

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 23 February 2011**

**Public Authority:** UK Border Agency (an executive agency of the Home Office)  
**Address:** 11<sup>th</sup> Floor Lunar House  
40 Wellesley Road  
Croydon CR9 2BY

### Summary

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The complainant requested indicative passport control times and the most recent Service Level Agreement made between Eurotunnel and the public authority. The public authority refused to provide this citing section 43(2) as its basis for doing so. It upheld this position on internal review although it did provide a copy of its generic service level agreement. It also introduced reliance on section 31(1)(e). The Commissioner has decided that the public authority was not entitled to rely on either section 31(1)(e) or section 43(2). In failing to provide the Service Level Agreement upon request the public authority contravened section 1 and section 10 of the Act.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. The Commissioner notes that under the Act the UK Border Agency is not a public authority itself, but is actually an executive agency of the Home Office which is responsible for the UK Border Agency. Therefore the public authority in this case is actually the Home Office not the UK Border Agency. However, for the sake of clarity, this decision notice refers to

the UK Border Agency ("UKBA") as if it were the public authority.

3. On 27 May 2009, the complainant requested information of following description from the public authority:
  - "(i) full details of the indicative time(s) which are currently in operation or which have been agreed with the operators of the Eurotunnel train service, during which passengers will be seen by an immigration officer for the purpose of passport control as contained in the basic passenger service standard in respect of the processing of passports of passengers of the Eurotunnel train service; together with
  - (ii) a copy of any Service Level Agreement or similar document under which the UKBA agreed to the time(s) referred to in paragraph (i) above with the operators of the Eurotunnel train service".
4. The public authority provided a response to the complainant on 18 June 2009 in which it refused to disclose the requested information on the basis of the exemption contained in section 43(2) (Commercial Interests) of the Act.
5. The complainant requested an internal review of the public authority's decision on 1 July 2009. He specified the following elements of the information as being of specific interest based on the public authority's initial arguments as to the application of section 43(2).
  - a) full particulars of UKBA general policy in relation to Service Level Agreements (SLA);
  - b) full particulars of the "generic themes" which the SLA is expected to cover;
  - c) how the "legal and operational situation" of Eurotunnel is distinguished from that of other ports of entry;
  - d) explain the "legal framework and unique service" of Eurotunnel which distinguishes it from other ports
  - e) particulars of the "range of areas" in which it is your attention [sic] to work more closely with Eurotunnel;
  - f) the basis upon which you claim that disclosure of information relating to indicative passport control times may be used by competitors to seek unfair commercial advantage; and
  - g) the basis upon which you claim that disclosure of information relation to indicative passport control times would undermine border security.

6. Unfortunately, there was a considerable delay between the date of this request for internal review and the public authority completing its internal review (see Other Matters). Following the intervention of the Commissioner, the public authority wrote to the complainant on 18 January 2010 to advise him of the outcome of its internal review. It upheld its original position regarding the use of section 43(2) in relation to some of the information it held within the scope of his request. It also introduced reliance on section 31(1)(e) (Law Enforcement).
7. As regards the complainant's points a) and b) the public authority explained that its business plan of 2008-11 set out the objective to "*publish Public Service Level Agreements by December 2008*"<sup>1</sup>. It explained that "*generic SLAs were issued and are now used by UKBA. These generic SLAs are adapted to meet local needs*". It provided a copy of a generic SLA dated August 2008. In response to points c) and d) it explained that the legal bases for border controls and commercial operations were contained with the Treaty of Canterbury, the Channel Tunnel Act 1987 and the Concession Agreement. It explained that the operational situation is unique "*as there are rules governing Eurotunnel which clearly state the undertakings of those who grant the concession (the UK and French governments) to ensure they maintain fluidity of traffic. In practice this means that Eurotunnel's customers are required to check in and board shuttles with minimum dwell times in order to maximise loading capacity and meet stringent departure schedules. UKBA acknowledges this special environment and has necessarily tailored its procedures to minimise queue times at the border controls and therefore support fluid traffic movement*".
8. In response to point e) it explained that it works closely with Eurotunnel on matters relating to "*queue management and include access to client data and provision of real time traffic capacity. These will help UKBA with targeting and Eurotunnel with maintaining fluidity*".
9. In response to point f), it stated that "*without a complete understanding of the context in which the SLA was devised, competitors may seek to drive down UKBA border queue times*

