

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 3 October 2011

Public Authority: Home Office (UK Border Agency)
Address: Seacole Building
2 Marsham Street
London
SW1P 4DF

Summary

The complainant requested information regarding instructions given to the UK Border Agency (UKBA) by the Police to stop and question people when entering the UK. UKBA initially refused to disclose the requested information in reliance of section 31(1)(e) of the Act, on the basis that its disclosure would be likely to prejudice the operation of immigration controls. During the course of the Commissioner's investigation the UKBA determined that it should primarily rely on section 31(1)(a) in order to withhold the requested information. It considered that its disclosure would be likely to prejudice the prevention and detection of crime. The Commissioner has decided that section 31(1)(a) is correctly applied to the information sought by the complainant and that the balance of public interest lies in favour of the maintaining this exemption. In not confirming whether the requested information was held in its refusal notice, UKBA breached section 1(1)(a) of the Act.

The Commissioner's Role

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

2. The Commissioner notes that under the Act UKBA is not a public authority itself, but is actually an executive agency of the Home Office

which is responsible for UKBA. Therefore the public authority in this case is actually the Home Office not UKBA. However, for the sake of clarity this decision notice refers to UKBA as if it were the public authority.

3. The complainant made the following request to UKBA on 16 June 2010:

'I have been advised by the UK Border Agency that they have been instructed by the Police Force to stop and question persons re-entering the UK who are on the Sex Offenders Register. I would like to know what that actual instruction was, when it was given and also the advice given to UK Border Agency officers as to how to implement it.'
4. UKBA responded on 20 July 2010 stating that it would not be releasing the information requested as it was exempt under section 31(1)(e) of the Act.
5. The complainant requested an internal review of the decision on 21 October 2010. The internal review was provided to the complainant on 29 November 2010. UKBA's initial decision was upheld, stating that section 31(1)(e) had been correctly applied.
6. However, it did state that it had been in breach of section 1(1)(a) of the Act as it had not informed the complainant whether or not the information was held. It had also confirmed a breach of section 17(1)(c) as the explanation regarding the application of section 31(1)(e) had not been given thoroughly. The application of the exemption was explained in UKBA's internal review decision.

The Investigation

Scope of the case

7. On 30 September 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He did not agree that the requested information should be exempt from disclosure under section 31(1)(e) of the Act.

Chronology

8. The Commissioner contacted UKBA on 13 January 2011 to outline the scope of his investigation and ask further relevant questions. The Commissioner informed the UKBA that he would investigate whether or not the requested information should be exempt under section 31(1)(e) of the Act. He also informed the complainant of the scope of his investigation and the complainant confirmed his acceptance of the scope on that same day.

9. UKBA responded to the Commissioner's questions on 8 February 2011. It provided arguments concerning the application of section 31(1)(e) and raised the potential application of section 31(1)(a) to the information sought by the complainant. The UKBA also outlined its public interest considerations in respect of the withheld information.
10. UKBA stated that it believed the request was consisted of two parts: i) the instruction from the Police to UKBA to ask the questions to which he refers, and ii) the advice given to UKBA as to how to implement such an instruction.
11. UKBA have confirmed that they do not know the source of the comment, referred to by the complainant in his request, that the UKBA was directly advised by the Police to ask such questions. It explained that information is shared between the Police and UKBA under the provisions of section 36 of the Immigration, Asylum and Nationality Act 2006. This places a duty on the two parties to share information when it will be of use for police, customs or immigration purposes. This was outlined to the complainant in UKBA's internal review decision.
12. The Commissioner accepts this legislation as the basis for information sharing between UKBA and the Police and therefore it would be understandable for the police to have advised UKBA about the matter of concern to the complainant. Nevertheless UKBA has assured the Commissioner that no direct instruction was given by the Police to question people crossing the border and the Commissioner has no reason to doubt this assurance. The Commissioner has therefore not considered this in his decision.
13. The Commissioner put these points to the complainant in hope that they would be accepted and the complaint withdrawn. If the complainant was unwilling to withdraw, the Commissioner requested that he provide arguments as to why he believed the exemption is not engaged. These are the complainant's arguments:

