

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 02 June 2014

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

Decision (including any steps ordered)

1. The complainant has requested information about the legality of the UK's arrangements for receiving passenger data from carriers arriving from EU member states. The Home Office disclosed some information, and withheld other information, citing the exemptions at section 23(1) and 31(1)(e). It would neither confirm nor deny whether it held further relevant information, citing the exclusion from the duty to confirm or deny provided by sections 31(3) and 36(3). The Commissioner's decision is that the Home Office applied the exemption at section 23(1), and the exclusions at 31(3) and 36(3), correctly. However it was not entitled to rely upon section 31(1)(e) to withhold information.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the information it had previously ruled exempt under section 31(1)(e) (annex A of the data sharing guidance).
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 28 February 2013, further to an earlier request, the complainant wrote to the Home Office and made the following request for information:

"The following quotes are taken from the links above:

*"As regards the legal basis allowing the collection by the carrier of personal data in the Member State of departure, it seems to me that, pursuant to Article 4 (1) of Directive 1995/46/EC, **such a legal basis must be found in the legislation of the Member States in which the processing takes place. This implies that where the processing is carried out by an establishment of the carrier on the territory of a Member State, the law of that Member State shall apply to this processing.** Taking into account the specific safeguards implemented by the UK authorities, Articles 7 (e) and (f) of Directive 1995/46/EC could be used by those Member States to make the data collection referred to above lawful. It is necessary that the Member State in which the processing takes place expressly acknowledges that the "public interest" pursued by the third party requiring the data is shared by that Member State. A Member State might consider such a public interest on the basis of, for example, cooperation in the fight against illegal immigration or customs offences, or assisting another Member State in carrying out its law enforcement policy. As regards the precise form of such recognition, an opinion of the relevant national data protection supervisory authority or a governmental decision would seem to satisfy the requirements of Article 7 (e) of the Directive".*

*"The Commission's letter in one of those links makes clear that for the transfer of data to the UK authorities, a legal basis must be found in the legislation of the Member State **in which the processing takes place. For carriers departing the UK, the processing will take place in the UK, and so the Data Protection Act 1998 will be the applicable legislation.** Those carriers will be under a legal obligation under UK law, in terms of article 7(c) of the Data Protection Directive, to transfer the data."*

Question 6.1:

How has the UK (i.e. Border Force or any other relevant body within your jurisdiction) been interpreting and applying these two paragraphs (with special attention to the wording with emphasis added)?

Question 6.2:

Do different regimes apply for different airlines covering the same route or does the same regime apply for all airlines covering the same routes? For instance, assuming that Lufthansa processes its passengers' data in its headquarters in Germany, then all the passenger's data will be subject to Germany's data protection laws - whether they depart from a German airport or a British airport, insofar as the carrier is Lufthansa? Does this then mean that British Airways will always have to transmit its passengers' data to the UK, even if it flies to and from Germany (assuming Germany forbids the transmission of this data), as long as the processing of British Airways' passengers' data is made in the UK? Or does it mean that in a Lufthansa flight a passenger will only see its data transmitted to the UK when the Lufthansa flight departs from British soil, but not when it departs from German soil? Does it also mean that if Lufthansa was to transfer its passengers' data processing centre to London, even though it is a German company and subject to German laws and operating from Germany, it would nevertheless have to transmit its data to the UK all the time on all of its flights between Germany and the UK as the DPA 1998 would apply? Please provide detailed answers to each of these questions.

Question 6.3:

Please inform whether the UK has received any express acknowledgement from other member states' data protection authorities (or other relevant body) for data to be transmitted and whether they have acknowledged that there is a "public interest" in the sharing of this data. Please provide me with details of which members states have done or refused to do so.

Question 7:

Please provide me with any communications received by the UK from other member state's data protection authorities (or other relevant body) on this matter.

Question 8:

Has the UK informed the airlines operating on its territory of these arrangements? If yes, when has it done so?

Question 9:

Has EU passenger's data in intra-EU flights (between the UK-other EU countries) been stored by the UK (past and present) and, if so, please provide the details of the type of data that has been stored and for what routes/countries. Also provide me with any 'rules/guidance' that apply to the processing and storing of this data."

5. The Home Office responded on 10 May 2013, and addressed the individual points of the request as follows:

"6.1 Carriers are responsible for the way in which they process data. The relevant data protection law will depend on where the controller is established.

6.2 Section 31(1)(e) applies to this question.

6.3 & 7 We neither confirm nor deny whether we hold such information under the exemption at section 31(3).

8. In Autumn 2012 the UK started a process of formally notifying affected carriers via service of form IS72 (e-Borders TDI) Intra EEA. A copy is attached.

