

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 July 2020

Public Authority: Serious Fraud Office
Address: 2-4 Cockspur Street
London
SW1Y 5BS

Decision (including any steps ordered)

1. The complainant has requested information about plea deal agreements from the Serious Fraud Office ('SFO'). The SFO refused to provide the requested information, citing sections 31(1)(a), (b) and (c) (law enforcement) of the FOIA.
2. The Commissioner's decision is that the SFO was entitled to rely on the exemptions cited. No steps are required.

Background

3. The SFO has explained its role as follows:

"The SFO investigates and prosecutes the top tier of serious or complex fraud, bribery and corruption and carries a small caseload of this type of work. For instance, the SFO's caseload stood at around 70 cases in 2018 to 2019¹, and charges were brought in four cases against eight individuals, whereas the Crown Prosecution Service (CPS) prosecuted nearly half a million cases during the same period². Our cases frequently feature high profile suspects

¹ Page 13 of Serious Fraud Office Annual Reports and Accounts 2018-19
<https://www.sfo.gov.uk/publications/corporate-information/annual-reports-accounts/>

² The precise figure was 494,811 cases; page 7 of Crown Prosecution Service Annual Report and Accounts 2018-19

and tend to be of interest to the media and others. Speculation is common on a range of matters such as whether particular individuals or businesses are of interest to the SFO.

In accordance with the SFO policy on making information about cases public, the office tries to provide as much information as possible about its investigations and prosecutions without compromising this work, prejudicing the rights of suspects or defendants, or otherwise causing them damage or harm. This includes confirming the existence of SOCPA agreements where it is not detrimental to do so".

4. The SFO has explained to the Commissioner that, whilst the term 'agreement' has been generally used in connection with sections 71, 72 and 73 of the Serious Organised Crime and Police Act 2005³ ('SOCPA'), in terms of the actual statutory language:

"... an immunity notice is given under section 71; a restricted use undertaking is given under section 72; and an agreement is only made under section 73".

Request and response

5. On 30 September 2019, the complainant wrote to the SFO and requested information in the following terms:

"Could you please tell me how many plea deal agreements the SFO has signed with cooperating defendants between 2005 and 2019 under sections 71, 72 and 73 of the Serious Organised Crime and Police Act 2005. Please can you break this information down to provide the individual number of agreements signed separately under section 71, section 72 and section 73 of SOCPA each year between 2005 and 2019".

6. The SFO responded on 25 November 2019. It refused to provide the requested information, citing sections 31(1)(a), (b) and (c) of the FOIA.
 7. Following an internal review, the SFO wrote to the complainant on 27 January 2020. It maintained its position.
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<https://www.cps.gov.uk/sites/default/files/documents/publications/CPS-Annual-Report-and-Accounts-2018-19.pdf>

³ <http://www.legislation.gov.uk/ukpga/2005/15/contents>

Scope of the case

8. The complainant contacted the Commissioner on 7 February 2020 to complain about the way his request for information had been handled. The Commissioner required further information which was provided on 14 February 2020.
9. The complaint's grounds of complaint were as follows:

"I have asked the UK Serious Fraud Office (SFO), a national prosecuting agency, to reveal the number of plea agreements it has signed with defendants who agree to plead guilty and provide evidence against their co-defendants in return for a reduced sentence. The legal mechanism underpinning a deal like this is known as a SOCPA agreement. I believe it is in the public interest to know how often the SFO has used this mechanism. The Crown Prosecution Service (CPS), another public prosecuting agency, publishes its own SOCPA figures yearly on its website, however the SFO will not reveal its own SOCPA figures".

And:

"I believe the SFO should publish its SOCPA figures as I do not believe that the agency has made a sufficiently compelling argument for not publishing them. The Director of the SFO has made clear in a number of interviews with the media that she sees increasing the SFO's use of SOCPAs as a key priority for her tenure. In order to be held to account on this ambition, the SFO's current usage of SOCPA agreements needs to be made public."

10. The Commissioner will consider the citing of sections 31(1)(a), (b) and (c) to withhold the requested information.
11. Some of the arguments provided by the SFO have not been included in this notice as they would reveal the actual withheld information. The Commissioner has been provided with the withheld information.

Reasons for decision

Section 31 – law enforcement

12. Section 31(1) of the FOIA states 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-

- (a) the prevention or detection of crime,*
- (b) the apprehension or prosecution of offenders,*
- (c) the administration of justice ...”*

13. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but also that it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.

14. 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 (in this case, the prevention or detection of crime, the apprehension or prosecution of offenders and the administration of justice);
- 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.

