

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2019

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

Decision (including any steps ordered)

1. The complainant requested information from the Home Office about Border Force staffing levels in Northern Ireland during a specified two year period.
2. The Home Office confirmed it held information within the scope of the request but refused to provide it, citing sections 31(1)(a) and (e) (law enforcement) of the FOIA.
3. The Commissioner's decision is that the Home Office was entitled to rely on sections 31(1)(a) and (e).
4. No steps are required as a result of this decision.

Request and response

5. On 8 February 2018, the complainant wrote to the Home Office and requested information in the following terms:

"Under the Freedom of Information Act I am seeking all held records on Border Force staffing levels for Northern Ireland since May 2016".
6. The Home Office responded on 5 March 2018 and refused to provide the requested information, citing the following exemptions:
 - section 31(1)(a) and (e) (law enforcement).

7. Following an internal review the Home Office wrote to the complainant on 2 July 2018 maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 9 August 2018 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the Home Office confirmed that it was relying on sub-sections (a) and (e) of section 31 to withhold the requested information. It also confirmed that it considered that both sub-sections applied equally to all the withheld information.
10. The analysis below considers the Home Office's application of section 31 of the FOIA to the requested information.

Reasons for decision

Section 31 enforcement

11. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. In this case the Home Office considers that sections 31(1)(a) and (e) apply. Those sections state:

"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,

...

(e) the operation of the immigration controls..."

12. Consideration of this exemption involves two stages. First, 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. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility: rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.
13. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

The applicable interests

14. Covering first whether the exemption is engaged, the relevant applicable interests cited in this exemption are the prevention or detection of crime and the operation of the immigration controls.
15. In correspondence with the complainant, the Home Office explained:
- "In providing a response to one person, we are expressing a willingness to provide the same response to anyone, including those who might represent a threat to the UK".*
16. It further explained that providing Northern Ireland staffing numbers:
- "...could provide potential criminals with details of the resources deployed there".*
17. In that respect it told him:
- "... the disclosure of the requested information regarding the Border Force staffing levels for Northern Ireland could provide potential offenders with insight into the operation and capabilities of UK borders. This would allow potential offenders (including terrorist organisations) to utilize this information in circumventing immigration controls and could allow a picture to be built up of the perceived effectiveness of resource allocations".*
18. The Commissioner is satisfied that the prejudice the Home Office is envisaging in this case is relevant to the particular interests that the exemption is designed to protect.

The nature of the prejudice

19. The Commissioner next considered whether the Home Office demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that sections 31(1)(a) and (e) are designed to protect. In her view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.

20. In its correspondence with the complainant, albeit in relation to the public interest test, the Home Office told him that disclosure in this case:

"... would provide useful information, especially to organised criminals about the operational capability deployed to safeguard our UK borders...."

21. It told him:

"This insight could be used by individuals with criminal intent to make an assumption on the reliability of the checks in place".

22. In its submission to the Commissioner, the Home Office said:

"The prejudice is not limited to just Northern Ireland, but to the whole of the UK's borders".

23. In support of its arguments, the Home Office told her:

"When port or location specific information is refused under the FOIA, the arguments cited are linked to what we call the 'mosaic effect'".

24. It referred the Commissioner to other cases in which 'the mosaic effect' had been considered and accepted. It told her:

"The mosaic effect can apply to a variety of situations; from the number of individuals stopped at a particular port, to the number of seizures of a particular substance or item. In this context, it applies to staffing levels and the deployment of resources for one area in particular".

The likelihood of the prejudice occurring

25. With respect to the likelihood of prejudice occurring, in its correspondence with the Commissioner the Home Office confirmed that disclosure *would be likely* to prejudice law enforcement.

Is the exemption engaged? Would disclosure be likely to prejudice law enforcement?