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<http://tna.europarchive.org/20081023083338/http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/businessplan/april2008march2011/ukborderagencybusinessplan.pdf?view=Binary>

*and thereby offer this as an incentive to customers. The unique nature of Eurotunnel's juxtaposed operation required UKBA and Eurotunnel to develop specific operating models. These models cannot be compared to other locations as no other location is fully juxtaposed in the same way.*

10. In response to point g) it acknowledged that it should have cited section 31(e) where it believed there was a risk to effective border controls. It commented that it was "*unable to confirm exactly how [disclosure] would prejudice the operation of immigration control, [it could] confirm that the UK Border Agency has to maintain a good working relationship with the Eurotunnel. Without the full co-operation of the Eurotunnel, this may lead to a breakdown of our working relationship which could consequently weaken our border control*". It also argued that, as regards the balance of public interest in relation to section 31(e), the public interest favoured maintaining the exemption because disclosure would not "*hold any value to the general public*".

## **The Investigation**

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### **Scope of the case**

11. On 2 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the application of the exemptions relied upon by the public authority.

### **Chronology**

12. On 9 February 2010, the Commissioner wrote to the complainant to confirm receipt of his complaint.
13. On the same day, the Commissioner also wrote to the public authority to advise receipt of the complaint and to request a copy of the information that had been withheld from disclosure.
14. On 20 July 2010, the Commissioner wrote to the complainant, setting out the scope of his investigation.
15. On the same day, the Commissioner also wrote to the public authority setting out a series of questions as to its application of exemptions. He also repeated his request of 9 February 2010 for a copy of the information that had been withheld from disclosure. He set a deadline for response of 20 working days

(17 August 2010) and reminded the public authority of his powers under section 51 of the Act to obtain information necessary for his investigation via an Information Notice.

16. On 16 and 17 August 2010, there were a series of telephone calls between the Commissioner and the public authority where the Commissioner sought to ascertain whether a response would be forthcoming within the deadline. The public authority advised that due to annual leave, certain relevant staff were not available to progress the matter. A revised deadline of 23 August 2010 was agreed.
17. On 25 August 2010, the Commissioner telephoned the public authority to ascertain whether a response would be forthcoming. The public authority advised that one should be sent by the end of that week (27 August 2010). During the telephone conversation the Commissioner reminded the public authority of his powers to obtain information formally under section 51 of the Act.
18. On 31 August 2010, the Commissioner telephoned the public authority to ascertain whether a response would be forthcoming. The public authority advised that a response should be sent in the next couple of days. The Commissioner advised the public authority that he was preparing an Information Notice under section 51 of the Act. The Commissioner confirmed this in writing on the same day.
19. On 10 September 2010, the public authority sent its response by email including a copy of the withheld information.
20. On 13 September 2010 there was an exchange of telephone calls and emails between the Commissioner and the public authority to establish whether all relevant email attachments had been sent. This was confirmed on the same day.

### **Findings of fact**

21. The border arrangement between the UK and France where travellers use Eurotunnel includes a juxtaposed border control at Coquelles. The juxtaposed border control arrangement at Coquelles is described by the European Union Committee of the House of Lords as follows:

"The nearest the United Kingdom comes to a land border with a Schengen state<sup>2</sup> is the terminus of Eurotunnel in France, at Coquelles. The Home Office arranged for us to visit on 8 January 2008 the juxtaposed controls there and at the ferry port of Calais. The controls at Coquelles have existed since 1994, and the agreement now allows staff from the Border and Immigration Agency (BIA) and HM Revenue and Customs (HMRC) [these agencies are the predecessors to the public authority] to apply United Kingdom immigration law within this very limited area of France, and so to control passengers and vehicles travelling to the UK before they leave France.<sup>3</sup>"

