

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 22 April 2021

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

#### **Decision (including any steps ordered)**

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1. The complainant requested a Data Protection Impact Assessment (DPIA) relating to UK Border Force's collection and processing of the personal data of incoming travellers to reduce the spread of Covid-19. The Home Office initially relied on section 31 of the FOIA (law enforcement) to withhold the information. It subsequently also relied upon section 42 (legal professional privilege) to withhold part of the document and section 28 (relations within the UK) to withhold the entire document.
2. The Commissioner's decision is that the Home Office has not adequately explained why either section 31 or section 28 is engaged in respect of the withheld information and is therefore not entitled to rely on either exemption. However, she considers that the Home Office has correctly cited section 42 and that the balance of the public interest favours maintaining the exemption. As the Home Office failed to issue a refusal notice, citing all of the exemptions on which it later came to rely, within 20 working days, the Home Office breached section 17 of the FOIA.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
  - Disclose the DPIA – with the exception of section 6.8 and the small amount of personal data that the Home Office has identified.
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.

## Request and response

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5. On 8 June 2020, the complainant wrote to the Home Office and requested information in the following terms:
  - "[1] Please provide a copy of the privacy impact assessment for the 'Provide your journey and contact details before you travel to the UK' service.
  - "[2] If one does not exist please explain why.
  - "[3] Please also explain why the declaration has to be printed, thereby erecting a barrier.
  - "[4] Lastly, please provide any assessment of digital exclusion and how people without access to the internet are meant to comply with this requirement."
6. The Home Office responded on 25 June 2020. It noted that the forms did not have to be printed and could be completed on tablets provided at the border. In respect of element [1], it confirmed that it held a DPIA, but it wished to rely on section 31(1)(g) of the FOIA to withhold the information.
7. The complainant requested an internal review on the same day. The Home Office had not carried out an internal review at the date this notice was issued.

## Scope of the case

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8. The complainant contacted the Commissioner on 15 October 2020 to complain about the way his request for information had been handled. At that point, the internal review was well overdue and the Commissioner therefore wrote to the Home Office asking it to complete its internal review within 10 working days. The correspondence was neither acknowledged nor responded to.
9. On 16 November 2020, the complainant informed the Commissioner that he had still not received the outcome of the Home Office's review. Given that the internal review was delayed, despite her intervention, the Commissioner considered that it would have undermined the complainant's rights under section 50 of the FOIA to have expected him to wait until he had received the outcome of the Home Office's review before having his complaint accepted. She therefore exercised her

discretion and accepted the complaint without waiting for the internal review to be completed.

10. During the course of the Commissioner's investigation, the Home Office informed her that, in addition to section 31, it also wished to rely on section 28 to withhold the entire document and section 42 in respect of a single section. As the Home Office appeared to have set out all its arguments in respect of all three exemptions and had also been granted an extension in order to make its initial submission, the Commissioner considered that it would be unfair to the complainant if she were to extend the complaint further by asking for more detailed submissions on the new exemptions cited.
11. Given that all three of the cited exemptions are qualified exemptions, the Commissioner will look first at the two exemptions which have been applied to the entire document. If neither exemption applies, she will then look at section 42.

## **Background**

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12. The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 introduced a requirement for international travellers, at their point of entry into the UK, to provide certain information including their name, age and onward journey details – including the address at which they would self-isolate, if required to do so. Where a traveller is suspected of needing to self-isolate, the Police or Border officials can detain that individual if they fail to provide this information. The information collected is also shared with public health teams to allow them to check that those required to self-isolate are in fact doing so and to notify those who may have been in contact with an infected person whilst travelling.
13. Because this process requires the large-scale processing of personal data, the Home Office is required to carry out a DPIA to ensure that it is processing the data lawfully.

## **Reasons for decision**

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14. 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—*

- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),*

15. Section 31(2) lists a number of potential law enforcement purposes including:

(a) *the purpose of ascertaining whether any person has failed to comply with the law,*

16. The exemption can be engaged on the basis that disclosing the information either "would" prejudice the regulatory function, or the lower threshold that disclosure only "would be likely" to prejudice that function. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility. If the higher threshold is engaged, this will carry more weight in the public interest test

17. The Commissioner's approach to the prejudice test is based on that adopted by the Information Tribunal in *Christopher Martin Hogan and Oxford City Council v the Information Commissioner EA/2005/0026 and 0030*. This involves the following steps:

- Identifying the "applicable interests" within the relevant exemption
- Identifying the "nature of the prejudice". This means:
  - Showing that the prejudice claimed is "real, actual or of substance";
  - Showing that there is a "causal link" between the disclosure and the prejudice claimed.
- Deciding on the "likelihood of the occurrence of prejudice".

