Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **28 January 2019**

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

Decision (including any steps ordered)

1. The complainant requested information relating to voluntary returns surgeries.

2. The Home Office refused to provide the requested information citing section 31(1)(e) (law enforcement – the operation of the immigration controls) of the FOIA.

3. The Commissioner's decision is that the exemption provided by section 31(1)(e) was not engaged.

4. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:

   - disclose the withheld surgery locations and host organisation names from the list of surgery names and addresses provided to the Commissioner.

5. 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

6. By way of background, the Home Office told the Commissioner:

> *"A voluntary surgery is one in which an overstayer or someone who has doubts about their immigration status can come and seek advice from an immigration officer in a safe environment".*

Request and response

7. On 9 April 2018, the complainant wrote to the Home Office and requested information in the following terms:

> *"… This email concerns the 'Immigration and Voluntary Returns' surgeries in the community that have been established in London, Birmingham, Manchester, Slough and other areas. Recently* [name redacted, role redacted] *at the Home Office, stated that there were at least 30 voluntary returns surgeries across the UK.*
>
> *I am hereby stating a claim to the Freedom of Information Act for the Home Office to release the locations - and the names of the organisations that are hosting the surgeries - of all the Immigration and Voluntary Returns surgeries across the country".*

8. The Home Office responded on 6 May 2018, refusing to provide the requested information and citing the following exemptions:

- section 31(1)(e) (law enforcement)
- section 43(2) (commercial interests).

9. Following an internal review the Home Office wrote to the complainant on 2 August 2018. It maintained its original position.

Scope of the case

10. The complainant contacted the Commissioner on 24 October 2018 to complain about the way his request for information had been handled.

11. During the course of her investigation, the Home Office wrote to the Commissioner advising that it no longer considered that section 43(2) applied. It did, however, confirm its application of section 31(1)(e).

12. The Home Office provided the Commissioner with a copy of the withheld information. The information in scope of the request was described as '*Surgery name*' and '*Address*'.

13. The analysis below considers the Home Office's application of section 31(1)(e) of the FOIA to the requested information.

Reasons for decision

Section 31 law enforcement

14. Section 31 of the FOIA creates an exemption from the right to know if releasing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.

15. In order to engage a prejudice based exemption such as section 31 there must be likelihood that disclosure would cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:

- first, the actual harm which the public authority alleges would, or would be likely to, occur if the disputed information was disclosed, has to relate to the applicable interests within the relevant exemption;
- secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the disputed information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance;
- thirdly, 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.

16. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

17. In this case, the Home Office is relying on section 31(1)(e) of the FOIA. This states that information is exempt if its disclosure would, or would be likely to, prejudice the operation of the immigration controls.

18. When requesting a review of its handling of his request, the complainant told the Home Office he found its reasons for refusing his request "*vague and unsatisfactory*".

19. The Commissioner considered that, in its correspondence with the complainant, the Home Office relied to a large degree on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis.

20. It was not until her investigation that the Home Office explained why it considered the exemption was engaged.

The applicable interests

21. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activity mentioned in section 31(1)(e) – in this case the operation of the immigration controls.

22. As noted above, in its correspondence with the complainant, the Home Office appears to have relied to a large degree on the requested material being self-evidently exempt, concentrating its analysis on the public interest factors.

23. However, in its submission to the Commissioner, the Home Office provided evidence in support of its view that disclosure would be likely to prejudice the operation of the immigration controls.

24. The Commissioner is satisfied that the prejudice the Home Office is envisaging in this case is relevant to the particular interest that the exemption is designed to protect.

The nature of the prejudice

25. The Commissioner next considered whether the Home Office demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 31(1)(e) is 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.

26. In its correspondence with the complainant, albeit in relation to the public interest test, the Home Office told him that disclosure of the information could damage and potentially undermine existing border controls.

27. Referring to the requested information as '*operationally sensitive*', the Home Office subsequently told him:

> *"It can be argued that once the information relating to the surgeries is disclosed, persons wishing to disrupt the voluntary returns process would have access to the locations and could thereby disrupt the operation. Disclosure of the location of the surgeries could lead to the organisation of protests around the surgeries in order to break down relations between the Home Office and other non-Governmental organisations who provide services for voluntary returns and thereby prejudice the operation of Immigration controls".*

28. Similarly, the Home Office told the Commissioner that disclosing a full list of surgeries and their locations would present a national picture:

> *"… and it would be likely that someone would be able to use this information to co-ordinate a programme of activity designed to cause disruption to the overall removal process. This in turn would prejudice the Home Office's ability to maintain and operate its immigration controls, notably the removal arm of that function".*

29. The Home Office told the Commissioner that there have been instances in the past where surgeries have been disrupted by protestors. In support of its argument it made reference to an incident in Manchester.

30. It also argued that disruption to the surgeries would be likely to deter third party stakeholders from working with the Home Office, making it harder for the Home Office to offer the individuals the option of a voluntary removal.

31. In it submission to the Commissioner, the Home Office acknowledged that information relating to individual surgeries:

> *"…is not sensitive on its own, as clearly those seeking to attend one of the surgeries need to know where they are. However, it is the information 'collectively' which would lead to the prejudice identified".*

The likelihood of prejudice

32. The Home Office considered that disclosure of the information *would be likely* to have the stated detrimental effect.

Is the exemption engaged? Would disclosure be likely to prejudice the operation of the immigration controls?

33. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual or of substance'.

34. As is her practice, during the course of her investigation the Commissioner asked the Home Office to revisit its handling of the request and to respond to her with respect to its application of the exemption. She also asked the Home Office to explain about voluntary returns surgeries, including how someone who wishes to attend a surgery knows when, and where they, are held.

35. The Home Office confirmed that voluntary return surgeries "*are held up and down the country*".

36. With regard to telling interested parties about a surgery, the Home Office told the Commissioner that national community engagement leads, who understand the needs of the community:

> *"… would disseminate the whereabouts of the surgery using local media, key stakeholders and advertising around the building it will be hosted in itself".*

37. It confirmed that the Home Office does not advertise the surgeries nationally:

> *"… as the surgery is intended for a specific area with a specific focus".*

38. It did, however, accept that if a charity who is hosting a surgery wants to advertise on the national stage:

> *"… then that is a choice they have made".*

39. In a case such as this, it is not enough for the information to relate to an interest protected by section 31(1)(e), its disclosure must also at least be likely to prejudice that interest. The onus is on the public authority to explain how that prejudice would arise and why it is likely to occur.

40. From the evidence she has seen, and having considered the arguments put forward by the Home Office in relation to the prejudice test, the Commissioner finds that the Home Office has failed to demonstrate that prejudice to the operation of the immigration controls is a real and significant likelihood as an outcome of disclosure.

41. It follows that the Commissioner finds that the Home Office has failed to establish engagement of the section 31(1)(e) exemption.

The public interest test

42. In light of the above finding, it has not been necessary to consider the public interest test.

Right of appeal

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43. 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

44. 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.

45. 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 .....

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF