

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2016

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

Decision (including any steps ordered)

1. The complainant requested information relating to illegal immigration. The Home Office refused this request under sections 12(2) (costs) and 31(1)(e) (prejudice to the operation of the immigration controls) of the FOIA.
2. The Commissioner's decision is that the Home Office refused the request correctly under sections 12(2) and 31(1)(e) and that no steps are required.

Request and response

3. On 24 February 2016 the complainant wrote to the Home Office and requested information in the following terms:

"The annual number of suspected illegal immigrants arrested or detained (please provide individual figures for both) by the force having travelled on or having been suspected of having travelled on a ferry attempting to reach the UK for each of the last 4 calendar years (including 2015). If a record is held as to whether the suspected illegal immigrants were pedestrians or posing as staff, please detail these incidents.

A list of incidents where suspected illegal immigrants were arrested or detained (please provide individual figures for both) by the force having travelled on or having been suspected of having travelled on a vessel that is not a ferry attempting to reach the UK for each of the last 4 calendar years (including 2015). Please provide a breakdown of:

- *the number of individual incidents,*
 - *date,*
 - *location of arrival or pickup (if known, if not please detail if this occurred at sea or on land),*
 - *location of departure (if known),*
 - *the number of suspected illegal immigrants detained,*
 - *the type of vessel (yacht, canoe, dinghy etc.),*
 - *the number of minors,*
 - *and whether the pilot was suspected of being a trafficker."*
4. The Home Office responded substantively on 6 April 2016. It stated that the request was refused and cited the exemptions provided by the following sections of the FOIA:
- 31(1)(a) (prejudice to the prevention or detection of crime)
- 31(1)(b) (prejudice to the apprehension or prosecution of offenders)
- 31(1)(e) (prejudice to the operation of the immigration controls)
5. The complainant responded on 6 April 2016 and requested an internal review. The Home Office failed to respond with the outcome of the review within a reasonable period.

Scope of the case

6. The complainant contacted the Commissioner on 25 May 2016 to complain about the refusal of his information request and indicated that he did not agree with the reasoning from the Home Office for the refusal of his request.
7. Given the delay in the completion of the review, the case was progressed without waiting any longer for the review to be completed. The Commissioner comments on the delay in the completion of the review in the Other matters section below.
8. During the investigation of this case, the Home Office stated that it was unable to establish within the cost limit whether it held information within the scope of the following part of the request:
- "If a record is held as to whether the suspected illegal immigrants were pedestrians or posing as staff, please detail these incidents."*
9. The Home Office was specific that it cited section 12(2) only in relation to this part of the request; it was not arguing that the entire request

should be aggregated with this part and the whole refused under section 12(2). The Commissioner has therefore taken the approach of considering section 12(2) below in relation to only this part of the request and has covered the rest of the request separately.

Reasons for decision

Section 12

10. The Home Office cited section 12(2) in response to the part of the request referred to at paragraph 8 above. This section provides that a public authority is not obliged to confirm or deny whether requested information is held if it estimates that to do so would incur costs in excess of the appropriate limit. In other words, if the cost of establishing whether the requested information is held would be excessive, the public authority is not required to do so.
11. The appropriate limit is set at £600 for central government departments by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the fees regulations). The fees regulations also provide that a cost estimate must be calculated at the rate of £25 per hour, giving an effective time limit of 24 hours.
12. Section 12(2) requires a public authority to estimate the cost of complying with a request, rather than to formulate an exact calculation. The question for the Commissioner here is whether the cost estimate given by the Home Office was reasonable. If it was, then section 12(2) is engaged and the Home Office was not obliged to comply with the request.
13. The Home Office's explanation of its cost estimate concerned the way in which it records information relating to illegal immigration. The Home Office stated that there is no requirement for it to record information to the level of detail that would be required in order to comply with this part of the request and that it would not necessarily do so. However, its position was that it was unable to simply state that it did not hold this information as it may have been recorded within the notes section of its relevant IT system. Therefore, in order to establish whether it did hold information falling within the scope of this request, it would be necessary for it to search each possibly relevant entry on its system.
14. As to the Commissioner's view on this estimate, the Home Office supplied a figure demonstrating the number of records that it would be necessary to search. The Commissioner cannot cite that figure here without undermining the citing of section 31(1)(e) for the other parts of the request, but does note that this suggests there would be a

considerable number of system entries to search in order to comply with the request.

15. The Home Office gave an estimate of 3 minutes for each case in order to establish whether they included information relevant to the request. Based on the indication from the Home Office on the number of records it would be necessary to search, even if this estimate was to be reduced from 3 minutes per entry, the total time would still be well in excess of the limit.
16. The Commissioner accepts that the Home Office estimated reasonably that it would exceed the cost limit for it to confirm or deny whether it held information within the scope of the part of the request quoted at paragraph 8 above. Section 12(2) therefore applied and the Home Office was not obliged to comply with section 1(1)(a) in relation to that part of the request.

Section 31

17. The Home Office cited sections 31(1)(a), (b) and (e) of the FOIA. The Commissioner has focussed here on section 31(1)(e). Section 31(1)(e) provides that information is exempt where its disclosure would, or would be likely to, prejudice the operation of the immigration controls, which the Commissioner's published guidance on this exemption¹ refers to as *"physical immigration controls at points of entry into the United Kingdom"*.
18. For this exemption to be engaged disclosure must be at least likely to prejudice the matters referred to in these sections. This exemption is qualified by the public interest, which means that if the public interest in maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
19. As noted above, these exemptions apply where disclosure *"would"* or *"would be likely"* to cause prejudice. In this case the Home Office has specified that its position is that prejudice *would* result through disclosure. The approach of the Commissioner is that she will accept that prejudice *would* occur where that outcome is more probable than not and that is the test she has applied here. The Home Office argument concerned prejudice that it believed would result through the combination of this information with other information that may already

¹http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/law-enforcement-foi-section-31.ashx

be in the public domain or that could be disclosed in future. It argued that this would enable a picture to be built up of where a clandestine entrant to the UK is most likely to be apprehended, which would then be of assistance to those seeking to evade entry controls, and that this would result in prejudice relevant to section 31(1)(e).

