FIRST-TIER TRIBUNAL

GENERAL REGULATORY CHAMBER

Appeal No. EA/2012/0041

BETWEEN:

DAVID ARMITT

Appellant

-and-

THE INFORMATION COMMISSIONER

First Respondent

-and-

THE HOME OFFICE

Second Respondent

Held on the papers on: 6 July 2012

Before: C Taylor; M Clarke and S Cosgrave

Subject Matter
Freedom of Information Act 2000 ('FOIA' or 'the Act'): s.31(1) and s.40(2)

DECISION

The Appeal is unanimously dismissed.

Reasons For The Decision

1. On 31st March 2011, the Appellant requested of the United Kingdom Border Agency[1] ("**UKBA**"):

   i. Part 1: All guidance provided for [customs officers] relating to which light vehicles/drivers should be stopped and interviewed and what circumstance should lead to the vehicle being detained whilst a search is undertaken and identity checks undertaken.

   ii. Part 2: UKBA's latest statistics regarding the number of cars and light vehicles stopped daily at Dover Port, and how many are detained in the garages for further interviews/inspections. Additionally, a breakdown of the number and nature of offences detected as a result of these activities and the respective percentages of offences detected as a result of a) prior intelligence and b) random checks.

2. UKBA responded on 9th May 2011 as follows:

   > For Part 1: It provided the a redacted version of the guidance, citing s31(1)(a) and (d) Freedom of Information Act 2000 ('FOIA') (*prejudice to prevention or detection of crime and assessment or collection of any tax or duty*), as the reason for not providing the guidance in its entirety.
   >
   > For Part 2: It confirmed that it held information on the number of cars stopped and searched at Dover and the types of offences discovered as a result. It claimed that this was exempt from disclosure under s31(1)(e) FOIA as prejudicing the operation of the immigration controls.

3. Following an internal review, the Home Office altered its position slightly. By the time of the Commissioner's investigation, UKBA was only relying on s.31(1)(a) and (d) FOIA for both parts of the request and additionally on s.40(2) for Part 1.

4. During the Commissioner's investigation, he sought to clarify the scope of information for Part 2 that would satisfy the Appellant. He explained the Home Office's position, including that providing the percentage of offences detected from profiling and prior intelligence would require extensive research or searches and that information related to the number of vehicles stopped was not collated on a daily basis. The Appellant confirmed that he was content to exclude this part of his request, although he expressed surprise that this information was not already collated. He agreed for the investigation to be restricted as follows:

   > "*For each month from April 2010 to March 2011, the total number of car interceptions, the total number of cars examined, the type of offence detected, and the total number of times each offence was detected at the Port of Dover*."

5. The Commissioner's decision notice of 6 February 2012, found in favour of UKBA.

Grounds of Appeal

6. The Appellant appealed to this Tribunal asserting that the Commissioner erred in his:

[1] UKBA is an executive agency of the Home Office. The latter is the public authority for the purposes of FOIA.

- Assessment of the balance of public interest in respect of s.31(1)(a) and (d) ('Ground 1');

- Application of s.40(2) FOIA. ('Ground 2').

The Task of the Tribunal

7. The Tribunal's remit is governed by s.58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently.

8. A public authority is exempt from providing information requested under the Act where it is exempt information, and in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information (S.2(2)(b) FOIA).

9. **Section 31(1) of FOIA** provides:

> *"Information … is exempt information if its disclosure under this Act would, or would be likely to, prejudice –*
> *a. the prevention or detection of crime...[or]*
> *d. the assessment or collection of any tax or duty or of any imposition of a similar nature."*

10. **Section 40(2) FOIA** provides:

> "*(2) Any information to which a request for information relates is also exempt information if— (a) it constitutes personal data …, and …(3) …(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene… any of the data protection principles…"*

11. The relevant data protection principle being claimed is that data

> "*shall be processed fairly and lawfully, and in particular, shall not be processed unless- (a) at least one of the conditions in Schedule 2 is met.*" (*See Sched.1, para. 1 of the Data Protection Act 1998 ('DPA')*).