22. This statement was included in a report which examined UK co-operation with Frontex, the EU external borders agency.
23. A Concession Agreement between the UK and France was signed in April 1986. This agreement was made as part of the legal framework which supported the building and operation of the Channel Tunnel. In 1987 the Treaty of Canterbury was signed by the then UK Prime Minister, Margaret Thatcher, and the then French President, Francois Mitterand, ratifying the agreement between the two countries to build and operate the tunnel.
24. The Concession Agreement can be found on the website of the Channel Tunnel Intergovernmental Commission<sup>4</sup>. This organisation was set up by the UK and French governments as part of the Treaty of Canterbury to supervise the operation of the Channel Tunnel. Relevant provisions include the following:

14.2 The Concessionaires shall ensure that all necessary steps are taken to permit the steady flow and continuity of traffic through the Fixed Link and that traffic may pass through with reasonable safety and convenience.

15.2 The two Principals will arrange frontier controls in a way which reconciles so far as possible the rapid flow of traffic with the efficiency of the controls. In accordance with the relevant Directives of the Council of the European

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<sup>2</sup>

[http://europa.eu/legislation\\_summaries/justice\\_freedom\\_security/free\\_movement\\_of\\_persons\\_asylum\\_immigration/l33020\\_en.htm](http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm)

<sup>3</sup> <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/60/60.pdf>

<sup>4</sup> <http://www.channeltunneligc.co.uk/Essential-texts,24.html?lang=en>

Communities, the Principal will take measures to extend bilateral co-operation on the facilitation of controls and administrative formalities. To this end, the frontier controls which are carried out within the boundaries of the Fixed Link will be juxtaposed near to the portals to the tunnels. This does not preclude the possibility of controls on through trains.

25. The process of juxtaposed control at the Port of Dover was described in December 2009 by the House of Commons Home Affairs Committee<sup>5</sup> using the following example:

"These controls are based on bilateral agreements between the countries that enable specified personnel to carry out immigration and customs checks on passengers and freight in one another's countries. The result is, for example, that passengers pass through French passport control before boarding a ferry to France in Dover.

[Footnote: A car booked onto a ferry from Dover to Calais passes, in this order: French frontier police, Kent police plus UKBA officials (who intercept only some vehicles, on the basis of intelligence), the international security checkpoint administered by the Department of Transport, and finally check-in with the ferry operator]."

## Analysis

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### Exemptions

26. The public authority has applied two exemptions as a basis for withholding the information requested by the complainant under the Act. These are section 31(1)(e) (Law enforcement – operation of border controls) and section 43(2) (Commercial interests). Both are set out in full in a Legal Annex to this Notice.
27. The complainant's request is in two parts. However, the information described in the first part is contained in the information described in the second part. This is a Service Level Agreement ("SLA") dated 1 April 2009 which was made between the public authority and Eurotunnel.

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<sup>5</sup>

<http://www.publications.parliament.uk/pa/cm200910/cmselect/cmhaff/170/170.pdf>

28. In its submissions to the Commissioner dated 10 September 2010, the public authority identified what information within the SLA was, in its view, exempt under section 31(1)(e) and section 43(2). However, its arguments also appeared to encompass the entire SLA. For ease of analysis, the Commissioner has considered whether either of the two exemptions applies to the entire SLA but he has paid particular attention to those parts of the SLA which have been identified by the public authority as being most sensitive.

### **Section 43 – Prejudice to commercial interests**

29. Section 43(2) provides that –

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”

30. Section 43 is qualified by a balance of public interests test. Information which is exempt under section 43 can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.
31. The Commissioner sets out below a summary of the public authority's submissions as to the application of section 43(2). He also sets out the complainant's submissions. He will then set out his findings with regard to the application of this exemption having considered the arguments of each party.

