

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 November 2014

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

### **Decision (including any steps ordered)**

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1. The complainant requested from the Home Office (HO) the type and nature of data that has been collected, processed, or stored from passengers travelling to the UK by air from Germany, France and Portugal. HO neither confirmed or denied holding the requested information relying on the section 31(3) FOIA exemption, by virtue of section 31(1)(e) (prejudice to the operation of the immigration controls).
2. The Commissioner decided that HO had applied the section 31(3) exemption correctly and that the balance of the public interest favoured maintaining the exemption. He does not require HO to take any further action.

### **Request and response**

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3. On 25 June 2014, the complainant asked HO for information in the following terms:  
*"I would be interested in knowing what type/nature of data has been collected/processed/stored from passengers travelling from Germany, France and Portugal. For instance, if data from passengers travelling from Portugal has been collected/processed/stored - I would like to know the type of data that was collected/processed/stored (e.g. passengers' names, point of origin, date of travel, etc) and over what period this was done (e.g. June 2010 - now)."*
4. HO responded on 18 July 2014 saying that it was unable to confirm or deny holding information within the scope of the information request;

HO relied on section 31(3) FOIA saying that to confirm or deny would prejudice the prevention or detection of crime, the apprehension or prosecution of offenders and the operation of immigration controls, the exemptions at sections 31(1)(a), (b) and (e) FOIA.

5. Following an internal review HO confirmed that position in an undated letter to the complainant.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 6 September 2014 to complain about the way his request for information had been handled. He said that he had put broadly similar requests to HO in the past which had received the same outcome. On this occasion he said he had narrowed his request to the collection of data from passengers travelling from countries which, he said, strictly prohibited such data being processed such as France, Germany and Portugal. He said that those countries forbade the transmission of such data to other European Union countries and he was simply checking whether or not HO was abiding by its international legal obligations.
7. Before the Commissioner HO maintained that the section 31(3) FOIA exemption applied by virtue of the prejudice at section 31(1)(e) FOIA, the operation of immigration controls.
8. The Commissioner considered whether HO was entitled to apply the section 31(3) FOIA exemption in this matter so as to neither confirm nor deny (NCND) holding information within the scope of the request.
9. During the course of his investigation, as well as receiving representations from the complainant, the Commissioner received representations from HO. These included some information provided to him in confidence the conclusions of which, but not the supporting detail, he has included within this notice.

## **Reasons for decision**

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### **Section 31- law enforcement**

#### **Section 31(3)**

10. The Home Office cited section 31(3) to NCND holding the requested information. Section 31(3) provides that a public authority is not obliged to confirm or deny whether it holds information described in a request if to do so would, or would be likely to, prejudice any of the matters

mentioned in section 31(1). The Home Office specified that the relevant matters are those set out at section 31(1)(e), the operation of the immigration controls. This is a qualified exemption, and is therefore subject to a public interest test.

11. The complainant said that he had made a similar broader request in the past and had been refused. Accordingly he had narrowed his request to ask for information concerning HO's arrangements for collecting passengers' data from passengers travelling from countries which strictly prohibited processing of such data, notably Germany, France and Portugal. He said that those countries had a clear policy on this and that the issue was very simple; Germany, France and Portugal forbade any data from passengers travelling from their countries to be transmitted to, and processed by, other EU countries. He said that their position on this was both clear, and public knowledge, so he had asked the HO whether they received and processed any data from passengers travelling from these countries. In this he was simply checking whether HO was abiding by its international legal obligations.
12. When setting out the likelihood of prejudice, the Home Office specified the higher threshold of "would prejudice". The Tribunal, in *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030)*, commented that to maintain a claim that disclosure would cause prejudice places a strong evidential burden on the public authority (Tribunal at paragraph 36). Therefore, the issue for the Commissioner to consider here is whether confirming or denying if the requested information is held would prejudice the operation of the immigration controls.
13. HO said that to confirm either way whether it had collected, processed or stored data relating to passengers travelling from Germany, France or Portugal would provide information relating to flights covered by the Border Systems Programme (formerly known as e-borders) and, by deduction, relating to flights not so covered. This could be used by criminals or those seeking to evade immigration control in efforts to circumvent the systems which are in place. HO said that the likelihood of that happening was high, which is why it considered that confirming or denying the request would prejudice the operation of the immigration controls and that section 31(3) therefore applied by virtue of the prejudice at section 31(1)(e).
14. HO drew attention to the report of the House of Lords European Union Select Committee 2011 on the UK opt-in to the Passenger Name Record (PNR) directive (the report). The report acknowledged that the collection of PNR data and their transfer to border agencies and law enforcement bodies, and the retention of such data for a number of years, all constituted a substantial invasion of privacy with major data protection