9. Please see the attached Data Sharing Guidance. Two sections have been redacted under section 23 and section 31(1)(e).

We neither confirm nor deny whether further information is held under section 23(5) of the Freedom of Information Act, which provides an absolute exemption in relation to information about the bodies set out in section 23(3) of the Act.

Please see the link below to some information already in the public domain:

<http://www.ukba.homeoffice.gov.uk/customs-travel/beforetravel/advanceinfopassengers/>

6. Following an internal review, the Home Office upheld its original handling of the request.

Scope of the case

7. The complainant initially contacted the Commissioner on 29 April 2013 to complain that he had not received an internal review. The Home Office subsequently provided this on 10 June 2013. He then contacted the Commissioner on 16 July 2013 to complain about the Home Office's refusal to release the requested information.
8. During the investigation the Home Office answered question 6.2 of the request and provided a redacted copy of a guidance document on the disclosure of e-Borders information ("the data sharing guidance") which it had previously exempted in its entirety under section 31(1)(e). It also withdrew its reliance on section 31(3) to neither confirm nor deny ("NCND") whether it held information in relation to questions 6.3 and 7 of the request. It substituted instead section 36(3). It withdrew its

reliance on 23(5) to NCND whether it held further information under question 9, applying section 23(1) instead. It also applied section 31(1)(e) to other information it held in respect of question 9. It also applied section 31(3) to NCND whether it held information in respect of the first sentence of question 9.

9. As a result of this, and after further discussion with the complainant, the Commissioner was able to refine the scope of his investigation to the Home Office's response to questions 6.3, 7 and 9.
10. This decision notice has therefore considered whether the Home Office was entitled to rely upon sections 23(1) and 31(1)(e) to withhold information and sections 31(3) and 36(3) to NCND whether it holds information.

Reasons for decision

Section 23 – information supplied by or relating to security bodies

11. The Home Office cited section 23(1) to withhold a small amount of information in the data sharing guidance, which it disclosed in reply to question 9 of the request. The guidance addresses how to deal with requests from authorised agencies to access information held under the e-Borders system (a passenger information programme which collects and stores information on passengers and crew entering and leaving the United Kingdom).
12. Section 23(1) of the FOIA states that information held by a public authority is exempt information if it was directly or indirectly supplied to the public authority by, or relates to, any of the bodies specified in subsection (3). Section 23(3) provides a list of bodies dealing with security matters.
13. Section 23(1) is an absolute exemption. It is not therefore subject to the public interest test. For section 23(1) to apply, the Commissioner only needs to satisfy himself that the requested information falls within the definition of this exemption.
14. In this case the Home Office has confirmed to the Commissioner that the requested information was directly or indirectly supplied by or relates to a body listed in subsection (3). Because of the nature of this exemption, the Commissioner cannot provide more information about the applicability of subsection (3) in the main body of this decision notice, as to do so may give some indication as to the content of the withheld information.

15. Further information about the applicability of subsection (3) is contained in a confidential annex to this decision notice. However, the Commissioner is satisfied from the information provided by the Home Office that the withheld information was directly or indirectly supplied by or relates to a body listed in subsection (3). He is therefore satisfied that the exemption at section 23(1) is engaged in respect of this information.

Section 31- law enforcement

Section 31(1)(e)

16. Section 31 of FOIA provides an exemption where disclosure of information would, or would be likely to, prejudice various functions relating to law enforcement. The Home Office has specified that the functions in question relate to matters set out at section 31(1)(e) - the operation of immigration controls. This is a qualified exemption, and is therefore subject to a public interest test.
17. When setting out the likelihood of prejudice, the Home Office has specified the higher threshold of "*would prejudice*". The Tribunal, in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030), commented that to maintain a claim that disclosure would cause prejudice places a strong evidential burden on the public authority (Tribunal at paragraph 36).
18. The Home Office applied section 31(1)(e) to withhold annex A of the data sharing guidance on the e-Borders system.
19. The Home Office's view was that disclosure of the information contained in the annex would prejudice the operation of immigration controls. It said that disclosure would reveal operationally sensitive information about border security which could undermine border controls if placed in the public domain.
20. The Commissioner cannot provide more information about the applicability of this exemption in the main body of this decision notice, as to do so may give some indication as to the content of the withheld information.
21. Further information about the Home Office's application of section 31(1)(e) is contained in a confidential annex to this decision notice. For the reasons set out in the confidential annex, the Commissioner is not satisfied that disclosure of the withheld information would prejudice the operation of immigration controls. Therefore, the Commissioner does not accept that the exemption at section 31(1)(e) is engaged by the information and considers that the Home Office is not entitled to rely upon it to withhold the information contained in annex A to the data sharing guidance.