'I note that Section 31 (1) (e) refers to '...exempt information if its disclosure under this Act would, or be likely to, prejudice... the operation of the immigration controls.' However, The UKBA have made it clear to me when stopping me that the exercise of immigration controls is NOT the reason they are stopping me (they say it is because the Police asked them to do so which the Police deny - because I am on the Sex Offenders' Register) so I fail to see how this can be used to justify their action in refusing to disclose data. My nationality is British and I can enter the UK without leave. This means that the questions that could be asked under immigration powers would be restricted to those which established that I was British and that I had my British passport with me. There may be supplemental questions required if there was doubt

as to the validity of my passport, but they should only be directed to establishing that I was who I said I was. The questions that I am actually asked by UKBA are not at all directed at establishing that I am entitled to enter the UK without leave, and so the UKBA should be able to show that it has the powers to obtain whatever information it is trying to obtain i.e. it should disclose the documents it feels give it this power.

Not knowing the truth about why the UKBA are stopping and questioning me (along with others on the Sex Offenders' Register) on re-entering the UK causes unnecessary anxiety whilst abroad wondering what will happen at passport control upon return, and causes acute embarrassment and distress when it does.

This is also a privacy issue: the UKBA officers are stopping me (along with others on the Sex Offenders' Register) and asking inconsistent sets of questions requiring information some of which is not even required to be given to the Police - including information on third parties - so there is substantial public interest in the scrutiny of their entitlement to and use of this information.

The information obtained from me (and others on the Sex Offenders' Register) by UKBA is recorded on scraps (literally) of paper and not on any official form so there should be public concern about how and why this information is being recorded, stored and used.

In any event, data alone would not undermine policing of immigration information on factors such as policing tactics, analytical capabilities, resources etc are equally necessary. Thus disclosure would not be prejudicial.

There are over 30,000 people on the Sex Offenders' Register in the same position as myself getting stopped and questioned whenever they return to the UK so disclosure is of wider interest than just to myself.

At a time of public sector cuts it is of public interest to know why public funds are being spent by the UKBA stopping and questioning people who are on the Sex Offenders' Register when a) there is no legal right or requirement for them to do so, b) and there is no obligation on the person stopped to answer such questions, and c) the bulk or all of the information sought has already been reported to the Police at least 7 days before departure from the UK or is already known to the UKBA from previous occasions of being stopped and questioned.

Disclosure would help people on the Sex Offenders' Register make more informed decisions about foreign travel.

The UKBA is not directly accountable to the public and therefore it is even more important that its actions are open and transparent and that

it can demonstrate that e.g. it is not abusing its power in order to harass people on the Sex Offenders' Register or there is no political motive behind its actions.

There is no general public interest in withholding information, there is a general public interest in openness and accountability by public bodies such as UKBA.'

14. It is on the basis of the arguments provided by both parties that the Commissioner has produced the following analysis. The Commissioner considers the majority of the complainant's submissions to be more closely related to private concerns than to the overall public interest, although he will cover the points raised by the complainant which are not a private concern.
15. The focus of the analysis concerns the application of section 31(1)(a) in respect of the requested information. This is because on 29 September 2011 the UKBA confirmed to the Commissioner that it was now primarily relying on this exemption. It also confirmed that it was also relying on section 31(1)(e), although to a lesser extent, because the requested information did, in some respects, impact on the immigration control of persons such as the complainant.

Analysis

16. UKBA has stated that it believes the request to be made of two parts: i) the instruction from the Police to UKBA to ask the questions to which he refers, and ii) the advice given to UKBA as to how to implement such an instruction.
17. The Commissioner accepts that section 36 of the Immigration, Asylum and Nationality Act 2006 is the basis for information sharing between UKBA and the Police and because of this no direct instruction between them exists.
18. The Commissioner considers UKBA to hold operational information relating to what it does or may do when stopping someone at the border, and which falls within the scope of the second part of the complainant's request.