### **The public authority's submissions**

32. In its letter dated 10 September 2010, the public authority identified within the SLA which parts of the document were, in its view, exempt under section 43(2). These can be characterised as information containing or relating closely to the indicative times described in the first part of the complainant's request. As noted above, it also made general remarks about the prejudicial outcomes that would arise if all the information in the SLA were to be released.
33. The public authority explained that, in its view, disclosure would be likely to prejudice its commercial interests and those of Eurotunnel. It gave particular emphasis to the likelihood of detriment where the SLA was to be disclosed without the full context in which the agreement was made.
34. It explained that the unique border control arrangements at Coquelles (Eurotunnel's terminal complex on the French side of



the Channel Tunnel) meant that any agreement made between itself and Eurotunnel as to levels of service could not readily be transposed to other ports. It argued that other port operators would be likely to start a bidding war "*to obtain a matching SLA in different circumstances without taking into consideration the unique nature of the juxtaposed control at Coquelles*". It then set out how those controls operated and provided an example scenario of how a bidding war might develop.

35. The public authority also argued that its own commercial interest would be damaged because it may be required to increase its own staffing levels as a consequence.
36. It also provided a copy of a letter from a senior executive from Eurotunnel commenting on the question of disclosure under the Act of the requested information.
37. As to the balance of public interests, the public authority acknowledged arguments favouring disclosure. It commented that other port operators may be able to use Eurotunnel's SLA as part of their negotiations with an outcome which may be beneficial to consumers. It also commented that there was a public interest in increasing the public's understanding of queue times.
38. When arguing in favour of maintaining the exemption it also set out how, in its view, disclosure would be likely to give rise to a negative outcome for consumers (delays and reduced travel options) which was not in the public interest. It also argued that the negative financial implications for the public authority that may arise as a result of disclosure would not be in the public interest.

### **The complainant's submissions**

39. The complainant argued that lack of contextual knowledge cannot be used as a basis for refusing disclosure. He also argued that the unique nature of Eurotunnel meant that its operation was sufficiently set apart from those of other operators such that disclosure would not give rise to unfair prejudice to its commercial interest. He also queried whether the public authority had consulted Eurotunnel.
40. He also argued that if the exemption was engaged, the public authority was wrong to conclude that the public interest favoured maintaining that exemption. He argued that there was a clear public interest in knowing passport processing times at each of the UK's ports which will affect the passage of individuals through the UK's borders.

41. In addition, he argued that there was a public interest in ensuring that companies are able to compete fairly and that, as a consequence, all UK port operators should be entitled to access the requested information. He contended that rather than give Eurotunnel's competitors a commercial advantage, failure to disclose could create an unfair disadvantage and consequently distort competition.

### **The Commissioner's conclusions**

42. When considering the application of prejudice-based exemptions, such as section 43(2), the Commissioner believes the following three criteria must be met:
- Firstly, the actual harm which the public authority alleges would or would be likely to occur must relate to the applicable interest described in the relevant exemption.
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the requested information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice must be real, actual or of substance.
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met. If the likelihood of prejudice is hypothetical or remote, the exemption will not be engaged.

### **Does the harm described relate to the applicable interest?**

43. The applicable interest set out in section 43 is the commercial interests of any party. The public authority has asserted that its commercial interests and those of Eurotunnel would or would be likely to be prejudiced by disclosure of the requested information.
44. The Commissioner notes the public authority's arguments as to the potential impact of disclosure on its commercial interests. The Commissioner does not accept that the potential harm to itself described above by the public authority relates to its commercial interests. Where the public authority believes it needs to employ more staff as a consequence of disclosure (or any other factor), the Commissioner considers that it is the public authority's financial interests rather than its commercial interests are potentially being affected. As such, the Commissioner does not accept that the first criterion described above is met in relation to the public authority's own

commercial interests. In reaching this view, the Commissioner has had regard for his own published guidance on this point<sup>6</sup>.

45. The public authority did not advance any other arguments as to why its commercial interests would be likely to be affected by disclosure. The Commissioner therefore does not propose to consider further whether the public authority's commercial interests would be likely to be prejudiced by disclosure.
46. The public authority has asserted that disclosure would be likely to put Eurotunnel at a commercial disadvantage in relation to its competitors (other port operators). It has asserted that those competitors would be likely to use the requested information in a manner which would allow them to draw business away from Eurotunnel. In the Commissioner's view, if this were to arise, this would relate to Eurotunnel's commercial interests. As such the first criterion is met.

