

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 July 2023

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

Decision (including any steps ordered)

1. The complainant requested information relating to Emergency Travel Document ('ETD') applications for Eritrea between 2019 and 2021. The Home Office refused to disclose the requested information, citing sections 27(1)(a) (International relations) and 31(1)(e) (Law enforcement) of FOIA.
2. The Commissioner's decision is that the Home Office is entitled to rely on section 27(1)(a) and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner requires no steps to be taken as a result of this decision.

Background

4. In a similar case¹, the Commissioner found that the Home Office was entitled to rely on section 27(1)(a) of FOIA to refuse to comply with the request.
5. That decision was appealed by the complainant (First-tier Tribunal reference EA/2022/0192) and was subsequently dealt with by way of a Consent Order, which resulted in the disclosure of some information.
6. There is a further, similar request for information in respect of Somalia, which is being investigated at the same time as this request. That request is being considered under reference IC-219611-S5K0.
7. The complainant has explained that:

“An ETD is a document that allows an individual to travel and to enter a country in the absence of a passport or other standard travel documentation. The UK detains approximately 24,004 immigrants annually², often for the purposes of expelling them to their countries of nationality. Many of those whom the UK seeks to expel do not have a current (or any) passport. In [the complainant]’s experience, difficulties in securing ETDs are a significant cause of long stay detention”.

Request and response

8. On 23 August 2022, the complainant wrote to the Home Office and requested the following information:

“We request the following information under the FOIA, in relation to Emergency Travel Documents from Eritrea.

1. How many Emergency Travel Document (‘ETD’) requests for Eritrea were submitted in:
 - (a) 2019
 - (b) 2020

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4025223/ic-155297-g9b7.pdf>

² Figures correct as of June 2022; this represented a small decrease of 2% compared with pre-pandemic levels in 2019.

(c) 2021 (to date).

2. How many ETDs for Eritrea were issued in:

- (a) 2019
- (b) 2020
- (c) 2021 (to date)

3. How many Foreign National Offenders from Eritrea were granted ETDs in:

- (a) 2019
- (b) 2020
- (c) 2021 (to date)

4. How many of the people referred to in (3) were subsequently removed?

5. How long on average did it take from the date of application for the document to be issued, for applications made in:

- (a) 2019
- (b) 2020
- (c) 2021 (to date)

6. How many ETDs were issued for people deemed not to be co-operating with the ETD process in

- (a) 2019
- (b) 2020
- (c) 2021".

9. On 8 September 2022, the Home Office responded. It refused to provide the requested information, citing sections 27(1)(a) (International relations) and 31(1)(e) (Law enforcement) of FOIA.

10. On 26 September 2022, the complainant requested an internal review.

11. On 20 October 2022, the Home Office provided an internal review. It maintained its position.

Scope of the case

12. On 20 December 2022, the complainant wrote to the Commissioner to complain about the response. He did not accept that the Home Office had given sufficient weight to the public interest in disclosure and he asked the Commissioner to consider the application of exemptions to the request.

13. On commencing his investigation, the Commissioner raised a query with the complainant regarding the appeal referred to in paragraph 5 above, seeking further information.
14. On 27 April 2023, the complainant provided the Commissioner with a copy of the information that had been disclosed by the Home Office as a result of that Consent Order. Referring to this, the Commissioner invited the Home Office to reconsider its position in this case.
15. Having received no acknowledgement or response, on 5 June 2023 the Commissioner again contacted the Home Office. The Home Office confirmed that its preference was for the matter to be dealt with by way of a full investigation, and the Commissioner sent a formal investigation letter on 8 June 2023.
16. On 26 June 2023, having received no formal response to that letter, the Commissioner issued an Information Notice; the Home Office responded on 5 July 2023, maintaining the position it had previously outlined to the complainant. Some of its submission was provided in confidence, and has not been reproduced in this notice.
17. The Commissioner will consider the citing of exemptions below. He has viewed the withheld information.

Reasons for decision

Section 27 – International relations

18. Section 27(1)(a) of FOIA states 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”.

19. The Commissioner’s guidance on section 27³ acknowledges that the effective conduct of the UK’s international relations depends upon maintaining the trust and confidence of other states and international organisations. This relationship allows for the free and frank exchange of information between the UK and its partners. In turn, this allows the UK to effectively protect and promote its interests abroad.

