

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 February 2016

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

Decision (including any steps ordered)

1. The complainant requested information relating to any alert given to border control staff about a named individual. The Home Office refused to confirm or deny whether it held this information and cited the exemptions provided by sections 24(2) (national security) and 31(3) (prejudice to law enforcement) of the FOIA.
2. The Commissioner's decision is that neither of these exemptions was engaged and so the Home Office is now obliged to confirm or deny whether it holds the requested information.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Send to the complainant a fresh response to his request that confirms or denies whether the requested information is held. In relation to any relevant information that it held, this must either be disclosed or the complainant given an explanation of the valid reason under the FOIA as to why it is withheld.
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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 19 May 2015, the complainant wrote to the Home Office and requested information in the following terms:

"I would like documents concerning any alert given to UK border control staff to watch out for US fugitive, Elaine Antoinette Parent. This would have occurred in 1996 when she was identified by the St Lucie Sherriff's Office, Florida, USA and the US State Department."
6. The Home Office responded on 16 June 2015. It refused to confirm or deny whether the requested information was held, but cited section 24 without specifying a subsection, and 31(1)(a) and 31(1)(e), which concern the duty to disclose information, rather than the duty to confirm or deny.
7. The complainant responded on 18 June 2015 and requested an internal review. The Home Office responded with the outcome of the review on 20 July 2015. It maintained the refusal to confirm or deny and now clarified that it was relying on the exemptions from the duty to confirm or deny provided by sections 24(2) (national security) and 31(3) (prejudice to law enforcement) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 21 July 2015 to complain about the refusal of his information request. The complainant indicated that he did not agree with the reasoning given by the Home Office for the refusal of his request.

Reasons for decision

Section 24

9. The Home Office cited section 24(2), which provides an exemption from the duty to confirm or deny where this is reasonably required for the purposes of national security. Consideration of this exemption involves two stages; first the exemption must be engaged due to the requirement of national security. Secondly, this exemption is qualified by the public interest, which means that the confirmation or denial must be provided if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.

10. The Commissioner interprets “required” as used in section 24 to mean reasonably necessary. The exemption will, therefore, be engaged if it is reasonably necessary for the purpose of safeguarding national security for the confirmation or denial to be withheld.
11. The Home Office explained its reasoning for citing this exemption as being that disclosure of the confirmation or denial could indicate which types of individual Border Force *“or other law enforcement agencies”* may have an interest in. It believed that this could be prejudicial to the maintenance of national security.
12. It also referred to what it believed was a requirement to give a neither confirm nor deny response in this case as it believed that to do otherwise would set a precedent for providing the confirmation or denial in response to similar requests.
13. As to whether the Commissioner accepts that these arguments demonstrate that exemption from the duty to confirm or deny is reasonably necessary for the purposes of national security, there is one point that can be dealt with briefly; the decision in this case would not be precedent-setting. Each information request should be considered on its own merits and the decision in this case would not have effect in relation to any other request.
14. Turning to the argument made by the Home Office about the inference that could be drawn about the interest or otherwise that Border Force or others may have in types of individuals, the main concern of the Home Office here would appear to be about maintaining consistency of responses to similar information requests. If, for example, it was to deny that it held information in response to this request, but later neither confirmed nor denied whether it held information in response to a similar request about another named individual, this may be taken as an indication that information within the scope of the latter request is held. This is sometimes referred to as a ‘mosaic effect’.
15. The Commissioner accepts the premise of this argument; for neither confirm nor deny responses to be effective they must be applied consistently to similar requests. If an individual was able to infer through a mosaic effect that they either are or are not of interest to Border Force or other bodies, this could undermine the work of those bodies. If the work of Border Force, or of other bodies concerned with border controls, was undermined, this would have a detrimental effect on national security. The question for the Commissioner here is whether he accepts that disclosure of the confirmation or denial in this case would contribute to the development of a harmful mosaic effect.