12. We are to interpret 'fair' in accordance with principles including:

> "*1(1)... regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed*…."
>
> *Part II, of Sch.1 of DPA Interpretation of the Principles*

13. The only Schedule 2 condition that has been referred to by the parties and that seems relevant is set out in paragraph 6(1), which we shall refer to as the "legitimate interest test". It provides that:

> *"6. -(1) The processing is necessary for the purposes of legitimate interests pursued by ... the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*
>
> *Sch.2 of DPA*

14. It has not been disputed that the requested information is considered 'exempt information' under 31(1)(a) and (d) FOIA.

15. The first issue between the parties is whether, on the balance of probabilities, the public interest in maintaining the exemption is greater than that of disclosing it. The second issue concerns whether UKBA had acted properly in redacting the names of officials from the disclosed policy documents in Part 1 under s.40(2)FOIA.

16. The relevant data that is the subject matter of the appeal is:

    a. For Part 1: Redacted information from 'Tourist Selection Indicators and Selection Techniques, including Annex A: 'Selection Criteria Tourist Area'. ('Document 1')

    b. For Part 2: Data from April 2010 to March 2011 on the number of car interceptions, exams, type of offences and number of searches undertaken, and type and number of offences detected at Dover port.('Document 2')

17. There was also a third document that UKBA provided for our consideration on a confidential basis, claiming that it was out of scope. We agree that it did not relate to the parameters of the request, but appreciated being given the opportunity to consider this on behalf of the Appellant.

Evidence and Submissions[2]

18. The parties submitted witness evidence, submissions and a bundle of documents, including a closed submission from the Home Office and the requested information. We have considered all of this, even if not specifically referred to below. We have not issued a closed addendum to this decision.

Appellant's Evidence

19. Although not specifically set out in a separate witness statement, the Appellant relayed elsewhere his personal experience of driving through the Port of Dover on a regular basis. This included:

    i. He accepted that the request in Part 1 posed a more difficult problem regarding the need for operational effectiveness. However, whilst it appeared that one in ten or twenty vehicles were requested to stop in the Customs area, he was almost always one of the selected minority. He was then asked questions not about the goods in his car but about where he had been etc. If he asked why he was being asked such personal questions, he would be told to drive to the garage where his car would be searched and any liquid purchases shaken. Requests as to the officers' identity were usually refused.

UKBA Evidence

20. Witness Testimony of Senior Investigation Officer, of UKBA, Criminal & Financial Investigation based in London included that:

    a. **Experience:** He had been involved in investigating serious organised crime, particularly drug smuggling, for over 20 years. He had gained experience of how

[2] We have added our titles and emphasis to the evidence and submissions for ease of reference.

organised crime groups operated from having had access to police, foreign customs and drug enforcement intelligence.

b. **Crime:** Organised criminal gangs operated in Dover, targeting the UK. They are very well resourced and keen to gather information about tactics used in border controls. He had experience of their efforts to identify weaknesses in customs controls. Preventing the smuggling of contraband goods into the UK posed very significant challenges.

c. **Prevention:** Targeting and selection capabilities on intra-EU traffic, including spot checks and intelligence, were important to UKBA's tactics.

d. **Harm:** Releasing information on such methods would (1) enable these gangs to adapt their smuggling practices to optimise their chances of succeeding in illegal smuggling, and (2) greatly assist those involved in border criminality.

e. **Accountability:** He did not think the disclosure necessary for the purposes of UKBA's own accountability as the enforcement methods were subject to careful supervision by Parliamentary Select Committees.

The Appellant's Submissions

21. The Appellant submitted extensive submissions. His arguments included:

Ground 1: s31(1)(a) and (d) Public Interest Arguments

a. **Scrutiny and Accountability:**

i. UKBA Activities Potentially of Concern: His original request had been made to better understand the operation of a public enforcement service with which he was regularly coming into contact. He had worked for 15 years in a public enforcement service. From initial observations, certain operational activities appeared unusual and concerned him. He considered that justice would require that before statutory powers were used to detain individuals such as travellers, additional factors related to those individuals should exist, such as specific prior intelligence.

ii. The more an institution has been accorded powers that allow it to monitor and constrain members of the public, the more it needs adequate scrutiny to demonstrate accountability to the public and state.

iii. UKBA procedures were intrusive, can cause distress, embarrassment, and inconvenience because of delaying to travellers who may have a number of hours driving ahead.

iv. In the Appellant's case, controls have been undertaken almost every time he returns to the UK, and yet are rarely experienced during travel through mainland Europe.