#### *The Home Office's position*

18. When asked to explain which public authorities' law enforcement functions would be prejudiced, the Home Office responded to say that:

*"The public authorities in question are the Home Office (more specifically Border Force), Department for Transport (specifically the Maritime Coastguard Agency), the Civil Aviation Authority, the Office of Road and Rail and police forces. Every police force in the UK is involved, as well as Border Force officers and private security companies (although we appreciate that these are not public authorities) who are all tasked with separate aspects of Covid-19 prevention work.*

*"The Health Protection (Coronavirus, International Travel) (England) Regulations 2020 ('the Regulations') made under sections 45B, 45F(2) and 45P(2) of the Public Health (Control of Disease) Act 1984 create the following law enforcement functions: Regulation 5 - Enforcement of requirement to self-isolate; Regulation 5A - Powers of Entry; Regulation 6 - Offences and penalties; Regulation 7 - Fixed penalty notices; and Regulation 8 - Prosecution."*

19. The Home Office also noted that the various devolved authorities (ie, the Scottish, Welsh and Northern Irish executives) have all invoked similar regulations and therefore their functions could be impacted too.
20. When asked to explain why disclosure of the withheld information would prejudice the functions it had identified, the Home Office explained that:

*"This DPIA is part of a multi-departmental response to a worldwide pandemic and reflects all the processing that is taking place across the four nations of the UK. There are agreements (MOUs) in place with all health bodies, the Department of Health and Social Care, the Joint Biosecurity Centre and the Department for Transport. All of these processes are designed to prevent the spread of Covid-19 by persuading people to comply with the law and thereby prevent onward transmission. The risk of enforcement action is there to strengthen compliance and is part and parcel of the measures designed to combat Covid-19. Should public confidence in this system be undermined there is a real risk of increased non-compliance. The police and other agencies are already stretched beyond their capacity to carry out this work, so any increased demand for enforcement would expose law enforcement agencies to further risk and lead to more non-compliance."*

*"The DPIA sets out how, where and how long the data will be stored and deleted alongside the types of data that will be collected and how enforcement of the regulations will be conducted. We know that some aspects of Covid-19 prevention are unpopular with and indeed opposed by some members of the public. Disclosure would be likely to lead to individuals trying to circumvent Covid-19 prevention measures and would provide information to help them to do so."*

*"Disclosure of the information in the DPIA would be likely to prejudice the enforcement of health regulations by those public authorities to which the DPIA relates, namely those mentioned above. The Regulations relate to measures to ensure public health and it is important that any negative impact on their operation be*

*avoided and good working practices are maintained, particularly as this is a multi-agency approach."*

*The Commissioner's view*

21. Whilst the Commissioner accepts that the Home Office has identified relevant applicable interests that could potentially be harmed, she does not accept that the Home Office has demonstrated why those interests would be harmed by disclosure.
22. To demonstrate that this exemption (or indeed any other prejudice-based exemption) is engaged, it is not sufficient for a public authority to merely assert that prejudice will occur. It must demonstrate how and why that prejudice would (or would be likely to) occur. In particular, it must be able to draw a causal link between disclosure of the withheld information and the claimed prejudice.
23. Having reviewed the Home Office's submission, the Commissioner is not clear how exactly the various public authorities cited would be impeded in carry out their functions. The Home Office has not been able to point to any specific section of the DPIA that would be of use to someone wishing to avoid the law – or explain how and why that information would be of use to someone with those intentions. Nothing in the withheld information strikes the Commissioner as being obviously of use to someone wishing to evade the public health regulations. Some of the information is already included in the UK Border Force's privacy notice.
24. Finally, although this was raised as a public interest argument, the Commissioner noted that the Home Office referred to the possibility that information might be misquoted or misunderstood. Whilst the Commissioner is aware that this is a possibility, she is also aware that the same argument could be applied to virtually any information, held by any public authority, at any time. This is not a case where the complainant has asked for an earlier draft – whereby having two versions of the same document in the public domain could cause confusion. The withheld information is the final version of the document. Having the full document in the public domain arguably makes it more difficult for sections to be quoted outside of their proper context. Furthermore, there is nothing to prevent the Home Office from issuing additional explanatory information to help the public understand the issues at hand or the terminology involved.
25. The Commissioner therefore considers that the Home Office has failed to demonstrate that there is any likelihood of any significant harm arising from disclosure of the withheld information. The Commissioner is therefore obliged to find that section 31 of the FOIA is not engaged in

relation to this information. As the exemption is not engaged, there is no requirement to consider the public interest test.