Exemptions

19. Section 31(1)(a) 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 –

(a) the prevention and detection of crime'

20. The application of the 'prejudice' element of section 31(1)(a), as in all other prejudice based exemptions, was set out in *Hogan v the ICO and Oxford City Council*¹. *Hogan* outlined a three stage process to assess whether the cited exemption is engaged. The Commissioner shall follow this process when analysing UKBA's submissions:

- I. Identifying the applicable interests within the relevant exemption
- II. Considering the nature of the prejudice
- III. Considering the likelihood of the prejudice

Prejudice

21. UKBA has stated that disclosure of the requested information 'would be likely' to prejudice the 'prevention and detection of crime'. Decisions of the Information Tribunal have defined the phrase 'would be likely' to mean that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote.
22. The applicable interest set out in section 31(1)(a) of the Act is the prevention and detection of crime. It is therefore only disclosure of information which would be likely to prejudice this, which will engage the exemption. Section 31(1)(a) has been applied to all of the requested information being considered in this decision. It is therefore necessary that disclosure of all of the exempted information be likely to prejudice the operation of immigration controls for the exemption to be engaged.
23. The exempted information consists of advice given by UKBA to its staff when stopping and questioning various individuals entering the UK.
24. The Commissioner accepts that this information clearly relates to the prevention and detection of crime. It defines specific actions to be taken by staff operating immigration controls, when stopping and questioning certain individuals at the border.

1

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

25. UKBA states that a causal relationship exists between disclosure of the requested information and a prejudicial outcome to the prevention and detection of crime. It states that disclosure of the requested information is likely to render less effective the measures in place designed to monitor the movements of certain classes of person, including those of the Sex Offenders Register. It suggests that this in turn would have an adverse effect on the system of information sharing between itself and the Police and on measures to prevent crime.
26. UKBA has expanded on this with more specific arguments. It has stated that if the requested information was to be disclosed it would be available to the world at large and would be available to those individuals whose movements it is required to monitor. Some of these individuals can represent a risk to members of the public, although the UKBA has not suggested the complainant in this case represents this risk.
27. UKBA explained that the requested information relates to its information gathering activities concerning the movements of defined categories of individuals. It has suggested that certain of these individuals may attempt to evade or compromise the information gathering process and this may impact the measures taken in respect of crime and/or potential crime.
28. UKBA brought to the Commissioner's attention the existence of certain online forums which are or can be accessed by former offenders, including those who may be of on-going interest to the UKBA. It gave the 'Unlock' website as an example where there are several forums where former offenders and others discuss their experiences of passing through UK borders. The Commissioner considers that the requested information could be shared on such forums with the intention of aiding people to more easily evade or compromise the controls UKBA have in place.
29. UKBA provided the Commissioner with a number of concerns it had about the potential disclosure of the requested information. The Commissioner has examined the withheld information and has considered these concerns. He accepts that the requested information relates to matters which would be prejudicial to the work of the UKBA supporting crime prevention, and the information not generally known outside of the police and UKBA. The Commissioner has decided that the some detail of the concerns expressed by the UKBA and its rationale for should not be outlined in the body of this notice. To do so could itself disclose information which would prejudice the matters detailed in the exemption.

30. UKBA states that there are former offenders who will wish to evade a system designed to track their movements, UKBA provided details of a forum they believed was used by former offenders who wished to evade the system. Knowledge of the requested information would allow such people to build up a bigger picture of the way in which law enforcement agencies keep track of their movements. This places them in a stronger position to evade or circumvent the procedures in place. UKBA provided examples of how this may be done.
31. The Commissioner accepts that the requested information is linked to the gathering and sharing of crime-related intelligence. He accepts that knowledge of the requested information would be a useful tool to someone who wished to evade or compromise one of the functions of the UKBA by likely prejudicing its relationship with the police and other agencies in respect of the prevention and detection of crime. To release the requested information into the public domain would potentially provide individuals with the opportunity to prepare in advance, methods by which they could compromise or prevent the legitimate gathering of crime related intelligence.
32. UKBA has stated that disclosure 'would be likely' to prejudice the operation of immigration control. This is the lower standard of prejudice but still requires a real or significant threat of prejudice. The Commissioner finds the arguments provided by UKBA persuasive. Knowledge of the instruction would inform people of concern to the police and UKBA of potential methods or strategies to undermine the legitimate activities of the UKBA. UKBA's example of the forum is indicative of the willingness of individuals to share their experiences of immigration control and the potential ways to circumvent it.
33. The Commissioner accepts that the disclosure of the requested information would impose a real and significant risk of prejudice to the prevention and detection of crime and agrees that the exemption provided by section 31(1)(a) has been correctly engaged.
34. Section 31(1)(a) is a qualified exemption. An assessment of the balance of public interest must be performed before a decision can be made as to whether or not the exemption should be maintained. The Commissioner shall therefore consider the public interest in the following analysis.

