

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2020

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

Decision (including any steps ordered)

1. The complainant has requested an equality impact assessment from the Home Office (the "HO"). The HO refused to disclose the information held, citing sections 31(1) (law enforcement) and 40(2) (personal information) of the FOIA.
2. The Commissioner's decision is that the HO was entitled to rely on section 31(1)(e) of the FOIA to withhold the requested information. No steps are required.

Background

3. The request to the HO refers to "Operation Skybreaker". According to an answered parliamentary question¹:

"Operation Skybreaker is a pilot approach to encourage greater compliance with the immigration rules in 10 pilot areas. Home Office Immigration Enforcement has intensified its local partnership engagement and sought to assist local businesses on how to conduct right to work checks on their employees."

¹ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2014-10-10/209312/>

The aim of the pilot approach is to test new ways of working and identify how best to reduce illegal immigration, which is bad for both British citizens and those who have come to this country legally.

This is a routine, local, operational matter and significant engagement has been undertaken with those involved in partnership working and the communities”.

4. Further official background information can be found online².

Request and response

5. On 22 May 2019 the complainant wrote to the HO and requested information in the following terms:

"I kindly ask you to release, under the Freedom of Information Act 2000, the Equality Impact Assessment that was carried out regarding an immigration enforcement pilot scheme codenamed 'Operation Skybreaker.' This was a pilot scheme that ran for a period of around 5 months, starting in July 2014, in the London boroughs of Brent, Ealing, Greenwich, Newham, and Tower Hamlets”.

6. The HO responded on 14 June 2019 and refused to provide the requested information citing the exemption at section 31(1)(e) of the FOIA.

7. Following an internal review, the HO wrote to the complainant on 14 August 2019. It maintained its position regarding section 31(1) and added reliance on section 40(2) (personal information) of the FOIA. It also further explained to the complainant:

"Immigration Enforcement, who provided the original response, have explained that the specific document you requested, the 'Equality Impact Assessment' (EIA), does not exist. Instead, there are 'Policy Equality Assessments' (PES) and Community Impact Assessments (CIA), which are in place of the EIA and these are the essentially the equivalent of the Equality Impact Assessment.

² <https://www.gov.uk/government/news/an-inspection-of-the-home-offices-approach-to-illegal-working>

The aim of these assessments was to focus on fostering good relations within the community and the intention was to demonstrate the necessity and proportionality of the operation. As the information contained within the assessments is considered operationally sensitive, Immigration Enforcement is withholding the information, for the reasons cited in the original response”.

Scope of the case

8. The complainant contacted the Commissioner on 18 September 2019, to complain about the way her request for information had been handled. She subsequently provided the following grounds of complaint:

“The grounds for my complaint relate to the way in which the Public Interest Test was applied in this case. It is not accepted that all of the data requested, and particularly the results of the Home Office's Policy Equality Assessment, are operationally sensitive. The proper objective of a Policy Equality Assessment is not, as the internal review response states, “to increase employer compliance with the immigration rules and...encourage voluntary returns” (Annex C, para 6), but rather to ensure that proposed policy does not cause discrimination. It is for the Home Office to explain why disclosing its assessment of the pilot scheme's compliance with equality law might prejudice the operation of immigration control”.

9. The complainant advised that she was happy to forego the disclosure of any names so the Commissioner has not further considered the application of section 40(2) of the FOIA to the request.
10. The Commissioner will consider the application of section 31(1) of the FOIA below.
11. The Commissioner understands that the relevant information in this case consists of a combination of a ‘Policy Equality Assessment (PES)’ and some ‘Community Impact Assessments (CIA)’, which the HO says it considers to be the ‘equivalent’ of what has been requested and therefore falling within the scope of the request.
12. The Commissioner has viewed the PES and a sample of the CIAs. Based on the detailed content of the CIAs viewed, she did not consider it necessary to view them all.

Reasons for decision

Section 31 – law enforcement

13. Section 31(1) 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(1) can be claimed by any public authority, not just those with law enforcement functions.
14. 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 is designed to protect. 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 whether 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.
15. Consideration of the exemption at section 31(1) of the FOIA 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.
16. In this case, the HO 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 immigration controls.