Section 31(3)

22. The Home Office cited section 31(3) to NCND whether it held information in relation to the first sentence of question 9.
23. Section 31(3) provides that a public authority is not obliged to confirm or deny whether it holds information described in a request if to do so would, or would be likely to, prejudice any of the matters mentioned in section 31(1). The Home Office specified that the relevant matters are those set out at section 31(1)(e).
24. As discussed above, section 31(1)(e) provides for an exemption where disclosure of information would or would be likely to prejudice the operation of immigration controls. When setting out the likelihood of prejudice, the Home Office has again specified the higher threshold of "would prejudice". Therefore, the issue for the Commissioner to consider here is whether confirming or denying if information described in the first sentence of question 9 is held would prejudice the operation of immigration controls.
25. To recap, the first sentence of question 9 asks:

"Has EU passenger's data in intra-EU flights (between the UK-other EU countries) been stored by the UK (past and present) and, if so, please provide the details of the type of data that has been stored and for what routes/countries."

26. The Home Office provided the following explanation to the complainant about the application of section 31(3):

"If we were to confirm whether or not we hold information relating to the first sentence of this part of the request, then the inference would that we have stored EU passenger's data in intra-EU flights. This may or may not be so. Equally, if we were to say that we hold no information, then that would appear to confirm that we have not stored EU passenger's data in intra-EU flights. Again, this may or may not be so.

To confirm either way whether we have stored EU passenger's data relating to intra-EU flights would provide information relating to flights covered by e-Borders (and, by deduction, to flights not covered). This information could be used by criminals or those seeking to evade immigration control to circumvent our e-Borders system. The likelihood of this happening is strong."

27. The Home Office provided more detailed arguments to the Commissioner. Because of the nature of the Home Office's arguments, the Commissioner cannot discuss them in the main body of this decision

notice, as to do so may give some indication as to whether or not it holds information relevant to the first sentence of question 9. The Home Office's arguments, and the Commissioner's consideration of those arguments, are set out in the confidential annex to this decision notice.

28. For the reasons set out in the confidential annex, the Commissioner accepts that the exclusion from the duty to confirm or deny provided by section 31(3) is engaged.

Public interest

29. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in neither confirming nor denying outweighs the public interest in confirming or denying whether information is held.
30. The Home Office provided the following information to the complainant about its consideration of the public interest:

"Considerations in favour of confirming or denying that information is held

We recognise that there is public interest in openness and transparency in all aspects of government and that there is a public interest in knowing that arrangements for securing the UK's borders are lawful and effective.

Considerations in favour of neither confirming nor denying whether information is held

...To compromise the security of the borders in [the manner set out in paragraph 26, above] would not be in the public interest.

Conclusion

We conclude that the balance of the public interest lies in neither confirming nor denying whether we hold the information requested in the first sentence of this part of the request."

31. The Home Office provided more detailed public interest arguments to the Commissioner. Because of the nature of the Home Office's arguments, the Commissioner cannot discuss them in the main body of this decision notice, as to do so may give some indication as to whether or not it holds information relevant to the first sentence of question 9. The Home Office's arguments, and the Commissioner's consideration of those arguments, are set out in the confidential annex to this decision notice.

32. Whilst the public interest arguments in favour of confirming or denying carry some weight, they are not sufficiently strong to outweigh the public interest in protecting UK border security arrangements.
33. The Commissioner has therefore concluded that the public interest favours maintaining the exclusion from the duty to confirm or deny at section 31(3).

Section 36 – prejudice to the effective conduct of public affairs

34. The Home Office cited section 36(3) to NCND whether it held information in relation to questions 6.3 and 7 of the request.
35. Section 36(3) provides that a public authority is not obliged to confirm or deny whether it holds information described in a request if, in the reasonable opinion of a qualified person, to do so would, or would be likely to, prejudice any of the matters mentioned in section 36(2). In such cases, the qualified person must give their reasonable opinion that to confirm or deny that the information is held would, in itself, have the effects listed in section 36(2).
36. The Home Office has confirmed that the relevant part of 36(2) is subsection (c):

"(c) would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs".
37. The Home Office has explained that the qualified person in this case is the Minister of State for Security and Immigration. The Commissioner is satisfied that this is in accordance with the requirements of section 36(5), which sets out who constitutes a "qualified person".
38. The Home Office provided the Commissioner with a copy of the submission to the qualified person and his confirmation that he agreed the engagement of section 36.
39. The opinion was requested from the qualified person on 17 February 2014. This is considerably later than the date of the initial refusal and the internal review, neither of which cited section 36 as a reason for withholding information.
40. However, following the combined cases of the *Home Office v Information Commissioner* (GIA/2098/2010) and *DEFRA v Information Commissioner* (GIA/1694/2010) in the Upper Tribunal, a public authority is able to raise a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims. The Commissioner has therefore treated this as a late claim that section 36 applies.

