Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **7 July 2014**

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

Decision (including any steps ordered)

1. The complainant submitted a two-part information request seeking information about which carriers have transmitted passenger data to the UK in respect of flights within the territory of the European Union (EU).

2. The Commissioner's decision is that the Home Office (HO) wrongly refused the first part of the request by incorrectly relying on section 14(2) FOIA. He decided that HO had correctly withheld the information requested in the second part of the information request by relying on the section 31(1)(e) FOIA exemption and that the balance of the public interest favoured maintaining the exemption. He further found that HO had not complied with the section 45 FOIA code of practice in that it took too long to respond to the request for an internal review.

3. To ensure compliance with the legislation, the Commissioner requires HO to provide a fresh response in respect of the first part of the request; no other steps are required.

4. HO must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 27 September 2013 the complainant made the following request to HO for information under the FOIA for:

In relation to your E-borders programme, please inform:
1) what carriers have transmitted API [Advance Passenger Information] data to the UK in intra-EU flights, and have seen it collected and stored in your E-borders programme (past and present)?
2) what carriers have been notified of form IS72 (e-Borders TDI) Intra EEA (as attached)?

6. The HO responded on 23 October 2013 and again on 11 November 2013. It stated that it need not comply with request 1 by virtue of 14(2) FOIA and that request 2 was exempt under section 31(1)(e) FOIA.

7. Following an internal review HO wrote to the complainant on 7 January 2014 upholding the earlier decision.

Scope of the case

8. The complainant contacted the Commissioner on 7 January 2014 to complain about the way his request for information had been handled.

9. HO said that the first part of the request repeated a request dated 28 February 2013 for the following information:

'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.'

HO said that although the wording was 'slightly different', the information described was essentially the same and that the section 14(2) FOIA (repeated request) exemption applied.

10. HO added that information within the scope of the second part of the request was held but was exempt under section 31(1)(e) FOIA.

11. The Commissioner considered the application of section 14(2) FOIA to the first part of the request and section 31(1)(e) FOIA to the second part of the request.

Reasons for decision

Part 1 of the request and section 14(2) FOIA

12. Section 14(2) FOIA states that:

> *"Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request."*

13. Section 14(2) of FOIA does not oblige a public authority to comply with a request for information that repeats, or is substantially similar to, a previous identical request. There is no public interest test.

14. The complainant told the Commissioner that when he had asked HO which EU member states had provided the UK with API data, HO had said that it was not the EU member states that had provided API data but the carriers. The complainant said that this had led him to rephrase the query, in his 27 September 2013 information request, to refer to the carriers; this was not a repeated request but was rather the clarification of an earlier request which had been incorrectly phrased. On 14 November 2013, when requesting a review of HO's refusal notice, the complainant told HO that he had rephrased his question and this time had made reference to 'carriers' in order to have his question properly answered.

15. The complainant added that there had been a seven-month time lapse between his 28 February 2013 and 27 September 2013 information requests. He said that even if the requests had been the same the time delay of seven months did not justify withholding the information, particularly as HO had not confirmed whether or not the information sought had changed over that time period.

16. HO said that although the wording of the two information requests was 'slightly different', it maintained that the information described in the 27 September 2013 request was essentially the same as for the earlier request and that the request therefore met the criterion that requests to which section 14(2) applies should be 'substantially similar'.

17. With respect to what is a reasonable time interval between requests, HO said that a related matter was being considered by the Commissioner (under his reference FS50505098). HO said it saw no point in considering a fresh request which was essentially the same as a request in response to which an exemption had been cited and which was under active consideration by the ICO.

18. HO added that if the ICO were to support the application of the exemption it had cited in the earlier matter, then it would probably regard a further six months as a reasonable time interval before a

further similar request would be accepted. This view was based on the reason for the refusal and the fact that it was unlikely that HO's position would change for the foreseeable future.

19. The Commissioner noted that his investigation of the connected matter to which HO referred was not on all fours with this matter as in it HO was relying on a different, albeit overlapping, set of FOIA exemptions.

20. The Commissioner has noted that HO had previously told the complainant that 'carriers' rather than 'EU member states' transmitted the relevant data. He considered that rephrasing the request to say 'carriers' was a reasonable next step for the complainant to have taken. It was clear from HO's evidence during the Commissioner's investigation, that some relevant EU member states have more than one carrier operating from within them. He considers therefore that, in the context of this information request, 'carriers' differ sufficiently from 'EU member states' to comprise a request that is substantially different.

21. With respect to the time interval between the relevant requests of seven months, given HO's view that in normal course a six month interval would be reasonable, he does not accept that the two information requests were not sufficiently separated. In contesting that, HO relied on the Commissioner's investigation of a connected matter. However, the Commissioner does not accept that an active investigation by him automatically creates an effective state of purdah preventing an applicant from making a further related request until his investigation of the first matter has been completed. The Commissioner's decision in the connected matter, his reference FS50505098, was issued on 2 June 2014.