The applicable interest

17. Relying on a broad definition of the term '*immigration controls*', the Commissioner considers that the subject matter of the requested information - a pilot approach to encourage greater compliance with immigration rules - relates to the law enforcement activity that the exemption is designed to protect.

The nature of the prejudice

18. The Commissioner next considered whether the HO demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 31(1)(e) of the FOIA 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.
19. The HO advised the Commissioner as follows regarding the withheld information:

"The purpose of the documents/assessments is as follows:

Policy Equality Statement (PES)

- *'Policy' must be interpreted expansively and means any of the following: new and existing policy, strategy, services, functions, work programme, project, practice and activity - whether written, unwritten, formal or informal. It includes decisions about budgets, procurement, commissioning or de-commissioning services, allocating resources, service design and implementation.*
- *A PES is the tool for demonstrating that due regard has been had in the exercise of our functions and delivery of our services. Evidence must be gathered as the policy is developed, so that it can inform decisions about the proposal and its future.*

Community Impact Assessment (CIA)

A Community Impact Assessment (CIA) is a means of measuring the 'mood' (actual or anticipated) of any group of people as a result of an incident, event, or pattern which is likely to cause concerns or tensions. It is used to inform IE [Immigration Enforcement] and partnership interventions through the National Intelligence Model tasking and coordination process, pre, during, and post-event, to restore positive community relations to the area or group affected.

To explain the difference in numbers, the PES is produced at the start of the operation and sets out the scope of the operation and

the general areas of how the Home Office (i.e. Immigration Enforcement) will interact with the community. Subsequently, the CIA's are weekly live documents that contain any issues or concerns with regard to the operation and the impact on the community. The CIAs were a more detailed report on the individual impact the operation was having on the associated local communities. As the operation ran for 5 months, this accounts for the high volume of CIAs".

20. It also advised the Commissioner that:

"If the information requested were to be released, then it would be assisting those attempting to evade detection or those seeking to exploit individuals that are illegally present in the United Kingdom and part of the black-market economy. If it was known how Immigration Enforcement are operating and gathering intelligence, then those trying to avoid detection would know what areas are safer to operate in.

The information held within the community impact assessments focuses on the companies, businesses, faith groups and organisations we contacted within the scope of the operation, how they interacted with us and the proposed next steps to be taken by Immigration Enforcement. If this information were to be disclosed, not only would it prejudice our controls by giving an insight into how we operate, but it would place those we interacted with being ostracised by their community for having assisted Immigration Enforcement".

21. In its correspondence with the complainant, albeit in relation to the public interest test, the HO also explained that:

"The information gathered by Immigration Enforcement and provided by the London wards is considered to be operationally sensitive and it is considered that disclosure of these assessments could assist those engaged in criminal activities. The intention of carrying out the assessments was to increase employer compliance with the immigration rules, tackle illegal working and non-compliant landlords and encourage voluntary departures. It was provided in confidence and disclosure could – for example - lead to offenders getting an insight into how intelligence is gathered and adopt methods to avoid detection. It is also considered that disclosure of the sensitive operational information gathered could undermine the trust under which the various wards in London engaged with Immigration enforcement officials".

Likelihood of prejudice

22. In its submission to the Commissioner, the HO explained that it considered that disclosure of the information *would* have the stated detrimental effect.

23. It stated:

*"Disclosure of the information **would** prejudice the operation of immigration controls. If the information were to be released then the companies, businesses, faith groups and organisations that co-operated with Immigration Enforcement during the operation, would cease to interact with Immigration Enforcement due to their fear of being ostracised by their communities. This in turn, would impact on the ability of Immigration Enforcement to carry out their immigration functions.*

... it is clear that this would severely impact on the Home Office's ability to remove those who no longer have a right to remain in the UK".

Is the exemption engaged?

24. 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'.

25. It is not enough for the information to relate to an interest protected by section 31(1)(e) of the FOIA, 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.

26. In this case, the Commissioner accepts that the information request relates to compliance with immigration rules so it does relate to this applicable interest.