implications and was therefore justified only if the benefits in combating terrorism and serious crime are as great as HO had stated. The report added that the Committee had received from HO further material which had persuaded them that PNR data, when used in conjunction with data from other sources, could significantly assist in the identification of terrorists. They therefore had no hesitation in accepting the HO assessment of the value of PNR data for the prevention and detection of serious crime and terrorism.

(<http://www.publications.parliament.uk/pa/ld201011/ldselect/lddeucom/113/11303.htm>).

15. HO provided the Commissioner with further, more detailed, supporting evidence on the issue in confidence and said that to provide the requested information and provide the explanation which would be required for its correct interpretation would provide more information about the collection of advance passenger information than was compatible with the effective operation of the system.
16. The complainant drew attention to a March 2013 report by the Chief Inspector of Borders and Immigration saying that API data cannot be collected from passengers travelling from either Germany or France (para 5.14 of the report):  
<http://icinspector.independent.gov.uk/wp-content/uploads/2013/10/An-Inspection-of-eborders.pdf>. HO said that the Chief Inspector's report related to matters as they stood in 2012. It could not be assumed that what was the case then would necessarily be the case now or have been at the time of the request.
17. The Commissioner has had regard for the evidence he has received from the complainant and HO as well as noting the conclusions of the Select Committee. He is satisfied from the evidence he has seen that to confirm or deny holding the information would prejudice the effective operation of the immigration controls and therefore decided that the section 31(3) FOIA exemption was engaged.

## **Public Interest**

18. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in NCND outweighs the public interest in confirming or denying whether information is held.
19. HO said it recognised that there is public interest in openness and transparency in all aspects of government. Also that there is a public interest in knowing that arrangements for securing the UK's borders are

lawful and effective. It was important to ensure confidence and general awareness regarding the security measures in place to protect the UK.

20. HO said that to compromise the security of the UK borders, which it said would be the outcome of either confirming or denying holding the requested information, would not be in the public interest.
21. The Commissioner is satisfied that the prejudice identified by HO *would* occur, rather than *would be likely* to occur, and that this adds to the public interest in favour of maintaining the exemption.
22. The Information Commissioner recognises that there is a significant public interest in the public knowing about the level of checks carried out at UK Borders and being reassured about the measures being taken.
23. He has seen however that any disclosed information, if combined with other information already in the public domain, would make it easier for individuals who wished to avoid immigration checks to do so. Undermining the operation of immigration controls in this way would not be in the public interest; there would be an adverse effect on HO's capacity to enforce the law.
24. Accordingly, the Commissioner found that the public interest arguments in favour of disclosure carry some weight but that there is a greater public interest in not disclosing information which would inform and assist those who might wish to use information flowing from any confirmation or denial to evade PNR transmission and the related border controls.
25. The Commissioner therefore concluded that the balance of the public interest favours maintaining the exemption from the duty to confirm or deny at section 31(3) FOIA.

## Right of appeal

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26. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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 .....**

**Graham Smith**  
**Deputy Commissioner and Director of Freedom of Information**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**