

The Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2023

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

Decision (including any steps ordered)

1. The complainant requested information about electronic passport gates (eGates) at Heathrow Airport. The Home Office refused the request under section 31(1)(e) of FOIA (the law enforcement exemption).
2. The Commissioner's decision is that section 31(1)(e) is engaged and that the public interest favours maintaining the exemption.
3. The Commissioner does not require any further steps in response to this decision notice.

Background

4. Border Force is the part of the Home Office responsible for securing the UK border. Border Force has guidance online which explains that eGates enable quicker travel into the UK¹.

¹ <https://www.gov.uk/government/publications/coming-to-the-uk/faster-travel-through-the-uk-border>

5. The Commissioner's understanding is that on 23 March 2022, the complainant used the eGates at Heathrow Airport but was referred to an immigration desk for manual processing.

Request and response

6. On 8 March 2023, the complainant wrote to the Home Office and requested information in the following terms:

"Regarding e-Gates data on 23 March at Heathrow Terminal 5.

I would like a 24-hr breakdown of that day [i.e 23 March 2022] of what % were referred by the machine please and what was the previous 30-day rolling average (not broken down by day or hour)".

7. The Home Office responded on 5 April 2023 and refused to disclose the requested information, under section 31(1)(e).
8. Following an internal review, the Home Office wrote to the complainant on 26 May 2023 and upheld its original refusal.

Scope of the case

9. The complainant contacted the Commissioner on 27 May 2023 to complain about the way their request for information had been handled.
10. The complainant disagreed with the Home Office's refusal. They argued that the requested information would not be comprehensive enough to be useful to people wanting to circumvent immigration controls, and they disputed the Home Office's arguments about border security.
11. The Commissioner considers that the scope of his investigation is to decide whether the Home Office is entitled to rely on section 31(1)(e).
12. The Commissioner has used his discretion in not asking the Home Office for any submissions or a copy of the withheld information. He considers that in this instance he is able to make his decision without those things, given the type of information being requested and the comments already made by the Home Office in its responses to the complainant.

Reasons for decision

13. Section 31(1)(e) of FOIA provides that information is exempt if its disclosure would, or would be likely to, prejudice the operation of the immigration controls (that is, physical immigration controls at points of entry into the UK).
14. The exemption, if engaged, is subject to the public interest test.
15. First the Commissioner is satisfied that the envisaged harm relates to one of the law enforcement interests protected by section 31(1)(e) – the operation of immigration controls.
16. He is also satisfied that the envisaged harm is not trivial. The harm that the Home Office focused on in its responses is the circumvention of immigration controls. Clearly circumventing immigration controls is an extremely serious matter, and even unsuccessful attempts to circumvent immigration controls put a strain on resources.
17. Furthermore he is satisfied that there is a causal link between disclosure and the harm. As the Home Office's internal review explained:

“Disclosure of information regarding the frequency of referrals from e-Passport gates to Border Force staff would provide an insight into the effectiveness of mainstream border controls. This information could then be pieced together with other information available by organised crime groups and determined individuals to circumvent UK border controls generally and at specific locations. This in turn would allow the effectiveness of immigration controls to be assessed and make it easier for them to be circumvented ... statistical information, like any other type of information, can provide information about resources deployed at border controls ...”.
18. The Commissioner notes some ambiguity around the level of likelihood ('would' or 'would be likely to') that the Home Office is claiming.
19. The Home Office's original response stated that disclosure “**could potentially** jeopardise Border Force port operations” and “**could substantially prejudice** the operations and the immigration controls work that Border Force carries out” (emphasis added). Such words suggest that the Home Office was claiming the lower level of likelihood ('would be likely to').
20. However its internal review stated that “disclosure **would prejudice** the operation of immigration controls”; and that disclosure of the type of information requested (statistics) “**can be prejudicial** to the operation

of immigration controls” (emphasis added). The Commissioner considers that the Home Office’s internal review suggests both levels of likelihood.

21. Given the ambiguity, the Commissioner has considered the lower level of likelihood (‘would be likely to’) in forming his decision in this case.
22. This means that there must be a real and significant risk of the prejudice occurring, even if the risk is less than 50%.
23. The Commissioner accepts that disclosure would be likely to cause the envisaged harm.
24. His guidance about section 31² explains that when considering the prejudice test, account should be taken of any mosaic and precedent effects.
25. The prejudice test is not limited to the harm that could be caused by the requested information on its own. Account can be taken of any harm likely to arise if the requested information were put together with other information. This is commonly known as the ‘mosaic effect’.
26. Some requests can set a precedent – that is, complying with one request would make it more difficult to refuse requests for similar information in the future. It is therefore appropriate to consider any harm that would be caused by combining the requested information with the information a public authority could be forced to provide subsequently, if the current requested was complied with. This is known as the ‘precedent effect’.
27. Such points are clearly relevant to this case, concerning a request for the percentages of people referred from eGates to an immigration desk over specified periods.
28. Whilst the complainant has argued that their request “is only for a 24 hour period last year at one terminal”, the Commissioner would point out that other similar requests if successful would likely enable a wider picture to be built.
29. The complainant has also said that even if disclosure enables trends to be identified, that “makes no difference to border security”. However the Commissioner disagrees, and considers that there is a real and significant risk of the operation of immigration controls being harmed as

² <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

set out above, by disclosure of the requested information. It is not difficult to imagine some people using details about immigration desk referrals at different times and locations to circumvent border controls, or try to.

30. The Commissioner therefore considers that the exemption is engaged.

Public interest test

31. The Home Office acknowledged factors in favour of disclosure, such as transparency, accountability and confidence in eGates information.

32. However against disclosure, the Home Office argued that the request concerns operationally sensitive information relating to immigration control, and emphasised the importance of protecting the UK border.

33. It concluded that the public interest favours withholding the information.

34. The Commissioner recognises that there is a general public interest in promoting transparency and accountability, which must always be given some weight in the public interest test.

35. The complainant has not argued that there is any particular public interest in the issue or information that their request relates to.

36. The Commissioner does not see any particular public interest in the percentages of people referred to an immigration desk by eGates on 23 March 2022 or the preceding 30 days.

37. Indeed the context of the request appears to be the complainant's own, private dissatisfaction about being referred to an immigration desk.

38. As the Commissioner's guidance³ explains, a requester's private interests are not relevant to the public interest test. For example, a requester may have a grievance they are pursuing and may think the information they want will help them. This in itself is not a relevant factor. There is only a public interest argument if it can be shown that there is a wider public interest that would be served by disclosure of the information.

39. The Commissioner highlights that there is a very strong public interest in protecting the ability of public authorities to enforce the law.

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/#pit9>

40. The Commissioner considers that on balance, the factors against disclosure have greater weight and the public interest lies in maintaining the exemption.
41. Consequently, he finds that section 31(1)(e) was correctly applied to the request.

Right of appeal

42. 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

43. 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.
44. 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

Daniel Kennedy
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