16. Rather than refusing all requests on a certain subject matter ostensibly to avoid a mosaic effect, it is necessary to consider the circumstances relating to each information request. The Commissioner considers that there are two significant factors relating to this request. First, any information falling within the scope of this request would be old; the requester makes clear in the request that he believes that any information falling within its scope would date from 1996. Secondly, the individual named in the request has been deceased for well over a decade¹.
17. As to why the Commissioner considers that these factors are relevant and significant, the age of any information falling within the scope of the request means that the confirmation or denial would not relate to current or recent work carried out by border control bodies. That the named individual is dead and has been for some time makes clearer still that the confirmation or denial would not relate to current or recent measures.
18. The Commissioner's view is that it would be likely to be correct to refuse under section 24(2) a request on similar subject matter, but that covered the current time or a more recent time frame and that named a living, or at least a more recently deceased, individual. Inconsistent responses to such requests could lead to reasonable inferences being drawn about border security efforts and hence to the mosaic effect mentioned above.
19. He does not, however, agree that the confirmation or denial in question here would contribute to a harmful mosaic effect. This is because, due to the time frame the request in this case relates to, he does not consider that any reasonable inference could be drawn from a response to this request about the current work of border security bodies.
20. The Commissioner agrees that it is necessary to maintain a consistent neither confirm nor deny stance in response to requests that may contribute to a harmful mosaic effect relating to the current work of border security bodies. He does not agree, however, that this means that a neither confirm nor deny response is appropriate in relation to all requests about border agencies' interest in named individuals, regardless of the particular circumstances of each request.

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<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1391705/Chameleon-Killer-cheats-the-Florida-police-by-ending-her-many-faced-life.html>

21. In this case, his view is that the circumstances relating to the information requested means that exemption from the duty to confirm or deny is not reasonably necessary for the purposes of national security. The conclusion of the Commissioner is, therefore, that the exemption provided by section 24(2) of the FOIA is not engaged.

Section 31

22. The Home Office cited section 31(3), which provides an exemption from the duty to confirm or deny where to do so would, or would be likely to, prejudice any of the matters mentioned in section 31(1). Consideration of this exemption involves two stages; first the exemption must be engaged as prejudice resulting through disclosure of the confirmation or denial would be at least likely. Secondly, this exemption is qualified by the public interest, which means that the public interest in the maintenance of the exemption must outweigh the public interest in disclosure.
23. Covering first whether the exemption is engaged, the Home Office has specified that it believes that confirmation or denial would be likely to prejudice the matters mentioned in sections 31(1)(a) and (e), which are the prevention or detection of crime and the operation of the immigration controls. In explanation for the citing of this exemption, the Home Office stated that it believed confirmation or denial *"would enable potential offenders, criminals and or terrorists to circumvent current systems and procedures in place to counter or detect the commission of offences"*. The Commissioner has taken this explanation as an indication that it is also relying here on a mosaic effect argument concerning prejudice to the work of border security agencies.
24. The approach of the Commissioner to prejudice-based exemptions is that to accept that prejudice would be likely to result, there must be a real and significant likelihood of this outcome occurring, rather than this outcome being only a remote possibility. The question in this case is, therefore, whether issuing a confirmation or denial in response to the request would result in a real and significant likelihood of prejudice to the prevention or detection of crime and to the operation of the immigration controls.
25. The Commissioner agrees that the mosaic effect argument concerning undermining border security efforts is relevant to the matters mentioned in sections 31(1)(a) and (e). However, for the same reasons as given above in the section 24(2) analysis, the Commissioner does not accept that disclosure of the confirmation or denial in this case would contribute to the development of a harmful mosaic effect. He does not, therefore, consider that prejudice relevant to sections 31(1)(a) and (e) would be a likely outcome as a result of a mosaic effect.

26. The Home Office also cited a further argument in support of the citing of this exemption, stating that it believed that confirmation or denial *"could be misleading as it might imply that this is the only method employed to monitor the entry of those of interest"*. Although not stated clearly, the Commissioner reads this to mean that *"this"* method referred to by the Home Office is monitoring by Border Force, so the Home Office is arguing that confirmation or denial in response to the complainant's request might imply that monitoring by Border Force is the only method used to monitor entry to the UK.
27. The Home Office has provided no explanation of this argument. In the absence of such an explanation, the Commissioner cannot see any grounds for finding that the implication described by the Home Office could be drawn from a confirmation or denial in response to the complainant's request.
28. The Commissioner is not convinced by the arguments of the Home Office and so finds that confirmation or denial would not result in a real and significant likelihood of prejudice to the prevention or detection of crime or to the operation of the immigration controls. His conclusion is, therefore, that the exemption provided by section 31(3) is not engaged. Having reached this conclusion it has not been necessary to go on to consider the balance of the public interests.
29. In light of this conclusion and that above on section 24(2), the Home Office is required at paragraph 3 to provide a fresh response to the request.

Right of appeal

30. 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

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

31. 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.
32. 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

Gerrard Tracey
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