15. The withheld information in this case consists of figures in respect of ‘agreements’ reached under sections 71, 72 and 73 of SOCPA.

The applicable interests

16. The first point for the Commissioner to consider is whether the arguments provided by the SFO relate to the relevant applicable interests, namely the prevention or detection of crime, the apprehension or prosecution of offenders and the administration of justice.

17. The SFO explained that

"Powers under sections 71 to 73 of SOCPA may be used by the SFO in respect of suspects and defendants who wish to assist in the investigation or prosecution of their accomplices by acting as an intelligence source or as a witness. Individuals who cooperate in this manner are known as ‘assisting offenders’ and may receive:

- *immunity from prosecution under section 71;*
- *undertakings restricting the use of information under section 72;*

or

- *a reduction in sentence under section 73.*

These statutory provisions are supplemented by guidance to prosecutors which has been agreed by the Attorney General (the Guidance).⁴ The Guidance recognises that in very serious cases, cooperation may create a risk of harm to assisting offenders which is so great that witness protection measures such as relocation or a change of identity are required.

Whether the existence of a SOCPA agreement is made known to an assisting offender's accomplices, or enters the public domain, depends on the circumstances of the particular case including the type of assistance provided and the risk to life or limb. In the context of sentence reductions, the starting point is that a discount for assistance must be disclosed in open court unless the sentencing judge thinks it would be in the public interest not to do so (see sections 73(3) and (4) of SOCPA). By way of example, the Guidance explains that an assisting offender may be prepared to provide intelligence in confidence but not to give evidence against accomplices as this would reveal the fact of their cooperation. The Guidance also requires prosecutors to be alert to the need to apply for protective measures under section 73(4) in advance of any sentencing hearing in cases where disclosure of cooperation would not be in the public interest.

Conversely, where an assisting offender makes a statement as a witness with a view to giving evidence for the prosecution, the fact that they have done so pursuant to a SOCPA agreement will usually be made known to their accomplices following charge (if not before)".

18. In its submission to the Commissioner, the SFO provided arguments in support of its view that disclosure *would be likely to* prejudice the prevention or detection of crime, the apprehension or prosecution of offenders and the administration of justice.
19. The Commissioner is satisfied that the arguments provided by the SFO (which are expanded on below) do relate to the applicable interests stated, so the first limb of the three part test outlined above, is met.

⁴ The Guidance is called 'Queen's Evidence – Immunities, Undertakings and Agreements under the Serious Organised Crime and Police Act 2005'

The nature of the prejudice

20. The Commissioner next considered whether the SFO demonstrated a causal relationship between the disclosure of the requested information and the prejudice that sections 31(1)(a), (b) and (c) 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.

21. The SFO has explained to the Commissioner that its annual figures for SOCPA agreements are small, as are its annual figures for prosecutions. It added that any SOCPA agreements therefore only ever relate to a small pool of cases and that the requested information, if released:

"... would be liable to fuel speculation and inferences as to the identity of suspects and defendants who have assisted the SFO, where that information is not already in the public domain for good reason".

22. The SFO also argued that disclosure may allow for identification of assisting offenders who have either cooperated on a covert basis or whose cooperation has not yet been disclosed to their accomplices. It advised that this could apply not only to past and present cases but also to future cases were a precedent set by disclosure on this occasion.

23. The SFO advised that:

"Of most concern is that the risk of identification is greatest by those against whom an assisting offender has provided information as they have a personal stake, know most about the case and are best placed to surmise that a fellow offender has covertly provided insider information about their criminality to the SFO. Depending on their profile, jigsaw identification by such individuals may put an assisting offender at risk of threats or physical harm.

On the other hand, there is also scope for speculation and inferences to result in individuals being wrongly identified as assisting offenders. Arguably, this is even more problematic as unknown risks to such individuals cannot be mitigated".

24. When asking for an internal review, the complainant stated the following in respect of the refusal notice he had received:

"I believe your suggestion that it would be possible to identify recipients of SOCPA agreements simply by knowing how many agreements were signed and in what years is simply wrong; even if a journalist was reckless and speculative enough to attempt such a fruitless exercise. I would add that it would also be impossible to use an anonymous and unattributable statistic to factually confirm

speculation about a possible SOCPA agreement a specific individual may have signed”.

25. In direct response to this, the SFO advised the Commissioner that it disagreed with this argument that statistics could not realistically be used to identify those individuals concerned. It gave the following hypothetical scenario:

“If, for example, the SFO released figures indicating that it had entered only one SOCPA agreement under section 73 in a given year, and a prosecution followed in which there was a notable disparity of sentence in respect of one defendant as compared to the others, the situation would be ripe for persons with an interest in the case to piece together this information, by virtue of the mosaic effect, and deduce that the defendant with the markedly lower sentence was the person who had entered the SOCPA agreement”.

