

Decision notice

Date: 22 August 2018

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

Decision (including any steps ordered)

1. The complainant has requested information regarding deportations. The Home Office disclosed some information and withheld the remainder under sections 31(1)(c) and (e) (law enforcement), 38(1)(a) and (b) (health and safety) and 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the Home Office has not applied sections 31(1)(c) and (e), 38 (1)(a) and (b) or 40(2) of the FOIA appropriately. The Commissioner also considers that the Home Office has breached sections 10(1) (time for compliance) and 17(1) and (3) (refusal of a request) of the FOIA.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information in relation to question 3 of the request for information.
4. The Home Office 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.

Background

5. On 28 March 2017 a flight bound for Nigeria and Ghana was prevented from taking off from Stansted airport due to activists who chained themselves to the runway.
6. At the time of the request for information, there was an ongoing criminal trial regarding this. The judge had not decided what information should be disclosed by both the prosecution and the defence.

Request and response

7. On 7 July 2017, the complainant wrote to the Home Office (HO) and requested information in the following terms:

*"1. Please confirm how many individuals scheduled to be on the charter flight bound for Nigeria and Ghana leaving from Stanstead Airport on 28-3-17 have since submitted fresh asylum applications?
2. If the answer I to (1) is one or more, please confirm if any of these applications have since been successful?
3. Please confirm how many individuals scheduled to be on the charter flight bound for Nigeria and Ghana leaving from Stansted Airport on 28-3-17 have since been referred into the National Referral Mechanism for identification of victims of trafficking?"*

8. The HO responded on 7 August 2017. It explained that it was considering applying section 31(1)(e) (operation of immigration control) but needed further time to consider the public interest arguments. It provided an estimated date for its full response of 1 September 2017.
9. On 23 August 2017 the HO wrote to the complainant apologising for the delay.
10. On 16 November 2017 the complainant requested an internal review regarding the length of time taken by the HO to provide her with a full response.
11. On 22 November 2017 the HO responded to the complainant, acknowledging that it had breached section 10 (time for compliance). It also confirmed that her request was under active consideration, but that it could not provide a date for its final response.
12. On 6 December 2017 the HO provided a full response. It answered the first two questions, but withheld information in relation to question 3 citing the following exemption:

section 40(2) – personal information.

13. The HO also explained that it has obligations under the Data Protection Act 1998 (the DPA) and in law generally to protect personal data. Additionally, it explained that it had concluded that the requested information on referrals to the National Referral Mechanism was exempt from disclosure under section 40(2) because of the condition under section 40(3)(a)(i). This exempts personal data if disclosure would contravene any of the data protection principles in Schedule 1 of the DPA.
14. Following an internal review the HO wrote to the complainant on 6 February 2018, upholding its application of section 40(2) to question 3 of the request.

Scope of the case

15. Initially, the complainant contacted the Commissioner on 10 September 2017 to complain about the HO's non-response to her request. The Commissioner contacted the HO about this and it responded to the complainant on 6 December 2017.
16. The complainant contacted the Commissioner again on 8 February 2018 and explained that she did not agree with the HO's application of section 40(2) to question 3 of her request.
17. During the Commissioner's investigation, the HO explained that it was also relying on the following additional exemptions:
 - section 31(1)(c) – administration of justice;
 - section 31(1)(e) – operation of immigration control;
 - section 38(1) – health and safety.
18. In relation to section 31(1)(c) the complainant explained that there was a court case relating to the incident in question. She also explained that she considered that the requested information would not prejudice that court case. In addition, she explained that to the extent that the answer could possibly be relevant, it goes to the question of the defendants' motivations. The complainant also explained that there was a strong public interest argument for the HO to disclose the requested information as she considered that there was evidence that it was deporting people unlawfully and that the requested information would support this case. The complainant explained that her request was linked to an action that she and others were part of, where they stopped a deportation flight by blocking the plane and 'locking on' around the wheel. She also explained that the trial was adjourned until October.

19. During the Commissioner's investigation the HO confirmed that it considered that section 31(1)(c) was the lead exemption.
20. The Commissioner will consider the HO's application of exemptions to question 3 of the request ie: *"Please confirm how many individuals scheduled to be on the charter flight bound for Nigeria and Ghana leaving from Stansted Airport on 28-3-17 have since been referred into the National Referral Mechanism for identification of victims of trafficking?"*
21. She will also consider how the HO has dealt with this request, including the length of time taken to deal with it.