20. These types of arguments are sometimes referred to as “mosaic” arguments, where the public authority argues that disclosure of the information in question could be combined with other information to form a mosaic of the process that the information relates to. The approach of the Commissioner is to assess the merits of mosaic arguments in the circumstances of each case and that they should not be dismissed automatically.
21. The Commissioner notes first that the reasoning advanced by the Home Office is relevant to the operation of the immigration controls; the process referred to in section 31(1)(e). As to whether the likelihood of this prejudice occurring is more likely than not, the first step is to consider what disclosure of the information in question would reveal.
22. The argument of the Home Office was that disclosure would allow a picture to be built up of where individuals are most likely to be apprehended. On the issue of other information that could be combined with the information in question to cause a mosaic effect, the Home Office appeared to be referring to information that may be disclosed in response to future similar information requests, which it argued would be difficult to refuse if the information in question here was disclosed.
23. Where mosaic effect arguments are advanced the Commissioner’s view is that these will be more convincing where the public authority is referring to other specific information that is already in the public domain, rather than to information that may be disclosed at an indeterminate future time. However, she does not reject entirely arguments based on disclosures to future information requests, so she accepts that this element of the Home Office’s argument in this case is valid, albeit that it carries less weight than if the Home Office had been able to point to specific information that is already available.
24. The Commissioner’s view is that the Home Office has made a valid argument about how a fuller picture of law enforcement efforts at ports could be built up through disclosures in response to other similar requests, combined with the response to this request. Whilst she does not accept that the test for *would* prejudice is met, the Commissioner has gone on to consider whether the test for *would be likely* is met, which she generally will do where she has found that the higher test is not met.

25. The test that the Commissioner applies when considering whether prejudice would be likely is that there must be a real and significant likelihood of prejudice occurring, but it is not necessary for this outcome to be more probable than not. Applying that test here, the Commissioner accepts that there is a real and significant likelihood of prejudice relevant to section 31(1)(e) through the information in question being combined with information disclosed in response to future similar information requests. The Commissioner accepts the possibility that this could be taken as an indication of which ferry sailings offer the likeliest opportunity for covert entry to the UK, or which locations on the coast offer the best possibility for a covert landing.
26. The mosaic effect picture that would emerge through a number of disclosures could then be of significant use to those seeking to evade the border entry controls. Increasing the possibility of border controls being evaded would be likely to prejudice the operation of the immigration controls. Her conclusion is, therefore, that this exemption is engaged.
27. The next step is to consider the balance of the public interests. In forming a conclusion here the Commissioner has taken into account the general public interest in the transparency of the Home Office, as well as factors that apply in relation to the specific information in question.
28. Covering first arguments in favour of disclosure, issues relating to immigration, including illegal immigration, are perpetually high on the political agenda. The Commissioner recognises that there is public interest in disclosure that would inform the public about the operation of the immigration controls in relation to curbing illegal immigration. The complainant made a similar argument; he believed that the requested information was of public interest owing to its subject matter. The requested information would provide some insight into the effectiveness of the process and work of the Home Office relating to border security. This is a valid public interest factor in favour of disclosure.
29. Turning to arguments in favour of maintenance of the exemption, having found that the exemptions are engaged as the prejudice predicted by the Home Office would be a likely outcome of disclosure, the Commissioner must acknowledge the public interest in avoiding that outcome. Clearly it would not be in the public interest to prejudice the ability of the Home Office to operate the immigration controls. The public interest inherent in the exemption is a valid factor in favour of maintenance of the exemption which carries considerable weight.
30. In conclusion, the Commissioner has recognised that there is some public interest in disclosure. However, the prejudice to the process

inherent in section 31(1)(e) would need to be outweighed by sufficiently weighty factors in favour of disclosure. In this case the Commissioner does not believe that the public interest in favour of disclosure is sufficiently weighty. Her finding is, therefore, that the public interest in the maintenance of section 31(1)(e) outweighs the public interest in disclosure. This means that the Home Office was not obliged to disclose the information requested by the complainant.

31. In light of this conclusion it has not been necessary to go on to also consider sections 31(1)(a) and (b).

Other matters

32. Whilst there is no statutory time limit for the completion of internal reviews, the Home Office is aware that the approach of the Commissioner is that they should be completed within a maximum of 40 working days. The Home Office failed to comply with that timescale in this case. The Commissioner has made a separate record of this delay and the Home Office must ensure that it has appropriate procedures in place to carry out internal reviews promptly.
33. Ordinarily in a decision notice that covers the citing of section 12 the Commissioner will consider whether the public authority has complied with its duty under section 16(1) to provide advice and assistance to a requester. In relation to section 12 this should mean that the public authority gives the requester advice on how their request could be refined to bring it within the cost limit.
34. In this case the Commissioner has not covered section 16(1) as section 12(2) was only cited for the first time during her investigation. The Home Office should, however, seek to avoid situations where section 12 is cited belatedly and must comply with section 16(1) in any case where section 12 is relied upon.

Right of appeal

35. 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>

36. 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.
37. 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

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