**Is there a causal relationship between disclosure and the prejudicial outcome described in the exemption?**

47. The public authority has asserted a causal relationship between disclosure and the prejudicial outcome described in the exemption in respect of Eurotunnel. In support of its position, it has submitted correspondence from a senior executive of Eurotunnel and a worked example which refers specifically to one of Eurotunnel's competitors.
48. The Commissioner welcomes the fact that the public authority sought an opinion from Eurotunnel. However, he would describe the correspondence from the senior executive in question as lacking in conviction on the question of likely prejudice to its own commercial interests.
49. The worked example provided by the public authority appears to show several stages between disclosure and the prejudicial outcome that is envisaged by the public authority as being likely. The stages it set out are as follows: a disclosure is made without contextual information; a competitor of Eurotunnel would seek to drive down border processing times in negotiations with the public authority using the disclosed information; the competitor in question would be successful in those negotiations with the public authority; the competitor

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[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/awareness\\_guidance\\_5\\_v3\\_07\\_03\\_08.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/awareness_guidance_5_v3_07_03_08.pdf)

would be able to offer this as an incentive to customers; customers would choose to take up this incentive instead of travelling with Eurotunnel.

50. In the Commissioner's view, the public authority has failed to demonstrate a causal link between the disclosure of the requested information and likely prejudice to Eurotunnel's commercial interests of the manner described by the public authority.
51. Firstly, the Act does not prevent a public authority from making a disclosure with contextual background information.
52. Secondly, in the Commissioner's view, the service offered by Eurotunnel and the other services available for crossing the English Channel are not like-for-like. Eurotunnel states that its average crossing time is 35 mins. The Commissioner notes the fastest Dover-Calais ferry crossing times by major ferry operators as being between 70 mins and 90 mins and a Dover-Boulogne ferry route advertised at 55 minutes. In a brief on-line search during January 2011, the Commissioner noted the cheapest fare quoted for a single journey travelling via Eurotunnel was £49 per car. For a single journey by ferry on the Dover-Calais route, the Commissioner noted the cheapest fare quoted was £29 per car for a journey of 90 minutes. For a single journey on the Dover-Boulogne ferry route, the Commissioner noted the cheapest fare quoted was £25 per car for a journey of approximately 50 minutes.
53. In the Commissioner's view, a consumer may prefer a journey by Eurotunnel because of the duration of the journey or they may prefer a journey by ferry because of the price. A number of other factors may also inform a consumer's decision, for example, their intentions for travel once they have crossed the Channel; their preferred mode of transport for crossing the Channel; any other travel deal that might be linked with their journey across the Channel; prevailing weather or traffic conditions.
54. The Commissioner would also observe that that Eurotunnel's competitors would have ample opportunity to assess average border control times by testing it themselves at Coquelles using "secret shoppers" or by consulting the numerous online fora that the Commissioner identified during the course of his investigation where consumers describe their positive and negative experiences of crossing the Channel by ferry or by train.

55. Even if Eurotunnel's competitors were able to negotiate successfully with the public authority to achieve a border processing time of shorter duration, the Commissioner would note that this would not make the duration of the crossing time any shorter. If time was the primary factor that informed a consumer's decision as to their preferred mode of transport, the Commissioner believes they would still focus their initial inquiries on journeys via Eurotunnel. This is because the standard journey is, self-evidently, of shorter duration.
56. Furthermore, as shown in Findings of Fact, it is clear from publicly available documents that both the UK and French governments have formalised a wish to facilitate the rapid flow of traffic where Eurotunnel passengers cross their respective borders. Both governments are obliged to put this aspiration into practice.
57. In the Commissioner's opinion, the public authority has failed to demonstrate how disclosure of information about indicative border control times at Eurotunnel would allow Eurotunnel's competitors to take business away from it. The Commissioner believes there is sufficient information in the public domain to show that passengers experience border control at Coquelles of shorter duration than at other border control points for crossing the Channel. There is also a considerable information in the public domain to explain why there is a particular imperative for the public authority to operate quicker border controls at Coquelles. In other words, Eurotunnel's competitors could already seek to make arguments for parity in border control times based on information or evidence which is freely available to interested parties.
58. In light of the above, the Commissioner is not satisfied that there is a causal link between the disclosure of any of the requested information and the prejudicial outcome described in the exemption at section 43(2). As such, he does not agree that the requested information can be withheld under section 43(2).