v. The scrutiny is of practices that might be considered prejudicial to certain groups of travellers. It is frequently suggested that cooperation between agencies to provide prior intelligence is more effective tool in preventing crime than targeting individuals or groups based on such criteria as age, ethnic origins, styles of clothing or other arbitrary characteristics, often associated with public prejudice.

vi. The current searches and prolonged waiting times for travellers at airports are, generally, accepted as necessary. When enforcement operations are undertaken which appear to the public not to be justified, disclosure of information has ensured that public scrutiny can allow the appropriate expressions of disapproval and this can change strategies that are not commensurate with a free society.

vii. The ICO suggestion is that judicial review should be used to initiate an investigation into operational activities of public agencies. This is not a viable option for the vast majority of citizens who are effectively denied any realistic opportunity of benefiting from such opportunities for justice.

viii. The UKBA witness refers to the enforcement methods being subject to parliamentary scrutiny. Whilst the Home Affairs Committee may have a role to oversee the activities and performance of UKBA, the Tribunal should consider whether this might accurately be described as "*careful supervision*" of the "*enforcement methods*". Whilst individuals are free to contact the committee regarding evidence with respect to an existing investigation, there does not appear to be a procedure by which a complainant can suggest that an investigation be instigated, and it seems unlikely, that it would happen because of a complaint by innocent travellers, aggrieved by being regularly stopped and searched because their circumstances corresponded with one of the Traveller Selection Criteria.

ix. Whilst the public want security, they may not wish to remain in ignorance of excessively intrusive or over-rigorous enforcement practices. Enforcement agencies should not be able to take advantage of secrecy.

x. Most travellers will not encounter customs controls more than two or three times per year. Opportunities for the sort of concerted opposition to inappropriate enforcement operations, which resulted in changes in police stop and search operations in some cities, are very limited. That should not mean, however, that enforcement agencies should be given the green light to become a law unto themselves.

xi. Enforcement agencies choosing such operations or strategies should be required to inform members of the public what steps they can take to avoid generating suspicions that they are committing an offence.

xii. Disclosure would assist knowing whether these searches are necessary and the opportunity to question whether their taxes are being effectively spent. If, the disclosed statistics demonstrated that, despite the many vehicles stopped, travellers interrogated and searches undertaken these operations resulted in very few crimes being detected, the public, especially those who are innocent but regularly stopped, may feel that operational effectiveness could be better realised by alternative strategies.

b. **The weight to give to the Second Respondent's arguments regarding real risk of harm and prejudice:**

i. The risks of prejudice under the exemptions needs to be a genuine possibility.

ii. UKBA's witness testimony may have grossly over-estimated the potential for damaging enforcement capability as a consequence of disclosing the information.

iii. The witness statement did not refer to the requested document on Tourist Selection Criteria as being relevant when he referred to strategies required in the fight against criminal gangs and the maintaining the effectiveness of the Border Force in identifying drug smugglers.

iv. From the Appellant's own professional experience, he can envisage no situation where the information actually requested could compromise enforcement operations and has not seen one example of supporting evidence submitted to substantiate such a risk as claimed.

v. It cannot be accepted, without some significant and supporting evidence, that the disclosure would enable the potential criminal to modify his behaviour in order to reduce the chance of detection.

vi. Smugglers would not have access to information which might enable them to choose the port of entry they considered the least risky, simply because this does not exist, officially at least. The statistics might show, for example, that more guns are found in Dover than in Portsmouth, but whilst this might indicate a preferred port of entry for gun smugglers, such statistics will not reveal what percentage of gun smugglers were successful in deceiving the officers at either Dover or Portsmouth.

c. **Public Understanding and better operation by UKBA:**

i. The disclosure of the documents requested might result in operational advantages brought about by a better understanding of the need for proportional 'stop and search' operations at UK ports-of-entry.

ii. UKBA's defensive attitudes may actually reduce the effectiveness of the customs service.

iii. All policing and enforcement agencies operate more effectively in gathering information and detecting or preventing of crime if they have the respect of the public.

iv. Public Confidence in the Policy: Stopping and interrogating travellers of specified categories and searching their vehicles can only be a justified intrusion on their freedom of movement if there exists evidence that the guilty minority is more than an insignificant proportion. There must be no doubt that the criteria, are both accurate and proportionate and there exists an effective remedy for anyone who believes they have suffered prejudice as a result of them or their application.

