

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2017

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

Decision (including any steps ordered)

1. The complainant has requested information about imaging scanners. The Home Office provided some information and withheld the rest under sections 31(1)(a) (prevention or detection of crime), (b)(apprehension or prosecution of offenders), (e) (the operation of immigration controls) and 21 (information accessible by other means) of FOIA.
2. The Commissioner's decision is that the Home Office has applied sections 31(1)(a),(b) and (e) of FOIA appropriately. However, the Commissioner considers that the Home Office has breached sections 10 (time for compliance) and 17 (refusal of a request) of FOIA.
3. The Commissioner does not require the Home Office to take any further steps as a result of this decision.

Request and response

4. On 14 May 2016 the complainant wrote to the Home Office (HO) and requested information in the following terms:

"1. The number of fully-lorry passive millimetre wave imaging scanners currently in the possession of the UK's Border Force

2. The UK Border Force Resource budget in £ millions, for the years 2014/15 and 2015/16."
5. The HO responded on 22 August 2016. It applied sections 31(1)(a) (prevention or detection of crime) (b) (apprehension or prosecution of offenders) and (e) (immigration controls) to the first part of the request. With regard to the second part of the request, it explained that the

government publishes the budget for Border Force as part of the Estimates process each year as well as the final outturn figures in the published annual accounts. The HO also explained that these were available on both the Government. uk and Home Affairs Select Committee websites. In addition, it also explained that section 21 (information accessible by other means) of FOIA exempted it from having to provide this information as it was already reasonably accessible to him. However, it explained that for ease of reference it would provide the budget for Border Force in each of 2015/16 and 2014/15 to him. It also provided the complainant with links to further information.

6. Following an internal review the HO wrote to the complainant on 8 November 2016, upholding its original decision.

Scope of the case

7. The complainant contacted the Commissioner on 16 December 2016 to complain about the way his request for information had been handled. He explained that the information had previously been provided in a written answer to a Parliamentary question and that the number of scanners could not in itself harm law enforcement. The complainant did not complain about the HO's response to the second part of his request, therefore the Commissioner will not consider that part of the request any further, including the HO's reference to section 21 of FOIA.
8. The Commissioner will consider the HO's application of section 31 of FOIA and how it dealt with the request.

Reasons for decision

Section 31 – Law enforcement

9. Sections 31 (1)(a),(b) and (e) of FOIA state that:

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

- (a) the prevention or detection of crime
- (b) the apprehension or prosecution of offenders
- (e) the operation of immigration controls".

10. Section 31 is a prejudice based exemption. In order to be engaged, the following criteria must be met:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- it is necessary to establish that the level of likelihood of prejudice being relied upon by the public authority is met – ie whether disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

11. The relevant applicable interests cited in this exemption are the prevention or detection of crime, the apprehension or prosecution of offenders and the operation of immigration controls.

12. When considering the second point the Commissioner must be satisfied that the nature of the prejudice is "*real, actual or of substance*" and not trivial or insignificant. She must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.

13. The HO acknowledged that the number of scanners in operation in 2014 had been disclosed in a written Parliamentary answer. However, it argued that as things stand, the world at large, including anyone involved in people smuggling or intending to attempt to enter the UK illegally, do not know whether the number of scanners has increased since then or not.

14. The HO explained that providing a figure subsequent to the Parliamentary answer would also enable comparison as to whether Border Force's operational capability in this area has decreased, stayed the same or increased. It argued that in itself, this would provide useful information to anyone intent on trying to enter the UK by this means or in trafficking clandestine migrants by means of HGVs.

15. The HO also acknowledged that providing the figure itself would not provide information on where the scanners might be located. It explained that the prejudice that would be caused was not a matter of individuals directly identifying ports - it related to the exposure of the limits of Border Force's detection technology, which would expose tactical vulnerabilities.

16. Furthermore, the HO explained that information about the effectiveness of these detectors could be obtained from public sources. It explained that knowing the number of detectors used to cover all Roll On-Roll Off (Ro-Ro) ferry routes into the UK could enable someone with open source-derived knowledge of all Border Forces locations, to deduce that these detectors were most likely to be placed in ports handling high volumes of Ro-Ro. It also argued that this knowledge would enable such individuals to monitor other lower volume ports to confirm whether the equipment was being used and to target those ports and routes for movement of clandestine entrants and/or prohibited items.
17. In addition, the HO argued that anybody involved in people smuggling or intending to attempt to enter the UK illegally, would therefore avoid such routes and use alternatives where they could be reasonably confident that scanners would not be in operation. The HO pointed out that this would make it more likely that any attempt to gain entry or smuggle people would be successful.
18. With regard to the third point, the HO explained that disclosure of the requested information would prejudice the detection of crime, the apprehension or prosecution of offenders and the operation of the immigration controls by providing assistance to those who would try to enter the UK by these means or encourage or arrange for others to do so. It also explained that Border Force could adopt a countermeasure of moving some the detectors around, but that in itself would mean that the disclosure of information had caused prejudice.
19. Taking everything into account, the Commissioner is satisfied that the disclosure of the requested figures would prejudice the prevention or detection of crime, the apprehension or prosecution of offenders and the operation of immigration controls.
20. As section 31 is a qualified exemption, it is also subject to the public interest test ie: the public interest in maintaining the exemption must outweigh the public interest in disclosure of the requested information.