22. Having reviewed the representations made to him, the Commissioner considers that a related and rephrased request, made some seven months later, does not amount to an identical or substantially similar request. He therefore decided that section 14(2) of FOIA has been incorrectly applied in this case. He requires HO to issue a fresh response to ensure compliance with the legislation.

23. During the course of his investigation, HO told the Commissioner that, should he find that section 14(2) was not engaged, then it would be minded to find the information requested to be exempt under section 31(1)(e) FOIA and that the balance of the public interest would be likely to favour withholding the information. HO added that it was citing section 31(1)(e) for the second part of the request and that in many respects the arguments for both parts were essentially the same.

Part 2 of the request and section 31(1)(e) FOIA

24. Section 31(1) FOIA 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-*
>
> *…*
>
> *(e) the operation of the immigration controls,*
>
> *… .*"

25. Section 31 provides an exemption where disclosure of information would, or would be likely to, prejudice various functions relating to law enforcement.

26. Consideration of this exemption is a two-stage process. First, in order for the exemption to be engaged it must be found at least likely that prejudice would occur to the process specified in the relevant subsection - in this case subsection (e) - relating to the operation of the immigration controls.

27. Secondly, the exemption is subject to the public interest test. The effect of this is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.

28. 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).

29. The complainant told the Commissioner that HO's considerations revealed a myopic attitude to democratic process and to disclosure of information much of which was already widely known. He said that a 9 October 2013 report by the Chief Inspector of Borders and Immigration (the report) had said that HO had been unable to mandate the collection and processing of API from member states that prevented its collection, such as France and Germany; these were the two most populous countries of the EU with the highest numbers of daily air connections to the UK. Anyone wishing to avoid API-based UK border checks had only to use those routes.

30. HO said that to identify which carriers have been issued with an Intra EEA IS72, and so provide API, would also identify which, if any, carriers do not, or at least might not. This information could be used by those who wish to circumvent the checks enabled by API by travelling with a

carrier not on the list. This would ultimately interfere with immigration controls. HO considered it more likely than not that prejudice would occur, and that disclosure 'would prejudice' the operation of immigration controls. HO said that carriers that have been issued with an Intra EEA IS72 would be providing API, but the converse did not necessarily hold, ie not all carriers providing API would have been served with an Intra EEA IS72. As matters stood, passengers could not tell with any degree of certainty which carriers/ routes provide API and which do not.

31. HO said that the report (at paragraph 5.14) stated that France and Germany did not authorise the collection and transmission of API data. However, it did not follow that anyone wishing to avoid API data transmission already knew what routes to avoid as inference (whether accurate or not) that routes from those two countries were not covered by API transmission was not the same as being told exactly which carriers had been issued with an Intra EEA IS72. The reference to France and Germany provided no information about carriers and routes from other countries, whereas the list certainly did. HO said that the list of carriers provided specific and detailed information that was not in the public domain.

32. The Commissioner has seen that disclosure of the withheld information would provide passengers with a greater degree of certainty than they currently have about which carriers and routes do, and do not, provide API. He accepted HO's evidence that providing the public with greater certainty - which disclosure would do - would prejudice immigration controls. He therefore decided that the section 31(1)(e) exemption was engaged.

Public interest arguments in favour of disclosing the information

33. The complainant said that passengers had a right to know how their data was being used and added that HO would not gain public trust by acting surreptitiously. HO said that it would not necessarily dismiss the argument that, in principle, passengers should have a right to know whether API data is being transmitted.

34. The Commissioner considers that factors in favour of disclosing the requested information include the need for greater transparency and accountability and, in this case, enhancing the public's understanding of, and confidence in, the operation of immigration controls.

Public interest arguments in favour of maintaining the exemption

35. The complainant accepted that the advance transmission of passenger data served a very useful purpose in the fight against serious crime.

36. HO said that the fact that some member states did not mandate the collection and processing of API only strengthened the case for

withholding the information. Any disclosed information, together with other information already in the public domain, would make it easier for individuals who so wished to circumvent any immigration checks. Undermining the operation of immigration controls in this way would not be in the public interest; there would be prejudice to HO's capacity to enforce the law.

37. HO said that, where some routes involved the transmission of API data and others did not, then disclosing the information would tend to defeat the object of API by providing a means of avoiding it thereby damaging the effectiveness of this aspect of border control.

Balancing the public interest arguments

38. The Commissioner has considered the balance of the public interest arguments. He must decide whether or not it is in the public interest for the requested information to be disclosed to the general public rather simply to the complainant.

39. The Commissioner recognises the strong public interest in knowing about the level of checks carried out at UK borders. However, he considers that this public interest has already largely been met by publication of the report.

40. The Commissioner found that the weighty public interest arguments in favour of disclosure are outweighed by the greater public interest in not disclosing information which would help those who might wish to evade API transmission and the related border controls.

Other matters

41. The complainant requested an internal review on 14 November 2013 but HO did not provide the review until 7 January 2014. The time taken was too long and was not in accordance with the code of practice established under section 45 FOIA.

Right of appeal

42. 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

43. 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.

44. 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
Deputy Commissioner and Director of Freedom of Information

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