d. **Specific arguments related to Part 2**

i. Accountability: Information revealing both past operational statistics and current operational strategies should be in the public domain to enhance accountability and permit scrutiny.

ii. If arbitrary searches resulted in a significant proportion of travellers being found to be offenders, then the practice may be considered, despite its unsatisfactory nature, to justify the inconvenience and embarrassment suffered by those innocent people who were stopped, questioned and searched. However, if the percentage of those found innocent was overwhelmingly greater than those found to be offending, then the details of

the Selection Indicators should be subject to public scrutiny for their appropriateness. In either case, the effectiveness of the practice of using profiling unsupported by other evidence to give an assumption of reasonable suspicion should be subject to scrutiny by the disclosure of the statistics.

Harm:

iii. All police authorities, individually and collectively via the Home Office, publish statistics concerning crimes reported to them and those for which the culprits have been identified. No arguments have been seen that the publication of such statistics enables potential offenders to choose in which part of the country they will commit their crime, or which month of the year would be most favourable in order to avoid detection.

iv. No evidence has been put forward by the Home Office that the organisation or the nature of crimes involving smuggling goods for tax avoidance or attempting to import illegal items, are so fundamentally different from other crimes as to require the special protection of secrecy from public scrutiny as to the nature and numbers of those detected. In, for example, the crime of burglary victims will usually report this to the police and the subsequent 'clear-up' statistics may demonstrate the different effectiveness of different police forces.

Ground 2: Personal Data: Identity of Customs Officers

e. If it is reasonable to suggest that visible identification of officers and a need for them to be properly authorised, must apply when a vehicle is stopped within the UK there can be no valid reason why such principles should not also be adhered to within a port of entry to the UK. Practices of stop and search should, nevertheless, be subject to a measure of public scrutiny and that the disclosure of the documents requested would contribute to this and provide a necessary democratic safeguard against the arbitrary application of statutory authority.

f. It seems strange that the Home Office defence argues that such disclosure might present a risk to junior members of the service. In the only document received under the request, the only redaction appeared to relate to the Head of Detection who issued a Revised Scheme of Control in October 2002. This would not appear to be a junior officer.

g. Customs Service is attempting to reserve for its officers and their operations a freedom from the need for transparency; a freedom neither generally requested by nor accorded to the police and other enforcement agencies. Such secrecy is normally only granted when faced with significant risks. If tackling smuggling by violent gangs, whether of goods or people, it can be appreciated that customs operations and personnel must be adequately protected.

UKBA's submissions

Ground 1

22. UKBA argued that the risk that disclosure would or would be likely to prejudice the prevention or detection of crime or assessment or collection of any tax, duty or similar imposition was overwhelming, and the balance clearly lied in favour of non-disclosure.

Part 1:

23. As regards the redacted copy of "*Tourist Selection Indicators and Selection Techniques*":

a. Consequence of Disclosure for Crime:

i. Disclosure of the document would significantly harm the effectiveness of UK border controls.

ii. There is an extremely strong public interest in UKBA taking all appropriate measures to detect and prevent smuggling of harmful illegal drugs, weapons and human trafficking. Weapons smuggling into the UK accounts for a significant amount of gun crime, with devastating effects. In 2005, an EU national killed his girlfriend in Harvey Nicholls store using a weapon illegally smuggled into the UK. The Coroners Court, gun victims groups and the family all expressed their dissatisfaction that the UK border controls had not prevented this particular illegal smuggling.

iii. Customs Evasion: The loss to the public revenue from smuggling of goods and the evasion of duties is extremely significant.

b. The harm:

i. The disclosure would assist potential offenders by providing sensitive and detailed knowledge of the selection criteria for searches. The risk that they would discover and use the disputed information if disclosed exists because the form of crime is one that is often organised, well resourced and sophisticated.
ii. UKBA are aware that gangs of organised criminals (some based in China) and drug gangs are keen to gather such information. Smugglers are quick to adapt tactics.
iii. Disclosure would incontrovertibly undermine the public authority's targeting and selection capabilities on intra-EU traffic. The damage was heightened when taking into account that UKBA is responsible for enforcement across a large numbers of people and vehicles. It was never possible to check all individuals and all vehicles passing through. Therefore, the proper organisation of any system of customs controls must involve the use of spot checks, targeting and intelligence.
iv. The damage to the UK would be out of all proportion to any benefit from disclosure.

c. The public interest in favour of disclosure being limited:

i. Scrutiny: Parliamentary select committees carefully scrutinised UKBA's enforcement methods. There was no reason why scrutiny requires the disclosure. The public would appreciate the inappropriateness of such scrutiny being conducted in a non-confidential manner.