Public interest arguments in favour of disclosing the requested information

35. Both UKBA and the complainant have provided arguments in favour of disclosing the requested information. The Commissioner shall discuss UKBA's submissions first.

36. UKBA states that disclosure of the requested information would increase the transparency of its work and its operations. Further, it would promote accountability and openness in relation to the methods and tactics it uses when monitoring offenders' movements through the UK border.
37. It explains that disclosure may also increase public confidence that the monitoring which it undertakes is in line with the agreed code of practice and procedures. It states that disclosure could reassure the public that effective systems are in place to ensure that people who have committed certain offences are correctly monitored when entering the UK. Finally, UKBA has asserted that disclosure may reassure the public that it has the capability and capacity to locate and monitor offenders and evidence that public money is being spent effectively.
38. The complainant also put forward similar arguments in favour of disclosure regarding public accountability and openness. The other argument he put forward regarding the public interest is that over 30,000 people are on the Sex Offenders' Register who are also being stopped and questioned and therefore there is a general public interest in disclosing the requested information.
39. The Commissioner considers 30,000 people to be a significant number and he accepts that this group would have an interest in understanding more about the procedures.

Public interest arguments in favour of maintaining the exemption

40. UKBA have stated that disclosure of the requested information to the public would allow them to see the type of information gathered. This in turn would assist offenders to evade the system and could have a knock on effect on its ability to gather and manage intelligence information effectively on certain passengers.
41. The Commissioner finds that any significant undermining of the procedures in this area, caused by the release of the requested information is a very strong public interest factor in favour of non disclosure.
42. UKBA also states that disclosure of this information may be misleading. It believes this may lead the public to think that only this method is in place to monitor the entry of individuals who may be of interest to the police into the UK. Disclosing the requested information without confirming, whether it has other methods available for this purpose, may give a false impression of its ability to maintain the border effectively.

Balance of the public interest arguments

43. The final stage when coming to a conclusion on the public interest is to balance the arguments in favour of maintaining the exemption against those in favour of disclosing the information and come to a conclusion on which side the balance is favoured. Where the balance is equal or in greater favour of disclosure then the information should be disclosed. If it lies more in favour of maintaining the exemption, then it should be maintained.
44. UKBA states that the balance of public interest lies in favour of the exemption being maintained. Its arguments for this are outlined below.
45. When analysing the balance of public interest, UKBA compared the public's 'right to know' against the need to 'enable effective government'. It believes the balance lies in favour of maintaining the exemption as the release of information would enable offenders to evade or undermine the controls in place.
46. It acknowledges that confirming that there is guidance in place to monitor the movements of people who are a potential risk, serves the public interest. It suggests it would instil confidence in the public that procedures are in place to monitor such individuals. However, it explains that the release of the detail within the instruction would not best serve this end. UKBA asserts that the instruction is too technical and contains jargon, which the general public would not understand and therefore disclosure of the information would not be informative.
47. It also suggests that release of the information would make the public think that UKBA were 'playing into the hands of' offenders by releasing the information, rather than being transparent or instilling confidence in its capabilities.
48. In coming to his conclusion, the Commissioner has analysed the public interest arguments submitted by the complainant and UKBA and concluded on the overall balance of public interest.
49. He accepts that there is a public interest in having an open and accountable public service and that knowledge of instructions or guidance in place to maintain the UK border would certainly help to improve public confidence in UKBA's ability to do this.
50. The complainant points out that there are 30,000 people on the Sex Offenders' Register to whom this information may be of interest.
51. UKBA has stated that the public interest is served by merely confirming that instructions are in place (as it has done) to monitor offenders and that releasing the specific information requested would not aid the public

interest further. Its argument for this is that the information is technical and difficult to understand to those not familiar with the terms used. It is therefore not particularly informative to the public.