26. The information withheld by virtue of this exemption comprises Northern Ireland Border Force staffing levels during a specific time period.
27. The Home Office's arguments concern the provision of information to potential offenders about resources deployed within a specified border area during a particular timeframe.
28. The Commissioner also recognises that the Home Office's argument is not only that disclosure of the requested information would, on its own, prejudice law enforcement capability, but that disclosure of such information over a period of time and in relation to other locations, would allow a wider picture to be built up.
29. The Commissioner's published guidance on section 31¹ recognises that the prejudice test is not limited to the harm that could be caused by the requested information on its own. Her guidance states:

"Account can be taken of any harm likely to arise if the requested information were put together with other information. This is commonly known as the 'mosaic effect'".
30. The Commissioner considers that the Home Office was correct to consider the possibility of a mosaic effect – ie that the disclosure of location specific information could be combined with other information already in the public domain, or with information the authority could be forced to reveal subsequently, if the current request was complied with.
31. Having duly considered the arguments put forward by the Home Office, and having viewed the withheld information, the Commissioner is satisfied that the arguments are relevant to section 31(1)(a) and (e).
32. She is also satisfied that there is more than a hypothetical or remote possibility of prejudice occurring if the withheld information were to be disclosed.
33. Consequently, she is satisfied that its disclosure would be likely to represent a real and significant risk to law enforcement.
34. Accordingly, the Commissioner accepts that, in the circumstances of this case, the lower threshold of likelihood is met.

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

35. As the Commissioner accepts that the outcome of disclosure predicted by the public authority would be likely to occur she is therefore satisfied that the exemption provided by sections 31(1)(a) and (e) is engaged.

Public interest

36. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

37. In support of disclosing the requested information the complainant told the Home Office that he was seeking an internal review:

"... on the basis that I believe the information sought to be in the public interest".

38. He did not provide any further explanation as to why he considered the information to be in the public interest.

39. The Home Office recognised that there is:

"...a general public interest in openness and transparency in all aspects of government".

40. In correspondence with the complainant, the Home Office acknowledged the public interest in the public being informed of the staffing levels in Northern Ireland. It told him:

"The release of information would help raise public awareness and aid the debate about the resources in place to safeguard and enhance the experience of the travelling public. There is also a public interest in ensuring confidence in the United Kingdom's border control. This would help build greater public confidence in the operational procedures in place in Northern Ireland ports."

Public interest arguments in favour of maintaining the exemption

41. In favour of maintaining the exemption, the Home Office told the complainant that providing the requested Northern Ireland staffing numbers:

"... could provide potential criminals with details of the resources deployed there. Revealing this information, along with other pieces of information obtained under FOIA would potentially allow criminals to build up a picture of the resources deployed in Northern Ireland in the last two years".

42. It argued that it was not in the public interest to disclose information that could impact on the abilities of the police and Border Force to protect the UK borders.
43. With reference to both limbs of the exemption which it considered apply in this case it told him:

"There is clearly a strong public interest in doing everything we can to detect and prevent crime and protect the public at large. Disclosing the requested information would not be in the public interest as it could impact on the abilities of the police and Border Force to protect the UK borders and ensure the lawful operation of the immigration controls".

44. Similarly, in its correspondence with the Commissioner, the Home Office said:

"It would not be in the public interest to disclose information which could provide potential criminals with details of the resources employed in Northern Ireland, which could along with other information, allow criminals to build up a picture of the overall structure of ports across the UK; and the resources deployed in Northern Ireland over the last two years".

45. With respect to the exemption at section 31(1)(e) it further argued:

"This insight could be used by individuals with criminal intent to make an assumption on the reliability of the checks in place. There is a strong public interest in not disclosing any information which would be likely to help individuals to circumvent the UK's immigration controls; not just in Northern Ireland but other locations as well".

Balance of the public interest arguments

46. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and the Home Office.
47. She accepts that it is important for the general public to have confidence in the UK's border control. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.
48. She also recognises that there is a very strong public interest in protecting the law enforcement capabilities of public authorities. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in

avoiding prejudice to the prevention or detection of crime and the operation of the immigration controls.

49. In this case, she recognises the strong public interest in protecting the UK's borders. In the context of this case, she recognises the public interest in preventing individuals – and organised gangs - intending to circumvent border controls from having access to information which could assist them in building a picture of the capabilities of UK borders.
50. Clearly, the disclosure of any information that would assist people to commit unlawful activities and circumvent immigration and customs controls would not be in the public interest.
51. Having given due consideration to the opposing public interest factors in this case, the Commissioner has concluded that the factors in favour of disclosure do not equal or outweigh those in favour of maintaining the exemption.
52. Accordingly the Commissioner is satisfied that sections 31(1)(a) and (e) of the FOIA were applied appropriately in this case.

Right of appeal

53. 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

54. 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.

55. 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

**Deborah Clark
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**