27. She also accepts the HO's arguments that releasing the information would disclose methodology which could allow those wishing to evade detection to do so. Furthermore, disclosure would also act as a deterrent for those parties which have been willing to cooperate with the HO to assist in its aims, and would also impact on their willingness (and that of any potential new bodies) to provide future cooperation. The Commissioner considers this latter argument against disclosure to be particularly compelling.

28. Having duly considered the arguments put forward by the HO, and having viewed a representative sample of the withheld information, the Commissioner is satisfied that there is more than a hypothetical or

remote possibility of prejudice occurring if the withheld information were to be disclosed.

29. Consequently, she is satisfied that its disclosure would represent a real and significant risk to law enforcement.
30. Accordingly, the Commissioner accepts that, in the circumstances of this case, the higher threshold of a likelihood of prejudice arising, ie 'would', is met.
31. 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 section 31(1)(e) of the FOIA is engaged.

Public interest test

32. Section 31 of the FOIA 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 disclosure

33. When requesting an internal review the complainant has argued:

"It is my conviction that the balance of public interest in this case lies in favour of disclosing the requested information, in order that members of the public are assured of the rigourousness [sic] of equality impact assessments pertaining to pilot schemes like the one in question, which involved members of the public from all walks of life".

34. The HO has argued:

"We recognise that disclosure of the assessments would ensure the public that a fair assessment was carried out by the government. There is a general public interest in transparency in government, including the work of Immigration Enforcement and matters relating to illegal migration".

Public interest arguments in favour of maintaining the exemption

35. The HO summarised its position as follows:

- *The information gathered by Immigration Enforcement and provided by the specified London wards, is operationally sensitive information.*

- *Disclosure of that information could assist those engaged in criminal activity (i.e. immigration offenders) by enabling them to gain an insight into how intelligence is gathered and adopting their methods to avoid detection.*
- *Disclosure could also undermine the trust under which the various wards in London engage with Immigration Enforcement officials.*
- *Disclosure would identify how Immigration Enforcement plans operations and could assist those wishing to undermine immigration controls.*
- *Disclosure will identify how we become aware of anti-raid plans and the steps we take in light of those attempts to disrupt our work.*

36. The HO further added:

"... The intention of carrying out the assessments was to increase employer compliance with the immigration rules, tackle illegal working and non-compliant landlords and encourage voluntary departures. It was provided in confidence and disclosure could – for example - lead to offenders getting an insight into how intelligence is gathered and adopt methods to avoid detection. It is also considered that disclosure of the sensitive operational information gathered could undermine the trust under which the various wards in London engaged with Immigration enforcement officials".

Balance of the public interest arguments

37. In reaching a view on where the public interest balance 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 HO.
38. She accepts that it is important for the general public to have confidence in the UK's immigration control system. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.
39. 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 operation of the immigration controls.
40. 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 intending to circumvent immigration

controls – and those who wish to assist them - from having access to information which could assist them in building a picture of how they can best achieve their aims and remain in the UK illegally. Disclosure of the details from each of the CIAs, which are detailed updates of current intelligence gathered at the time, would reveal the parties concerned which would clearly, in the Commissioner's view, severely hamper any cooperation not only with the parties which are revealed but also with the possible assurances of confidentiality for other bodies which may assist the HO in the future. Furthermore, revealing any new tactics or approaches to immigration matters which are not currently published would obviously 'tip off' the perpetrators, or potential perpetrators, and assist in their evasion of such controls. This is again not in the public interest. As referred to above, the HO has advised that the purpose of the CIAs is to increase employer compliance with the immigration rules, tackle illegal working and non-compliant landlords and encourage voluntary departures. Revealing how this is to be done would be detrimental to its success.

41. Clearly, the disclosure of any information that would assist people to commit unlawful activities and circumvent immigration controls, and also dissuade assistance of those willing to help the HO, would not be in the public interest.
42. 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.
43. Accordingly the Commissioner is satisfied that section 31(1)(e) of the FOIA was applied appropriately in this case.

Other matters

44. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

Information Notice

45. As the HO failed to respond to the Commissioner's enquiries in a timely manner it was necessary for her to issue an Information Notice in this case, formally requiring a response.
46. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal

in her draft Openness by Design strategy³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

47. 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

48. 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.
49. 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

Carolyn Howes
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