Part 2

24. As regards the request for statistical information:

a. The harm:

i. Disclosing the location specific statistics would be extremely detrimental to customs detection operations at Dover and would compromise their detection operations. It would clearly assist criminal gangs in smuggling illegal and

harmful products into the UK. It would likely assist them to build up information concerning patterns of enforcement, i.e. numbers of vehicles stopped at Dover in particular categories and at particular times of the year. Such information is of obvious use to those seeking to evade customs controls, as it can be used to assist potential offenders in targeting their smuggling activities.

ii. If the information were disclosed, it would be difficult to refuse similar requests relating to other ports. Potential offenders could then compile information concerning the different ports and their patterns of enforcement. Such information would be of significant assistance in targeting the ports in which they were most likely to be able to smuggle goods into the United Kingdom whilst evading customs controls.

iii. Even if the particular information in itself may appear innocuous, when combined with other information that may be in the public domain or be otherwise accessible, its disclosure will or may result in the relevant prejudice.

b. The public interest in favour of disclosure being was limited for the same reasons as set out in paragraph 23(c) above.

Ground 2: Personal Data: Identity of Customs Officers

25. Redaction of the names of the officials in the document '*Tourist Selection Indicators and Selection Techniques*' was appropriate because:

a. They did not exercise a significant level of personal judgment or responsibility in relation to the relevant decisions.

b. They were junior and had no an expectation that information relating to their employment would be placed in the public domain when related to their public role.

c. The public interest in the accountability of UKBA's processes was not significantly furthered by disclosure of the identity of junior officers.

d. The junior officers concerned did not exercise a significant level of personal judgment or personal responsibility. They were not the original authors of the selection guidance.

e. There was no suggestion that individual officers have engaged in wrongdoing or misconduct in relation to the operation of searches.

f. There was no suggestion that any individual officer may know the complainant, nor that this was the reason why the complainant had been stopped in the past.

g. The Appellant stated that officers displayed a staff number when working. However, such display was visible to those being searched at the port. That was very different to publication to the world at large.

h. Endanger Officials: The Second Respondent had experience of its correspondence having been published on social networking sites and anti-customs chat rooms and of officials being victimised and insulted as a result.

Commissioner's Submissions

26. To the extent the Commissioner's arguments differed from the Second Respondent's, they included:

Ground 1:

Public Interest Against Disclosure

a. Consequence of Disclosure for Crime:

   i. Whilst the Appellant asserted that the information would assist innocent travellers to avoid being stopped, they would equally assist criminals in avoiding being stopped and detected. Such information would therefore assist in the commission of crime, so self-evidently its disclosure would be contrary to the public interest.

b. The public interest in crime prevention was greater than the public interests favouring disclosure, such as:

   i. Allowing the public to assess whether it was adequately carrying out its functions of preventing or detecting crime and collecting taxes.

   ii. Reassuring the public that there were effective systems in place to ensure that customs officials had robust procedures to exercise their functions effectively and proportionately.

   iii. Potentially alleviating some inconvenience or embarrassment to a small number of individuals who were frequently stopped when passing through UK ports.

c. The Appellant appeared to accept that delays and prolonged waiting times were necessary for entering the UK through airports. To suggest that it was not equally the case in respect of seaports seemed untenable.

d. The public were thought to be prepared to accept relatively minor inconvenience in exchange for border security and crime prevention. If there were evidence to the contrary, for example, frequent stories in the media or questions being raised in Parliament, this would be taken as a factor to be weighed when considering the public interest in favour of disclosure. However, if anything, the contrary were true, with public and political attention apparently currently more concerned with lax border control.

