were provided by Tekever:

"In terms of operational sensitivity our proposal contains information relating to the operational performance of our systems which if made public could affect our ability to deliver operations satisfactorily and lead to potential loss of life at sea. Another factor to bear in mind is that if our detailed technical information was made public it may enable evasion techniques to be implemented that again would impact on the operational performance of our systems".

31. The Home Office provided further rationale which the Commissioner is unable to reproduce here as to do so would compromise its withholding of the information.
32. The Commissioner is satisfied that the arguments provided relate to the applicable interests cited and so the first test is met.

The likelihood of prejudice

33. The Home Office has specified that it is relying on the higher threshold, that the prejudice envisaged **would** occur, in this case.

Is the exemption engaged?

34. In a case such as this, it is not enough for the information to relate to an interest protected by sections 31(1)(a) and (e), its disclosure must also at least be likely to prejudice those interests. The onus is on the

public authority to explain how that prejudice would arise and why it would occur.

35. Having considered the arguments put forward by the Home Office, the Commissioner accepts that the requested information would be useful to people traffickers or smugglers who are intent on avoiding detection in their attempts to enter the country illegally. Such actions would clearly be prejudicial to law enforcement. He is unable to be more specific regarding this, as to do so would risk disclosure of the information that has been withheld.
36. Consequently, the Commissioner is satisfied that its disclosure would represent a real and significant risk to law enforcement matters.
37. As the Commissioner accepts that the outcome of disclosure predicted by the Home Office would occur, he is satisfied that the exemptions provided by sections 31(1)(a) and (e) are engaged.

Public interest test

38. Section 31 is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at sections 31(1)(a) and (e) of FOIA outweighs the public interest in disclosing the information requested by the complainant.

Public interest considerations favouring disclosure

39. The Home Office has argued:

"We recognise that there is a public interest in disclosure of the contract, in that it would help to demonstrate the measures which the Home Office is undertaking to combat trafficking and smuggling and to protect fishing rights. For that reason, we have disclosed a redacted version of the contract".

Public interest arguments in favour of maintaining the exemption

40. The Home Office has argued:

"... it is strongly against the public interest to make it easier for criminals to avoid detection".

Balance of the public interest arguments

41. In reaching a view on where the public interest balance lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and the Home Office.

42. He accepts that it is important for the general public to have confidence in the UK's law enforcement capabilities in connection with its immigration control systems. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.
43. He also recognises that there is a very strong public interest in protecting the law enforcement capabilities of public authorities. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption – that is, the public interest in the prevention and detection of crime and avoiding prejudice to the operation of the immigration control.
44. In the context of this case, the Commissioner recognises the public interest in preventing individuals intending to circumvent immigration controls – and those who wish to assist them – from having access to information which could assist them in building a picture of how they can best achieve their aims and enter the UK illegally. Provision of information which could assist their knowledge of the UK's capabilities around the security of the UK's borders would not be in the public interest.
45. Clearly, the disclosure of any information that would assist people to commit unlawful activities and circumvent immigration controls, also putting human life at risk, would not be in the public interest.
46. Having given due consideration to the opposing public interest factors in this case, the Commissioner has concluded that the factors in favour of disclosure do not equal or outweigh those in favour of maintaining the exemption. Accordingly, the Commissioner is satisfied that section s31(1)(a) and (e) of FOIA were appropriately applied in this case.

Section 43 - (Commercial interests)

47. Some of the information which was withheld under this exemption was also withheld under section 31. As that information is considered to have been properly withheld under section 31, it has not been reconsidered here.
48. The remaining information which is under consideration under this exemption consists of pricing information and a small amount of related text.
49. Section 43(2) of FOIA states that: 'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)'.