Public interest arguments in favour maintaining the exemption

21. The HO argued that the public interest in maintaining sections 31(1)(a), (b) and (e) outweighed the public interest in disclosure.
22. It explained that disclosing the number of scanners in operation could assist persons seeking to entry the UK illegally, to deduce how successful they could be and whether they would be detected or not.
23. The HO also argued that disclosure of the information could provide potential offenders with information about security checks at the ports. It explained that individuals could be at an advantage by knowing whether there were lower or higher presence of security and target

locations where they believe they could be more likely to evade detection.

24. In addition, the HO explained that the FOIA is applicant-blind, which meant that it could not ask a requester why they wanted the requested information. In turn, this meant that if it provided the information to one person it would be expressing a willingness to provide the same information to anyone else, including those who might represent a threat to the UK.

Public interest arguments in favour of disclosing the requested information

25. The HO acknowledged that there is a general public interest in transparency in government, which serves to increase public trust. It also acknowledged the public interest in operational activities, in this case the image scanning of lorries, carried out by border force officials.
26. In addition, the HO also acknowledged that disclosure would result in greater transparency and accountability regarding operational matters at ports and that this would enhance the understanding of Border Force operations at ports of entry. It also explained that disclosure would enable the public to see the effectiveness of the Border Force in apprehending potential offenders and criminals. Additionally, the HO acknowledged that disclosure would therefore increase public confidence and offer reassurance that there are effective and sufficient security measures in place to safeguard the UK.
27. The complainant pointed out that the HO had acknowledged the public interest in operational activities in this case, the imaging scanning of lorries. He argued that this was borne out by stories appearing regularly in the media regarding the arrival of illegal immigrants in England. He pointed to an example concerning illegal immigrant being smuggled into the UK in Lidl lorries.
28. The complainant argued that it appeared that the HO wished to hide how few scanners there are currently in operation so as to "maintain the lie that the Border Force is in control of the situation". Furthermore, the complainant argued that the public had right to know whether the government claims of being in control of illegal immigration should be trusted or not.

Balance of the public interest arguments

29. The Commissioner has considered the public interest arguments from both parties, including the public interest in transparency.
30. The Commissioner notes that the complainant has pointed out that the number of detectors in use in 2014 was disclosed in a written parliamentary answer. She considers that answering a Parliamentary question is a different process to disclosing information to the world at large, under the FOIA. The Commissioner does not consider that this means that the present figure should automatically be disclosed under FOIA.
31. The Commissioner accepts the complainant's argument that there is a public interest in knowing whether the government's claims regarding being in control of illegal immigration should be trusted or not. However, the Commissioner also accepts the HO's explanation about FOIA being applicant blind, meaning that a public authority cannot ask a requester why they want the information. She also accepts the HO's argument that people who might represent a threat to the UK would have access to any information disclosed under FOIA.
32. The Commissioner also notes the HO's explanation to her that information about the effectiveness of these detectors could be obtained from public sources. She considers this goes some way to satisfying the public interest.
33. The Commissioner considers that appropriate weight must be given to the public interest inherent in the exemption; that is, the public interest in avoiding prejudice to the prevention or detection of crime, apprehension or prosecution of offenders or the operation of immigration controls by the HO. The Commissioner considers that it is clear that there is a very substantial public interest in avoiding that prejudice and that this is a strong public interest factor in favour of maintaining the section 31 exemption.
34. The Commissioner has weighed the public interest in avoiding the prejudice to the prevention or detection of crime, apprehension or prosecution of offenders or the operation of immigration controls, against the public interest in the openness and transparency of the HO and the complainant's arguments regarding disclosure. Her conclusion is that the public interest in avoiding these prejudices is a strong factor and so considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Conclusion

35. Taking all of the above into account, the Commissioner is satisfied that sections 31(1)(a), (b) and (e) have been applied appropriately in this case and that the public interest in maintaining the section 31 exemption outweighs the public interest in disclosure.

Procedural issues

36. The complainant submitted his request on 14 May 2016 and the HO responded on 22 August 2016, citing exemptions.

Section 10 – Time for compliance

37. Section 10(1) requires that the public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt.
38. The Commissioner considers that the HO has breached section 10(1).

Section 17 – refusal of a request

39. Section 17(1) states that if a public authority wishes to refuse any part of a request it must issue a refusal notice within the 20 working day time for compliance, citing the relevant exemptions.
40. The Commissioner considers that HO has breached section 17(1) as it took longer than 20 working days to respond to the complainant, citing the relevant exemptions.

Right of appeal

41. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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

Jon Manners
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