e. The Appellant presented no evidence to support his contention that the specific concerns he identified were of general concern to the wider travelling public. The Appellant's own experience and concerns may be legitimate, but were private in nature. In assessing the public interest in disclosing or withholding the disputed information, the Tribunal must consider matters from a wider perspective. Neither the Commissioner not the Tribunal could weigh in the balance for disclosure solely private concerns without first seeing evidence that those private concerns affect the wider public interest. In this respect, the burden of proof was on the Appellant to establish his case and he had failed to do so.

f. The Appellant's analogies regarding stop and search powers and police statistics concerning burglaries were entirely misplaced. The point of detection for customs controls was distinguishable from burglary, because it was primarily focused on a

limited number of policed points of entry into the country. This gave rise to different approaches to control and policing.

g. **Transparency**: Whilst the Appellant argued that the public interest in disclosure was high because law enforcement agencies exercised statutory powers to detain and search citizens, UKBA officers were subject to the criminal and civil law, including judicial review, and ministerial and parliamentary oversight.

h. Non-disclosure of the disputed information in this case did not on any reasonable view lead to the sort of police state the Appellant imagined. Nor did it lead to the tensions and issues of trust he referred to as having been experienced between the police and Afro-Caribbean youths in [Brixton].

Ground 2

i. The names being requested were not those of customs officers at Dover who may have detained and questioned the Appellant, but rather those of junior officials who would not have a reasonable expectation that their identities would be disclosed in this context. The disclosure would not be fair and lawful.

Our Findings

Ground 1

27. We accept that UKBA is exempt from providing the redacted information relating to Ground 1 because in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.

Our assessment of the weight of public interest is that the public interest in prevention and detection of crime outweighs the public interests in disclosure of both documents in the context of this case.

a. Interest in prevention and detection of crime:

For Document 1:

The exempt information is used in the prevention and/or detection of crime and the collection of customs duty. If disclosed, it would prejudice these public functions. On the basis of the evidence disclosed to us on a closed basis, we accept that the particular crimes include weapons, drugs, human trafficking and customs evasion. The document, which remains the current operational policy, reveals detection or enforcement processes. It would self-evidently assist the commission of such crime because if published, it is clear that some and possible many individuals would adjust their behaviour so as not to fall within the selection criteria. In that scenario, UKBA's prevention and detection strategy would be compromised and it would consequently need to invest in altering its methods to compensate.

In reaching this conclusion, we emphasise that it is not our function to comment on or specifically assess the effectiveness of the criteria used, notwithstanding the concerns of the Appellant on this. Our task is to form a judgement on whether the publication of Document 1 would be likely to affect the behaviour of potential law breakers, resulting in the likely prejudice to the prevention or detection of crime or the assessment or collection of duties.

For Document 2:

If disclosed, the requested information would be likely to prejudice these public functions. Determined sophisticated criminals (probably operating in gangs) would be likely to use this information, particularly if they could combine it with other information including about other ports (from future FOIA requests).

We reach this conclusion notwithstanding our acceptance of the point made by the Appellant that knowledge of the number of vehicles stopped and searched does not provide any information about the probability of this happening. The latter requires data about the total number of vehicles passing through. However, it might be obtained from future FOIA requests, such that in regards to probability Document 2 would still provide a part of the "jigsaw".

Notwithstanding this, Document 2 could reveal information that organised gangs would find useful without any further FOIA requests. For instance, it could assist them in deciding which ports to target and if they were to know Eg whether there were any patterns such as the number of examinations varying over time, or if the proportion of examinations as against interceptions, varied across port or over time.

b. We consider the following public interests favour disclosure:

   i. Transparency and improved understanding:

      I. There is interest in understanding the work of customs officers including in Dover.

      II. There is also interest in knowing more about how effective border controls are and allowing the public to assess whether UKBA is adequately carrying out its functions of preventing or detecting crime and collecting taxes.

      III. This interest is heightened by the significant public interest and concern in anything related to maintaining law and order, public finances and illegal migration. The information may inform individuals who are keen in understanding which enforcement techniques work best and may also promote public discussion.

   ii. Public Confidence

      I. There is interest in providing the public with information so that they can assess the immigration controls and preferably thereby public confidence is maintained and the public reassured the public that those seeking to abuse the controls are not assisted in doing so and that there are effective systems in place to ensure that customs officials can exercise their functions effectively and proportionately.