Reasons for decision

22. The Commissioner notes that the HO has applied the same arguments in relation to both sections 31(1)(c) and (e).

Section 31 – Law enforcement

23. Sections 31(1)(c) and (e) provide 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-

- (c) the administration of justice
- (e) the operation of the immigration controls."

24. This is a qualified exemption and is subject to the public interest test.

25. 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 whether the level of likelihood of prejudice being relied upon by the public authority is met – ie

disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

Section 31(1)(c) and (e)

26. The relevant applicable interests cited in this exemption are the administration of justice (section 31(1)(c)) and the operation of immigration controls (section 31(1)(e)).
27. 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.
28. The HO explained that the flight in question has been subject to a huge amount of media attention because it was prevented from taking off due to a number of activists who chained themselves to the runway and lay on the tarmac for over 10 hours. The activists in question are known as the 'Stansted 15' and the media attention continues as the criminal trial relating to this incident, draws nearer. It also explained that within the press reports of the incident there are several quotes from deportees on the flight about their fears if returned to Ghana and Nigeria. The HO also explained that it understood that other passengers and activists had also provided details about that day.
29. Additionally, the HO explained that the requester has made three requests for information about the individuals who were listed to be on the flight, each one seeking more details (general numbers, types of cases, outcomes). It confirmed that it has been widely reported that the number of individuals scheduled to be removed was 51.
30. The HO also explained that the judge has yet to rule on what information should be disclosed by either side. It also provided the Commissioner with confidential arguments, which are set out in a confidential annex.
31. The Commissioner has published guidance regarding section 31¹. In relation to section 31(1)(c), she explains that the administration of justice is a broad term and applies to the justice system as a whole. She

¹ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

also explains that amongst other interests, the exemption will protect information if its disclosure would undermine particular proceedings.

32. The Commissioner has considered the HO's arguments, including those contained in the confidential annex of this decision notice, in relation to its application of section 31(1)(c). She notes that there is a criminal trial and that the judge is considering what information should be disclosed by both parties. She notes that the judge will be deciding what information should be disclosed for the purposes of the trial; the Commissioner considers that even if the complainant had the withheld information, it could not be used in the trial unless the judge sanctioned it. However, she does not consider that the HO has demonstrated a causal relationship between the potential disclosure of the withheld information (a number) and the prejudice which the exemption is designed to protect - the administration of justice.
33. In relation to section 31(1)(e) the guidance explains that this exemption will be engaged if disclosure would, or would be likely to, prejudice physical immigration controls at points of entry into the United Kingdom. The Commissioner considers that this exemption could also protect information about issuing and approving work permits and the processing of asylum applications.
34. The Commissioner has considered the HO's arguments as set out in paragraphs 28-30 and the arguments contained in the confidential annex, in relation to its application of section 31(1)(e). She notes the HO has confirmed that within the press reports of the incident there are several quotes from deportees on the flight about their fears if returned to Ghana and Nigeria. However, the Commissioner considers that the HO has not demonstrated a causal relationship between the potential disclosure of the withheld information and the prejudice which the exemption is designed to protect - the operation of immigration controls.
35. The Commissioner considers that the HO has had sufficient opportunity to demonstrate the required causal link. Its arguments should have been in place since the initial response and internal review. During this investigation the HO was informed that it has one opportunity to justify its position and was provided with guidance on how the Commissioner handles complaints².
36. As the Commissioner is not satisfied that the HO has demonstrated a causal relationship between the potential disclosure of the information

² http://www.ico.org.uk/for_organisations/freedom_of_information/guide.aspx

being withheld and the prejudice the exemption is designed, she does not consider that sections 31(1)(c) or 31(1)(e) are engaged.

37. The Commissioner will therefore not consider the public interest test in relation to these exemptions.
38. The Commissioner will go on to consider the HO's application of sections 38(1)(a) and (b).

Section 38 – health and safety

39. Section 38(1)(a) and (b) of the FOIA provides that:

“Information is exempt information if disclosure under this Act would, or would be likely to

- (a) endanger the physical or mental health of any individual or,
- (b) the safety of any individual.”