26. The SFO also expressed concerns that there is a real risk that releasing figures would mean that those who may previously have considered cooperating with the SFO on a covert basis would be deterred in the future for fear of being identified. Such a refusal would undermine the effectiveness of SOPCA agreements as a tool in the fight against economic crime.

27. The SFO further explained that:

“In the SFO’s experience those who act as assisting offenders, or contemplate the prospect, tend to do so in a state of high anxiety and for some the risk of being exposed, or prematurely exposed, to their accomplices as having cooperated with the SFO is a major concern. Releasing information which increases the risk of being ‘outed’ would be likely to intensify such concerns and operate as a disincentive to cooperation under the SOCPA regime”.

Likelihood of prejudice

28. The SFO confirmed to the Commissioner that it considered that prejudice *‘would be likely to’* occur as a result of disclosure.

Is the exemption engaged?

29. In a case such as this, it is not sufficient for the information to merely relate to an interest protected by section 31(1)(a), (b) and (c). Its disclosure must also at least be likely to prejudice those interests. The onus is on the public authority to explain how that prejudice would arise and why it is likely to occur.

30. The Commissioner is satisfied that the prejudice envisaged by the SFO is real and of substance, and that there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.
31. The Commissioner considers that, because of the low volume of cases which the SFO has said it has dealt with, disclosure of the figures clearly has some realistic potential to allow for re-identification of those involved. This in turn could lead to a direct risk to those parties with a genuine fear of reprisals where their cooperation was not previously known. Additionally, there is a possibility that someone is misidentified and the wrong conclusion about their identity is drawn from the low figures. Were any suspicion of their cooperation with the SFO raised then this could nevertheless put them at personal risk.
32. Furthermore, the Commissioner accepts that disclosure would be likely to act as a future deterrent for those considering cooperation with the SFO, for fear of being identified. This could undermine current and future investigations as parties who may previously have agreed to assist may decline. This is clearly detrimental to law enforcement and the investigations conducted by the SFO.
33. The Commissioner is therefore satisfied that sections 31(1)(a),(b) and (c) of the FOIA are properly engaged.

Public interest test

34. Section 31 is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions at sections 31(1)(a),(b) and (c) of the FOIA outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

35. The complainant has argued that it is in the public interest to know how often the SFO has used these agreements in its investigations. He also noted that similar information is readily available from the CPS which publishes its own SOCPA figures yearly on its website.
36. The SFO argued:

"The SFO recognises the clear public interest in transparency to aid public understanding and scrutiny of the work of the SFO. As outlined above, the SFO takes steps to meet this interest by publishing casework information on its website where appropriate, including in respect of SOCPA agreements".

Public interest arguments in favour of maintaining the exemption

37. The SFO argued:

"... it is widely accepted that freedom of information rights should not undermine the investigation or prosecution of crime, or prejudice effective law enforcement. As outlined in the preceding section, the SFO considers that releasing information about the annual numbers of SOCPA agreements would:

- be liable to fuel speculation and inferences about the identity of assisting offenders in SFO cases;*
- result a real risk that disclosure would lead to the actual identification of assisting offenders, particularly by their accomplices; and*
- undermine the effectiveness of the SOCPA regime by disincentivising cooperation in future cases because of the increased risk of identification".*

Balance of the public interest

38. When balancing the opposing public interests in a case, the Commissioner must decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
39. The Commissioner accepts that there is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest.
40. The Commissioner recognises the importance of the public having confidence in public authorities that are tasked with upholding the law. Public confidence will be increased by openness and transparency with regard to actions taken by public authorities such as the SFO, and information about the types of cases it deals with, and the way it conducts its investigations are clearly of wider interest. It would also be of interest to understand how often the SFO has used these investigative powers.
41. Conversely, the Commissioner finds that there is a real and significant harm in the possible identification of those parties concerned. This is due to the small numbers involved. Furthermore, she accepts that fear of identification would be likely to act as a deterrent for those parties who may have previously considered assisting the SFO.

42. The Commissioner considers the arguments in favour of maintaining the exemption to be of considerable strength. The Commissioner also considers that the impact on the SFO's future investigations, if people are deterred from cooperating with it, would be likely to adversely affect efficient law enforcement, which would not be in the public interest.
43. Having given due consideration to all the arguments set out above, the Commissioner has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure, and therefore that sections 31(1)(a), (b) and (c) and (g) of the FOIA have all been applied appropriately in this case.

Right of appeal

44. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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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