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-27-international-relations/>

The complainant's position

20. The complainant submitted comprehensive arguments in support of his view that the requested figures should be disclosed. In his view, disclosure of the statistical information sought would not shed meaningful light on inter-state relations nor damage such relations. He said:

"... indeed, pursuant to Freedom of Information requests made by [the complainant] in 2018, 2019 and 2021, the [Home Office] has provided materially the same information now sought for Eritrea in respect of Liberia, Angola, Algeria and Iran. This supports [the complainant]'s contention that there is nothing in the provision of such data which, inherently, carries prejudice or risk (or at least, such prejudice or risk that may outweigh the public interest in disclosure)".

21. The further arguments he provided have also been taken into consideration.

The Home Office's position

22. The Home Office has argued:

"Emergency travel documents are required primarily where someone found not to have a right to stay in the UK is returned to their home country. The returns process is vital to effective immigration control, but the success of the process is heavily reliant on the co-operation of the receiving State. Such co-operation is in many cases hard won and susceptible to being withdrawn. The subject of returns and foreign national offenders is in varying degree a sensitive subject, for many if not most States, in that it requires the receiving State to acknowledge that numbers of its nationals are in the UK illegally or have committed offences here. Large numbers of returns might also be seen to imply that conditions in the home country are poor. Other States generally regard the details of such matters as confidential between them and the UK authorities.

Those requiring emergency travel documents do not hold passports, so the Home Office can only return them if the country of origin agrees to provide such a travel document. Many countries are at best ambivalent about accepting their nationals back, because they often send home remittances which help their economy, whereas they may become a burden on the receiving State if returned. This means that co-operation on documentation is variable and heavily reliant on delicate relationships with embassy staff of the other State."

23. When comparing this request to the disclosure previously made in respect of Iran, the Home Office explained to the Commissioner:

“Any request for information about emergency travel documents in respect of a particular country has to be considered individually and against the background of the level of cooperation between the UK and the country in question. The attitude of other countries to the returns process can vary considerably, as can the level and stability of levels of cooperation. We cannot take a blanket approach to disclosure of this type of information and must take into account the sensitivities associated with the particular country. In the case of Iran, given the nature of relations with that country at the time, it was decided that disclosure of the information would not appreciably damage relations or the operation of immigration controls”.

The Commissioner’s position

24. The Commissioner recognises that section 27(1) focuses on the effects of the disclosure of information and that section 27(1)(a) provides for information to be exempt if its disclosure would, or would be likely to, prejudice relations between the UK and any other State.
25. The Commissioner also recognises that the effective conduct of the UK’s international relations depends upon maintaining the trust and confidence of other States and international organisations.
26. In order for a prejudice based exemption, such as section 27(1), to be engaged the Commissioner considers that three criteria must be met:
- first, the actual harm or prejudice 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 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 on 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 of ‘would be likely’, which the Home Office has specified, 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.

27. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested 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 have otherwise have been necessary"⁴.
28. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Home Office clearly relates to the interests which the exemption contained at section 27(1)(a) is designed to protect and that, in this case, the Home Office is referring to the sensitivities associated with its relationship with Eritrea.
29. With regard to the second criterion, in its correspondence with the complainant the Home Office explained that it:

"...works closely with the governments of other states to obtain travel documents and disclosing the information you have requested would disregard the confidentiality of the relationship between the Home Office and the Government of the State of Eritrea and be likely to prejudice future cooperation and/or negotiations".
30. The Home Office provided the Commissioner with further rationale regarding the application of section 27, which was given in confidence and he is therefore unable to share it here, although it has been taken into account. It is further noted that the Home Office has consulted with the Foreign, Commonwealth & Development Office (FCDO) which has agreed that the information should not be disclosed.
31. While mindful of the complainant's reference to similar information having been disclosed in the past, the Commissioner does not consider that this set a precedent. As argued by the Home Office, the circumstances will be different for each country concerned and will need to be considered individually.
32. Having considered the Home Office's submission to him, some of which has been provided in confidence, the Commissioner is satisfied that it has demonstrated that there is a causal link between the disclosure of the withheld information and prejudice potentially occurring to the UK's relations with Eritrea.