### **Section 31(1)(e) – Law enforcement**

59. The public authority identified certain parts of the report which was, in its view, exempt under section 31(1)(e). This exemption is engaged where disclosure of requested information would or would be likely to prejudice the operation of immigration controls. It is subject to a balance of public interests test and the public authority has argued that the public interest in maintaining this exemption outweighs the

public interest in disclosure. In this case, the public authority argued that the prejudicial outcome described in the exemption would be likely to arise.

60. The Commissioner sets out below a summary of the public authority's submissions as to the application of section 31(1)(e). He also sets out the complainant's submissions. He will then set out his findings with regard to the application of this exemption having considered the arguments of each party.

### **The public authority's submissions**

61. In correspondence with the complainant and the Commissioner the public authority has put forward the following arguments in support of its view that section 31(1)(e) is engaged in relation to some of the information that has been withheld:

- Eurotunnel would be less likely to co-operate with it such that border control would be weakened;
- The SLA contains information about a particular point regarding its operations the disclosure of which would be likely to prejudice the public authority's operation of border controls;
- Disclosure would be likely to prejudice the public authority's financial interests. This would result in pressure on staff to do more in less time which would, as a consequence, have a prejudicial effect on the public authority's ability to operate immigration controls;
- The SLA contains information which could be exploited by those looking to undermine border security.

62. The public authority added detail to some of these arguments by reference to the withheld information in its correspondence with the Commissioner.

63. In its letter to the Commissioner dated 10 September 2010, the public authority commenced its analysis of the application of section 31(1)(e) by stating that "*releasing details of the indicative times which are in operation during which passengers will be seen by an immigration officer for the purpose of passport control, together with the SLA, would be likely to prejudice the operation of immigration controls.*" However, it did not add any detail in support of its assertion that disclosure of the indicative times would be likely to give rise to such prejudice.

64. The public authority set out its analysis of the balance of public interests. When arguing as to public interest in disclosure, the public authority stated that there was a public interest in increasing the public's understanding of the importance of arriving in good time for pre-booked departures. It also acknowledged that *"it was in the interest of the public to know that the border controls at Eurotunnel are tightly and effectively managed."*
65. When arguing as to the public interest in maintaining this exemption, it drew particular attention to the prejudicial outcomes it had described in detail. It argued that the public interest in avoiding these outcomes carried greater weight than the public interest in disclosure.

### **The complainant's submissions**

66. The complainant drew attention to the exact wording used by the public authority in its letter to him of 18 January 2010 where the author stated that:

"Although I am unable to confirm exactly how [disclosure] would prejudice the operation of immigration control, I can confirm that the UK Border Agency has to maintain a good working relationship with Eurotunnel. Without the full co-operation of the Eurotunnel, this may lead to a breakdown of our working relationship which could consequently weaken our border control."

67. The complainant commented that these remarks did not make the case for the application of section 31(1)(e).

### **The Commissioner's conclusions**

68. As outlined in paragraph 42, the Commissioner considers three criteria when analysing the application of prejudice-based exemptions such as those within section 31.

### **Does the harm described relate to the applicable interest?**

69. In this case, the applicable interest is the operation of border controls. This is one of the public authority's primary functions. The public authority has described outcomes which, in its view, would be likely to compromise its ability to carry out this function. The Commissioner accepts that these outcomes relate to the applicable interest.

**Is there a causal relationship between disclosure and the prejudicial outcome described in the exemption?**

70. The public authority set out its concerns regarding some of the contents of the SLA, the conclusions that could be drawn from them and what prejudicial outcomes might arise. The public authority referred to serious acts of criminality as being a potential outcome.
71. The Commissioner accepts it is feasible that the disclosure of some of the information of this nature could give rise to the prejudicial outcome described in the exemption. This is because the information sets out details about the operation of immigration control. In the Commissioner's view, the resultant prejudice from the disclosure of this information, were it to arise, would be of substance.