41. The Commissioner has accepted that an opinion was sought and given by a qualified person, and has gone on to consider whether the opinion given was reasonable.
42. In deciding whether an opinion is reasonable, the Commissioner will consider the plain meaning of the word. The Shorter Oxford English Dictionary defines "*reasonable*" as, "*...in accordance with reason; not irrational or absurd*". If the opinion is in accordance with reason and not irrational or absurd (in short, if it is an opinion that a reasonable person could hold) then it is reasonable.
43. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (but still reasonable) conclusion. It is only not reasonable for the purposes of section 36 if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
44. The Commissioner has been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC2* (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus,

"...does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant".
45. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, he is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
46. In this case, when setting out the likelihood of detriment in its submission, the Home Office specified that prejudice "*could*" occur. The Commissioner considers that it has applied the lower threshold of "*would be likely to*" prejudice the conduct of public affairs. In reaching a decision on the question of the likelihood of prejudice, the Commissioner considers that the expression "*likely to prejudice*" means that the chance of prejudice being suffered should be more than a hypothetical possibility – there must be a real and significant risk.
47. The Commissioner considers that prejudice to the effective conduct of public affairs might refer to an adverse effect on a public authority's ability to offer an effective public service or to meet its wider objectives

or purpose but the effect does not have to be on the authority in question - it could be an effect on other bodies or the wider public sector.

48. The submission to the qualified person requested his approval for the application of section 36(3) to NCND whether it held information which was covered by questions 6.3 and 7. The submission set out the Home Office's reasons for applying the exemption and a summary of the public interest arguments that it had considered in reaching its decision.
49. The submission specified the likely prejudice envisaged, were a confirmation or denial to be issued. Because of the nature of the Home Office's arguments, the Commissioner cannot discuss them in the main body of this decision notice, as to do so may give some indication as to whether or not it holds information relevant to questions 6.3 and 7. The Home Office's arguments, and the Commissioner's consideration of those arguments, are set out in the confidential annex to this decision notice.
50. For the reasons set out in the confidential annex, the Commissioner accepts that the qualified person's opinion with regard to the effects of confirming or denying whether information is held is a reasonable one, and that the exclusion from the duty to confirm or deny provided by section 36(3) is therefore engaged.

Public interest

51. Section 36 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in neither confirming nor denying outweighs the public interest in confirming or denying whether information is held.

Public interest arguments in favour of maintaining the duty to confirm or deny

52. The complainant offered no specific public interest arguments in respect of disclosing the information withheld under section 36(3). However, he asserted that there has been public debate about whether the UK position on API data gathering complies with EU legislation and he is of the view that the UK is not complying with its obligations. He considers there to be a strong public interest in disclosure for this reason.
53. The Home Office has provided the following arguments in favour of confirming or denying whether or not it holds any information:
 - the general public interest favouring transparency and openness in government;
 - a presumption of disclosure in most cases;

- increased transparency leading to a greater accountability of public officials and an increased level of public understanding and engagement with the process of government;
- the public interest in knowing that arrangements for securing the UK's borders are lawful and effective.

Public interest arguments in favour of maintaining the exclusion of the duty to confirm or deny

54. The Home Office explained the public interest in maintaining the exclusion of the duty to confirm or deny to the complainant, as follows:

"There is a strong public interest in effective border controls. We consider that the way in which information is requested in this case means that inferences (which may or may not be correct) could be drawn from confirmation as to whether or not we hold any information.

Incorrect inferences – for example, wrongly casting doubt on the propriety or legality of the data sharing arrangements - could in turn have consequences for the amount of API data which we receive. A reduction in the amount of API received would reduce our ability to check passengers in advance of travel, which in turn could prevent us from targeting our resources effectively. This would not be in the public interest."

55. It also provided further arguments which, because of their nature, the Commissioner cannot discuss in the main body of this decision notice, as to do so may reveal whether or not it holds relevant information.
56. Whilst the public interest arguments in favour of confirming or denying carry some weight, they are not sufficiently strong to outweigh the public interest in protecting UK border security arrangements.
57. The Commissioner has therefore concluded that, while it is finely balanced, the public interest favours maintaining the exclusion from the duty to confirm or deny at section 36(3).

Section 10 - time for compliance

58. Section 1 of FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information and, if so, to have that information communicated to him. Section 10(1) of FOIA provides that this must be done within 20 working days of receiving a request.

59. In this case, the complainant submitted the request to the Home Office on 28 February 2013. The Home Office issued a refusal notice in respect of the request on 10 May 2013. The Home Office therefore exceeded the 20 working day time limit. In failing to respond to the complainant's request within the statutory time frame it breached section 10(1) of the FOIA.

Right of appeal

60. 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: GRC@hmcts.gsi.gov.uk

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

61. 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.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Graham Smith
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