⁴<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i205/Campaign%20Against%20the%20Arms%20Trade;%20EA.2007.0040%20.pdf>

33. The Commissioner is also satisfied that the resultant prejudice would be real and of substance. Moreover, the Commissioner is satisfied that there is a more than hypothetical risk of prejudice occurring and therefore the third criterion is met. In reaching this conclusion, the Commissioner has taken into account the confidential arguments provided, the nature of the UK's relationship with Eritrea and that the effective conduct of the UK's international relations depends upon maintaining the trust and confidence of other States.
34. The Commissioner therefore finds the exemption engaged in relation to the information withheld by virtue of section 27(1)(a). However, the arguments presented do not persuade him that the level of harm demonstrated meets the higher threshold of 'would' prejudice, as argued by the Home Office. He will therefore consider the lower level of 'would be likely' to prejudice through the public interest test.

The public interest test

35. Section 27(1) is a qualified exemption and is subject to a public interest test. This means that, even where its provisions are engaged, it is necessary to decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

Public interest arguments in favour of disclosure

36. The complainant has argued:

"There are wide variations between countries as to their processes, time-scales and general willingness to issue ETDs for their nationals. Individuals who can demonstrate that the delays and difficulties that they are facing in obtaining an ETD are part of a general pattern of failure to engage by that country, rather than through any failure of co-operation by the individual with the Home Office's processes, are significantly more likely to secure their liberty".

37. And, in his view, that: "there is nothing in the provision of such data which, inherently, carries prejudice or risk (or at least, such prejudice or risk that may outweigh the public interest in disclosure)".
38. He has also argued that

"...resistance to disclosure and reasons given are inconsistent with the position adopted by this Government under section 72 of the Nationality and Borders Act 2022, which will lead, in practice, to the identification of states that do not co-operate with removals by introducing steps such as invalidating visa applications and imposing additional financial requirements on nationals of those countries seeking entry. The Home Secretary must, under those provisions, take into account matters including the extent to which the country is taking the steps which are in practice necessary or expedient in relation to facilitating returns and doing so promptly, and the duration, extent and reasons for non-cooperation. The imposition of penalties would, in effect, enable identification of those matters taken into account".

39. Amongst other arguments he has also said that disclosure : "is of central importance to individual liberty, and is necessary in the interests of transparency and good government".
40. The Home Office recognised that disclosure would provide transparency on the level of cooperation between the Home Office and Eritrea.

Public interest arguments in favour of maintaining the exemption

41. The Home Office has argued:

"Release of the requested information would be likely to prejudice future cooperation and/or negotiations between the Home Office and the Government of the State of Eritrea. This, in turn, would prejudice the operation of immigration controls and our ability to affect the return of immigration offenders and foreign national offenders.

...Non-disclosure of this information would prevent any prejudice to the operation of immigration controls and our ability to affect the return of immigration offenders and foreign national offenders".

42. The Commissioner is unable to reproduce the further arguments that he has taken into account.

Balance of the public interest arguments

43. The Commissioner accepts, in light of the submissions advanced by the complainant, that there is a genuine public interest in the disclosure of information which would provide insight into the level of engagement in obtaining an ETD, and into any delays in obtaining the same.
44. However, in contrast, the Commissioner considers that there is a very strong public interest in ensuring that the UK's relationships with other

States is not harmed or made more difficult and less effective. This is to ensure that the UK can protect and promote its interests abroad and it goes to the heart of the purpose of the exemption.

45. Taking all of the above into account, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 27(1)(a). While disclosure would add to the transparency, and thus the public's understanding, of matters relating to the number of ETDs issued in a given timeframe, the Commissioner considers that there is a greater public interest in maintaining good international relations between the UK and Eritrea.
46. The Commissioner's decision is, therefore, that the Home Office was entitled to rely on section 27(1)(a) of FOIA to refuse the request. In light of this decision the Commissioner has not considered the Home Office's reliance on section 31(1)(e) of FOIA.

Other matters

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

Engagement

48. The Commissioner has made a record of the Home Office's poor engagement with his initial enquiries and the resulting delay in this case. This may form evidence in future enforcement action should evidence from other cases suggest that there are systemic issues within the Home Office that are causing such delays.

Information Notice

49. 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.

Right of appeal

50. 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

51. 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.

52. 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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