      II. We accept that the Appellant seems to have raised some doubts as to his confidence in the current practices. We do not know if this is shared by others, in which case the public interest might be said to be more wide spread. We were not given strong evidence to suggest that this was shared by others. We accept that if there were substantial lack of

confidence, tensions or frustrations with the inconvenience caused by operations at Dover, this information would have been reflected in the media, and provided to us. Comparisons were made with controls at airports. From the media coverage, contrary to what the Commissioner wrote, it did not seem to us that passengers are particularly content to accept long queues at airports as necessary for effective border controls. However, conversely, we have not seen such media complaints related to Dover and so have no reason to consider that confidence in UKBA operations is currently in question, such that we are not convinced that the disclosures are necessary to, say, restore a lacking in confidence. Accordingly, we do not consider this to be a weighty public interest.

iii. Scrutiny and Accountability:

I. To an extent, all the public interests specified here overlap. However, the aspects related to scrutiny and accountability are, in our view, the strongest. The disclosure of both documents may help when combined with others to understand better and then scrutinise the activities of UKBA.

II. We accept that the greater the powers of a public enforcement body, the greater the need for scrutiny. We accept that UKBA's power to stop and search might be described as more than a 'minor inconvenience' to some people and intrusive. We accept that Parliamentary scrutiny is unlikely to address the details that the Appellant has described on any regular basis. Equally, leaving the matter to an individual to seek judicial review is unrealistic for most individuals.

III. We note the comparisons made by the Appellant relating to other stop and search practices and measures to stop burglaries. We did not find these to be a particularly good analogy. For the reasons explained by the Commissioner, the point of detection for customs controls is distinguishable from burglary, and need a tailored approach to control and policing.

Ground 2:

28. The Appellant seeks the identity of names of officials contained in Document 1. It has been confirmed that these are not the identity of customs officers at the Port of Dover who detain and question the public.

29. We did not receive extensive legal analysis on this ground from any parties.

30. The Second Respondent and Commissioner's arguments included that the officials were junior (being below Senior Civil Servant level), did not exercise a significant level of judgment in relation to the document in which their names were found, and did not expect their names to be placed in the public domain. Furthermore, they considered it could be dangerous to be so identified (being susceptible to victimisation and insult), the public interest in accountability was not furthered by disclosure, and the officials did not work at Dover or have a connection with the Appellant.

31. The Appellant appeared to argue that officials should be identified a part of public scrutiny and arbitrary application statutory of powers. He questioned whether the officials were

junior, and stated that secrecy should only occur when there were significant risks to the individuals.

32. In our consideration of s.40(2) FOIA, we have not been presented with arguments that the names are not personal data. In paraphrasing the law set out in paragraphs 10 to 13 above, the requested information then, may be disclosed if it is fair and lawful to do so, and needs to be provided for the legitimate interests pursued by others unless doing so would be unwarranted as it would prejudice to the rights and freedoms or legitimate interests of the officials.

33. In considering what is 'fair'

> "*1(1)... regard is to be had to the method by which they are obtained, including in particular whether any person from whom they are obtained is deceived or misled as to the purpose or purposes for which they are to be processed*…."
>
> *Part II, of Sch.1 of DPA Interpretation of the Principles*

34. We do not accept the argument that the officials would not have expected their names within the document to be made public and were not given compelling evidence of this. We were given no information as to their specific grading but they were described in the document as 'lead contributer' and 'lead postholder'. They clearly have some responsibility in relation to the work. We were given no compelling evidence that disclosing their names would result in victimisation, insult or any form of danger. However, we do accept that the officials would prefer not to have their names identified and that might in itself represent a certain right and freedom or legitimate interests in itself. In any event, to process personal data, it needs to be necessary to pursue the purposes of legitimate interests pursued by others. In this case, we do not find that the Appellant has shown any legitimate interest in the names of the officials being disclosed to the public under FOIA. We conclude, that the information is therefore exempt from disclosure.

Other Matters:

35. We would note that it seemed to us, that the Home Office relied to a large degree on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis. This clearly did not assist the Appellant, particularly as he was unable to see the material to assess whether the matter was 'self-evident'. We would hope the Home Office made greater efforts in the future, and did so at an early stage in the FOI process as this may result the expense of a tribunal hearing being avoided.

Signed:

Judge C Taylor

5 October 2012