**Is the prejudicial outcome likely to arise?**

72. As noted above, the public authority did not provide specific arguments as to why the disclosure of indicative passport control times would be likely to have a prejudicial effect on the enforcement of UK border controls. However, given that the public authority made this assertion (albeit unsupported), the Commissioner considers it appropriate to address this point.
73. The Commissioner accepts that indicative times would constitute specific operational information regarding the maintenance of the UK border at Coquelles. The Commissioner would observe that individuals with criminal intent could use such operational detail to their advantage. For example, individuals acting in concert, could put pressure on that system at one point by manufacturing reasons for delay in order to subvert it at another point, thus giving rise to prejudice to the operation of border controls.
74. That said, the Commissioner would also observe that individuals could undertake this action without precise indicative times based on a rudimentary understanding of the bilateral agreement in place between the UK and France to maintain expeditious border control arrangements. Similarly, such individuals could make observations as to border control times similar to those described above in the part of this Notice which deals with the application of section 43(2). The Commissioner therefore does not agree with the public authority's assertion that the indicative times are exempt under section 31(1)(e).



75. Regarding the public authority's reliance on section 31(1)(e) in relation to other information within the SLA, the Commissioner notes a particular point that the public authority is keen to protect. This point is mentioned at various stages in the withheld information. In order to avoid inadvertent disclosure of this point the Commissioner has set out his analysis of the public authority's arguments as to likely prejudice in a Confidential Annex to this Notice. Although the Commissioner has set out the detail of his analysis in a Confidential Annex to this Notice, he will set out his conclusion below.

### **Section 31(1)(e) - Conclusion**

76. Noting the extent to which information relating to this point was already in the public domain at the time of the request, the Commissioner has concluded that the prejudicial outcome discussed in the Confidential Annex to this Notice was no more likely to arise as a result of disclosure. The Commissioner's reasoning is also set out in detail in a Confidential Annex to this Notice.

### **Procedural requirements**

77. In light of the above, the Commissioner has therefore concluded that none of the information within the SLA is exempt under section 31(1)(e) of the Act.
78. In failing to provide the SLA within 20 working days the public authority contravened the requirements of sections 1(1)(b) and 10(1) of the Act. These provisions are set out in a Legal Annex to this Notice.

### **The Decision**

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79. The Commissioner's decision is that the public authority did not deal with the complainant's request in accordance with the Act.

### **Steps Required**

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80. The Commissioner requires the public authority to take the following step to ensure compliance with the Act:
- The public authority must disclose the SLA in full to the requester.

81. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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82. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### **Other matters**

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83. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
84. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 100 working days for an internal review to be completed, despite the publication of his guidance on the matter.
85. During the course of his investigation, the Commissioner has encountered considerable delay on account of the public authority's reluctance to meet the timescales for response set out in his letters. Accordingly the Commissioner does not consider the public authority's approach to this case to be particularly co-operative, or within the spirit of the Act. As such he will be monitoring the authority's future engagement with the ICO and would expect to see improvements in this regard.

## Right of Appeal

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86. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

87. 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.

88. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 23<sup>rd</sup> day of February 2011**

**Signed .....**

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

## Legal Annex

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### General Right of Access

#### **Section 1(1) provides that -**

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

### Time for Compliance

#### **Section 10(1) provides that –**

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

### Effect of Exemptions

#### **Section 2(2) provides that –**

"In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

#### **Section 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (c) section 21
- (d) section 23
- (e) section 32
- (f) section 34
- (g) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (h) in section 40 –
  - i) subsection (1), and
  - ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - iii) section 41, and
  - iv) section 44"

## **Law Enforcement**

### **Section 31(1) provides that –**

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (i) the prevention or detection of crime,
- (j) the apprehension or prosecution of offenders,
- (k) the administration of justice,
- (l) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (m) the operation of the immigration controls,

...

## **Commercial interests.**

### **Section 43(2) provides that –**

Reference: FS50271738

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”