50. The Commissioner's guidance 'Section 43 - Commercial interests'² states that 'a commercial interest relates to a legal person's ability to participate competitively in a commercial activity', for example the purchase and sale of equipment, goods or services.
51. In order for a public authority to properly engage a prejudice based exemption such as section 43(2), there must be a likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects.
52. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
- 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 avoid. 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 – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
53. Consideration of the section 43 exemption is a two-stage process. Firstly the exemption must be properly engaged and meet the three criteria listed above. Even if this is the case the information should still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The applicable interests

54. The Home Office has advised that:

"... the Supplier Proposal and the values in the Milestone Payments are exempt under 43(2), because disclosure would prejudice the commercial interests of Tekever Ltd and of the Home Office".

55. Tekever has said:
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² <https://ico.org.uk/for-organisations/section-43-commercial-interests/#432>

"In terms of commercial sensitivity there are two aspects which are covered within our proposal, technical details of our system which are not in the public domain and detailed pricing information for our services which is also not in the public domain ... If the details of the pricing information relating to the service was to be made public ... this would put us at a serious disadvantage to our competitors when competing with them for future work".

And:

"Anything that relates to how we came up with the price as this can be used by our competitors to understand how we price. So this includes flight hours, days available for flight, maintenance issues, rebates for lost flight hours etc".

56. The Commissioner agrees the remaining withheld information relates to monetary amounts for proposed services. He is satisfied that this falls within the remit of commercial interests.

The nature of the prejudice

57. The Commissioner must now consider if the Home Office has successfully demonstrated a causal relationship between disclosure and the prejudice which the exemption is designed to protect. In doing so he has visited some arguments which the complainant provided.
58. Albeit some of the complainant's examples post-date the request in question, the Commissioner nevertheless asked the Home Office for its views in case they could have led to a further reconsideration in favour of disclosure.
59. The complainant has argued that all financial considerations have been removed and that it is not clear why. He said:

"The cost of a Tekever contract has been previously disclosed by the government, as per the document attached ... [link redacted]".

60. In respect of the cost that the complainant located, the Home Office responded saying that this should not have been disclosed and steps will be taken to avoid any such disclosure in the future. It also advised the Commissioner:

"We reserve the right to withhold information which we consider to be subject to an exemption, notwithstanding the disclosure of similar or related information, where the disclosure in question was as a result of an error or a leak as opposed to a conscious decision to release".

61. The Commissioner cannot comment on the information which the complainant sourced and whether or not it should have been disclosed as this is outside his remit here. However, he does agree that such a disclosure does not guarantee that other similar information should also be disclosed in the future, particularly where a public authority maintains that the information in question was previously disclosed in error. Furthermore, the entry in the spreadsheet that the complainant located refers to a service which may be totally unconnected to the contract under consideration here.
62. The complainant also referred to various public debates and provided links to relevant information. He said that the actions of monitoring and costs of border control in the Channel had been the subject of heated public debate and subject to scrutiny in Parliament. The Home Office responded, saying:

“The fact that monitoring in general has been the subject of discussion is not in dispute. The question is whether the withheld information in this case is or is not subject to an exemption and whether it was properly withheld”.
63. The Commissioner understands this position. However, he does note that it shows the public’s interest in expenditure on this service.
64. Other quotes provided by the complainant refer to non-Home Office matters or assets, such as Operation Isotrope which is an MOD Operation (of which some details can be found in the public domain). These not only concern a different public authority but also post-date this request so have not been taken into consideration.
65. The Commissioner accepts that it will not be possible for the Home Office to provide concrete proof whether prejudice would, or would be likely to, occur as a result of disclosure. In order to do so disclosure would be required, which would undermine the point of the exemption and FOIA. However, the Commissioner must be satisfied that this causal relationship is based on more than mere assertion or belief that disclosure would lead to prejudice. There must be a logical connection between the disclosure and the prejudice in order to engage the exemption.
66. The Home Office explained to the Commissioner that it was relying on the higher threshold of prejudice, ie that disclosure **would** prejudice the commercial interests of both parties, on the following bases:
 - Prejudice to the ability of the Home Office to achieve best value, by damaging its negotiating position in relation to such services;