40. This is a qualified exemption and is therefore subject to the public interest test.
41. As section 38 is a prejudice-based exemption, in order to be engaged it must meet the criteria set out in paragraph 25.
42. The relevant applicable interests cited in this exemption are physical or mental health (section 38(1)(a)) or the safety of any individual (section 38(1)(b)).
43. 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 be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
44. The HO argued that in the event that individuals were identified, the information would be considered valuable by criminal enterprises involved in modern day slavery who may wish to identify victims who have escaped their enterprise to recover ‘debts’ or cause further harm. Additionally, the HO argued that this increased exposure into the public domain would be easily spotted by criminal enterprises and could bring the identities of the individuals to light, if reported.
45. Furthermore, the HO argued that by giving those who seek to traffic individuals to the UK information that may help locate the individuals in question, it would not only compromise their physical safety but also endanger their mental health. The HO also argued that if these individuals feared that they may not have reached a safe haven in the

UK and worried that their identities and location would be exposed, this would cause even further distress.

46. The Commissioner has published guidance regarding section 38³. She explains that the term 'endanger' should be interpreted in the same way as the term 'prejudice' in other exemptions of the FOIA. The Commissioner also explains that she considers that the focus of section 38 is on information that might pose a risk if disclosed, including:
- Any plans or policies relating to the accommodation of individuals, or groups of individuals where disclosure could lead to them being threatened or harassed (for example asylum seekers, ex-offenders).
47. In relation to section 38(1)(a), the Commissioner explains that endangering physical health usually means an adverse physical impact and often involves medical matters; this can relate to individuals or groups. The Commissioner also considers that endangering mental health implies that the disclosure of information might lead to a psychological disorder or make mental illness worse. This means that it has a greater impact than stress or worry.
48. The Commissioner has considered the HO's arguments regarding if individuals were identified, the information would be considered valuable by criminal enterprises involved in modern day slavery who may wish to identify victims who have escaped their enterprise to recover 'debts' or cause further harm. She also notes the HO's argument that this increased exposure into the public domain would be easily spotted by criminal enterprises and could bring the identities of the individuals to light if reported.
49. The Commissioner also notes that the HO has argued that if the individuals concerned feared that they may not reach a safe haven and their identities and location was exposed, this would cause even further distress.
50. However, the Commissioner notes that the main thrust of the HO's arguments relate to the individuals concerned being identified. In her guidance the Commissioner explains she considers that information involving living individuals will be covered by section 40 (personal information) rather than section 38.

³ <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

51. Additionally, as explained above, the Commissioner considers that the focus of section 38 is on information that might pose a risk if disclosed. The Commissioner does not consider that the HO has demonstrated a causal relationship between the potential disclosure of the withheld information and the prejudice which the exemption is designed to protect, ie the physical or mental health of any individual.
52. In relation to section 38(1)(b), the Commissioner notes the HO's argument that disclosure would compromise the physical safety of the individuals. However, as noted above, the Commissioner considers that the main thrust of the HO's arguments relate to the individuals concerned being identified. The Commissioner notes that the HO has referred to the physical safety of the individuals concerned. However, she considers that it has failed to demonstrate a causal relationship between the potential disclosure of the withheld information and the prejudice which the exemption is designed to protect, ie the safety of any individual.
53. As stated in paragraph 35, the HO has had sufficient opportunity to demonstrate the required causal link.
54. Given that the Commissioner's view is that the HO has not demonstrated any causal relationship between the potential disclosure of information and the prejudiced which section 38 is designed to protect, she considers that section 38(1)(a) and (b) are not engaged. She will therefore not go on to consider the public interest test.
55. The Commissioner will go on to consider the HO's application of section 40(2).

Section 40 – personal information

56. Section 40 (2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and its disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).

Is the information personal data?

57. The definition of personal data is set out in section 1 of the DPA:

" ...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any

indication of the intention of the data controller or any other person in respect of the individual."

58. The two main elements of personal data are that the information must 'relate' to a living individual and the individual must be identifiable. Information will relate to an individual if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
59. In this case, the HO told the complainant that it considered that the number of individuals was exempt from disclosure under section 40(2), by virtue of section 40(3)(a)(i).

Is the withheld information personal data?

60. As explained above, the first consideration is whether the withheld information is personal data. The information requested is the number of individuals scheduled to be on the charter flight bound for Nigeria and Ghana leaving from Stansted Airport on 28-3-17 who have since been referred into the National Referral Mechanism for identification of victims of trafficking.
61. The Commissioner's guidance on what is personal data⁴ states that of information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.
62. The information in this case does not directly identify individuals. However, just because the name of an individual is not known, does not mean that an individual cannot be identified. The guidance states:

"A question faced by many organisations, particularly those responding to Freedom of Information requests, is whether, in disclosing information that does not directly identify individuals, they are nevertheless disclosing personal data if there is a reasonable chance that those who may receive the data will be able to identify particular individuals."
63. The guidance also states:

"The starting point might be to look at what means are available to identify an individual and the extent to which such means are readily available. For example, if searching a public register or reverse directory

⁴ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

would enable the individual to be identified from an address or telephone number, and this resource is likely to be used for this purpose, the address or telephone number data should be considered to be capable of identifying an individual.