52. The Commissioner disagrees with the reasoning of UKBA regarding this. He is generally sceptical about arguments that information would be misleading or misunderstood unless these arguments are specific and clearly argued in terms of causal effect. A more plausible argument is simply that the information may not significantly inform the public about how the procedure operates, however the Commissioner finds that there is still a relevant public interest in the public being informed about the procedures, even if they are written in technical terms.
53. The number people effected is significant but isn't a large percentage of the public and the level of public debate about the issue is low. The Commissioner accepts that sex offenders travelling should have some understanding that a procedure is in place and this information is in the public domain. There a public interest in disclosing the details of the procedure to enable them to understand its basis. However, having considered the submissions the complainant has made about the alleged unfairness of the system and in the absence of other evidence, the Commissioner finds that there isn't a strong public interest in disclosure of the information. The Commissioner therefore finds there is a limited public interest in disclosure.
54. The Commissioner also agrees that there is a general public interest in UKBA being able to maintain the integrity of the border and for it to gather crime-related intelligence. Very strong weight should placed on the prejudice to the prevention and detection of crime that would be likely to occur if the requested information was placed in the public domain.
55. The Commissioner finds that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
56. In view of the Commissioner's findings in respect of section 31(1)(a) he has not gone on to consider the UKBA's application of section 31(1)(e).

Procedural Requirements

57. In not confirming that it held the requested information in its initial refusal notice to the complainant, UKBA breached section 1(1)(a) of the Act.

The Decision

58. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- It correctly applied section 31(1)(a) of the Act to the complainant's request.

59. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- In not confirming if it held the requested information, it breached section 1(1)(a) of the Act.

Steps Required

60. The Commissioner requires no steps to be taken.

Right of Appeal

61. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

62. 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.

63. 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 3rd day of October 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Freedom of Information Act 2000

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.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

1. states (if that would not otherwise be apparent) why the exemption applies.”

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-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment,

Immigration, Asylum and Nationality Act 2006

Duty to share information

Section 36 provides that-

(1) This section applies to—

- (a) the Secretary of State in so far as he has functions under the Immigration Acts,
- (b) a chief officer of police, and
- (c) Her Majesty's Revenue and Customs.

(2) The persons specified in subsection (1) shall share information to which subsection (4) applies and which is obtained or held by them in the course of their functions to the extent that the information is likely to be of use for—

- (a) immigration purposes,
- (b) police purposes, or

(c) Revenue and Customs purposes.

(3) But a chief officer of police in Scotland shall share information under subsection (2) only to the extent that it is likely to be of use for—

(a) immigration purposes,

(b) police purposes, in so far as they are or relate to reserved matters within the meaning of the Scotland Act 1998, or

(c) Revenue and Customs purposes other than the prosecution of crime.

(4) This subsection applies to information which—

(a) is obtained or held in the exercise of a power specified by the Secretary of State and the Treasury jointly by order and relates to—

(i) passengers on a ship or aircraft,

(ii) crew of a ship or aircraft,

(iii) freight on a ship or aircraft, or

(iv) flights or voyages, or

(b) relates to such other matters in respect of travel or freight as the Secretary of State and the Treasury may jointly specify by order.

(5) The Secretary of State and the Treasury may make an order under subsection (4) which has the effect of requiring information to be shared only if satisfied that—

(a) the sharing is likely to be of use for—

(i) immigration purposes,

(ii) police purposes, or

(iii) Revenue and Customs purposes, and

(b) the nature of the information is such that there are likely to be circumstances in which it can be shared under subsection (2) without breaching Convention rights (within the meaning of the Human Rights Act 1998 (c. 42)).

(6) Information shared in accordance with subsection (2)—

(a) shall be made available to each of the persons specified in subsection (1), and

(b) may be used for immigration purposes, police purposes or Revenue and Customs purposes (regardless of its source).

(7) An order under subsection (4) may not specify—

(a) a power of Her Majesty's Revenue and Customs if or in so far as it relates to a matter to which section 7 of the Commissioners for Revenue and Customs Act 2005 (c. 11) (former Inland Revenue matters) applies, or

(b) a matter to which that section applies.

(8) An order under subsection (4)—

(a) shall be made by statutory instrument, and

(b) may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.