- Prejudice to the ability of the Home Office to achieve best value through competitive retendering for the overarching contract for the provision of maritime surveillance services;
 - Weakening competition within the competitive tendering marketplace in this area by affording privileged insight into the pricing structure of a competing provider and the pricing previously accepted by the Home Office for a particular contract; and
 - Deterring service providers from entering or continuing within the market due to the disclosure of commercially sensitive price information.
67. When a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner* [EA/2006/0014].
68. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, the Commissioner expects that arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns. The Commissioner explained this position to the Home Office and asked for evidence that any third party had been consulted about disclosure of the information requested in this case.
69. The Home Office confirmed that it has liaised directly with Tekever concerning the information request and that the information which remains undisclosed has been specifically considered and highlighted as unsuitable for disclosure by Tekever (the remainder having now been disclosed).
70. The Commissioner is satisfied that the arguments presented by the Home Office outline how disclosure of the remaining withheld information, which is pricing-based, could prejudice the applicable interests within the relevant exemption. However, he has not been convinced by the somewhat limited arguments in respect of the likelihood of the prejudice occurring. He has therefore proceeded on the lower level of prejudice, ie that it **would be likely to** occur.

Public Interest Test

71. The exemption under section 43(2) is subject to the public interest test. This means that, even when a public authority has demonstrated that the exemption is engaged, it is required to consider the balance of the public interest in deciding whether or not to disclose the information.

Arguments in favour of disclosure

72. The Home Office has argued:

“There is a public interest in disclosure to the extent that this would help ensure that there is full transparency in the Home Office’s use of public funds and in particular to maintain the department’s accountability to taxpayers. Disclosure of this information would also enable the public to assess whether or not the Home office is getting best value for money in terms of its contracts with private providers and partner agencies”.

Arguments in favour of maintaining the exemption

73. The Home Office has argued:

“There is a public interest in Government departments and agencies being able to secure contracts that represent value for money and anything that would undermine this is not in the public interest. Value for money can best be obtained where there is a healthy competitive environment, coupled with the protection of the Government’s commercial relationship with industry.

Release of the withheld information would provide competitors with information, not available to them by any other means, about current service providers. This would create an unfair advantage resulting in a prejudice to the commercial interests of the company concerned. Disclosure would also prejudice the Home Office’s commercial interests by damaging commercial relationships with contractors and service providers”.

Balance of the public interest

74. The Commissioner understands the complainant’s argument that the Home Office, like any public authority, needs to be accountable for its spending.

75. He recognises that there is significant public interest in the Home Office being open and transparent about decisions it takes involving public money and this includes information about the costs paid to suppliers of goods and services such as Tekever.

76. Also, when dealing with the public sector, the Commissioner considers that a company must have some expectation that the public will want to know what services it is paying for, whatever the product. This is recognised, to some extent, in the contract itself which makes specific reference to FOIA and the responsibilities of the Home Office and Tekever in respect of the legislation.

77. However, the Commissioner also recognises that disclosure of the prices in the contract would be likely to undermine Tekever's ability to successfully compete for future tender competitions in this specialised market.
78. Furthermore, the Commissioner notes that the request was made in October 2020 and the prices which have been withheld were less than a year old at that time and so could be considered to be current. Were a request for pricing information to be made at a later date, any potential detriment caused by disclosure may have somewhat reduced.
79. In the Commissioner's opinion there is a very strong and inherent public interest in ensuring fairness of competition and in his view it would be firmly against the public interest if a company's commercial interests are harmed, thereby causing fair competition to be reduced. Furthermore, the Commissioner believes that there is an inherent, and very strong, public interest in ensuring that a public authority's ability to secure value for public money is not undermined, of which there would be a risk if fewer companies applied for public sector tender contracts for fear of current pricing structures being disclosed.
80. The Commissioner has therefore concluded that the public interest favours maintaining the exemption contained at section 43(2) and withholding the remaining information falling within the scope of the request.

Other matters

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

Information Notice

82. As the Home Office failed to respond to the Commissioner's enquiries in a timely manner it was necessary for him to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on the Commissioner's website.
 83. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by Design strategy³ to improve standards of accountability, openness and transparency in a digital age. The
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³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

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 Policy⁴.

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

84. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

85. 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.

86. 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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