When considering identifiability it should be assumed that you are not looking just at the means reasonably likely to be used by the ordinary man in the street, but also the means that are likely to be used by a determined person with a particular reason to want to identify individuals. Examples would include investigative journalists, estranged partners, stalkers, or industrial spies.”

64. In this case, the HO explained to the Commissioner that it considered that the withheld number of individuals referred to the National Referral Mechanism was personal data as it related to living individuals who could be identified from the data and other information which was in the public domain or could be obtained. It explained that it considered that this information was available to the requester and other individuals.
65. The Commissioner notes that the HO explained, in relation to sections 32(1)(c) and (e), that this case has been subject to huge media attention. She also notes the HO's explanation that contained within press reports regarding the incident, there are several quotes from passengers (deportees) who were on the flight about their fears if returned to Ghana and Nigeria and that it also understood that other passengers and activists had also provided details about that day.
66. The Commissioner explained to the HO that in this case, she considered that whether the number of referrals would disclose personal data would depend on what information was reasonably likely to come into the possession of someone, such as the requester and the Stanstead 15 defence teams, which in combination with the number of referrals, would identify the individuals referred. She asked to HO to explain what types of information could be available to assist in the identification of the individuals, if the number of referrals was known.
67. The HO explained that the types of information the complainant/ Stansted 15 would have to cross reference with volumes would include but not be limited to: names, dates of birth, nationality, gender, of all individuals scheduled to depart on the charter. The HO also explained that in addition they would have details of immigration history including types of applications previously made, immigration status and the details of family members for some individuals. It argued from this and by process of elimination, the complainant/Stansted 15 would be able to cross reference volumes with case types and identify the individuals in each immigration category.

68. The Commissioner has considered the HO's arguments, including the confidential one contained in the confidential annex. She has also considered the arguments the HO made in relation to section 38 regarding the identity of the individuals if the requested information was disclosed.
69. The Commissioner accepts that the complainant could be considered to be a motivated individual, as she has asked for this specific information and has explained that it could go the motivation of the defendants. She also notes that the HO has explained that the complainant/Stansted 15 would have to cross reference information.
70. However, the Commissioner considers that the HO has not sufficiently demonstrated how disclosing the withheld number would lead to the identification of the specific individuals concerned. It has not demonstrated how cross referencing and the process of elimination would lead to identification of individuals.
71. Taking everything into account, the Commissioner does not consider that the withheld constitutes personal data. She does not consider that section 40(2) is engaged and therefore has not gone on to consider the condition under section 40(3)(a)(i).
72. Given that the Commissioner does not consider that any of the exemptions cited are engaged, she considers the HO should disclose the withheld information in relation to question 3 should be disclosed to the complainant.

Procedural issues

73. The complainant submitted her request on 7 July 2017. The HO provided its full response on 6 December 2017.

Section 10 – time for compliance

74. Section 10(1) of the FOIA 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.
75. The Commissioner is extremely concerned that it took the HO approximately 5 months to provide the complainant with its full response. She therefore considers that it has breached section 10(1) as it took the HO substantially longer than 20 working days to respond to the request.

Section 17 – refusal of a request

76. Section 17(1) of the FOIA 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.
77. The Commissioner is extremely concerned that it took the HO approximately 5 months to inform the complainant which exemption it was relying on. She further notes that during her investigation, the HO cited additional exemptions it was also relying on.
78. Section 17(3) of the FOIA allows a public authority to extend its consideration of the public interest for a reasonable period of time if necessary. The Commissioner considers that this should normally be no more than an extra 20 working days, which is 40 working days in total to deal with the request. Any extension beyond this time should be exceptional and the public authority must be able to justify it.
79. On 7 August 2017 the HO responded to the complainant's request. Although it cited section 31(1)(e), it explained that it needed further time to consider the public interest test. As set out above, the HO provided the complainant with its full response on 6 December 2017. However, it did not provide any exceptional circumstances in relation to the length of time taken to consider the public interest test.
80. The Commissioner therefore considers that the HO has breached section 17(3).

Right of appeal

81. 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

82. 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.
83. 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

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