## **Section 28 – relations within the UK**

26. Section 28 of the FOIA states that:

*(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.*

*(2) In subsection (1) "administration in the United Kingdom" means—*

*(a) the government of the United Kingdom,*

*(b) the Scottish Administration,*

*(c) the Executive Committee of the Northern Ireland Assembly,  
or*

*(d) the Welsh Assembly Government.*

27. The Home Office provided a relatively short submission to explain why this exemption occurred. The gist of this submission was that, if the Home Office were to disclose the information, it would encourage individuals to make requests to the devolved authorities for the same or similar information.

28. The Commissioner notes that any individual could already make information requests to the Welsh Government or Northern Ireland Executive, using the FOIA (or, using the Freedom of Information (Scotland) Act 2002, to the Scottish Government), for this type of information.

29. Given that the DPIA is not a piece of correspondence exchanged between any of the devolved governments and is the rightful property of the Home Office, the Commissioner does not consider it reasonable for the Home Office to suggest that its relations with the devolved governments would be damaged if it were to comply with its obligations under the law. Furthermore, there is no automatic presumption that because one public authority has disclosed information, all other public authorities must disclose similar information. Each request would need to be assessed on its own individual merits.

30. In then Commissioner's view, it was inappropriate, on the grounds given, for the Home Office to cite this exemption.

## **Section 42 – Legal Professional Privilege**

31. Section 42 of the FOIA states that:

*Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.*

32. The Home Office has cited section 42 in respect of a single section of the DPIA, which is entitled “provide a summary of the legal advice received”. In broad terms, the section sets out the advisor’s view of the legality of this processing of personal data.
33. Privilege does not only attach to correspondence which contemplates specific litigation. Where a public authority has sought advice on the legality of proposed action, the related correspondence will be covered by legal advice privilege.
34. The Commissioner is satisfied that correspondence to and from a public authority’s own “in-house” legal advisors can be privileged. She also accepts that information that is not, in itself, privileged, can still attract the exemption if it references privileged correspondence.
35. Having reviewed the withheld information, the Commissioner considers that it is implicit that the wording of this section is either a summary or a transposition of a piece of privileged correspondence providing legal advice.
36. The Commissioner is therefore satisfied that section 42 is engaged.

### *Public interest test*

37. The Home Office recognised that there was always a public interest in transparency and accountability. However, it argued that there was a much stronger interest in protecting its ability to seek and receive good quality legal advice.
38. The Commissioner recognises that the unprecedented circumstances of the pandemic have brought about a raft of highly restrictive legislation. It is not her role to comment on the necessity of that legislation – except to note that, the more intrusive a piece of legislation is, the greater the public interest will be in understanding how it came about. However, having reviewed the withheld information, the Commissioner considers that this specific section would add very little to overall public understanding of the issue at hand – especially considering that she is requiring the remainder of the document to be disclosed.



39. A legal opinion has no status in law: the fact that a government solicitor does or does not consider that a particular action is legal does not make it so. The Commissioner does not consider that including this particular section would add significantly to public debate whilst, on the other hand, it would infringe on the rights of public authorities to seek and receive quality legal advice.
40. Whilst the public interest in disclosure need not be exceptional in section 42 cases, given the strong importance placed upon legal privilege as a cornerstone of the legal and policymaking processes, it follows that there will always be significant weight in favour of maintaining the exemption.
41. Having considered the Home Offices' arguments and the withheld information, the Commissioner is satisfied that the balance of the public interest lies in maintaining the exemption in respect of this particular section of the withheld information. The Home Office is therefore entitled to rely on section 42 of the FOIA to withhold this information.

#### **Section 40 – Personal Information**

42. For completeness – and because it affects the disclosure being ordered – the Commissioner has considered the application of section 40(2) to the withheld information – something the Home Office raised in its submission.
43. The Home Office did not attempt to rely on section 40(2) of the FOIA to withhold the names of the two senior civil servants named at the beginning of the DPIA, but did rely on it in relation to those individuals' contact information. It also relied on section 40(2) in respect of the names and contact details of several junior civil servants involved in the drafting of the DPIA.
44. The Commissioner does not consider that there is a legitimate interest in disclosing any of this personal data as it adds nothing to the substantive debate on the issues involved that is not covered by the remainder of the document. Even if the Commissioner were to accept that there was a legitimate interest, it would not outweigh the rights of the data subjects involved.
45. The Commissioner is therefore satisfied that section 40(2) of the FOIA has been cited correctly and she has not required disclosure of this information.

## **Procedural matters**

46. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

*within the time for complying with section 1(1), give the applicant a notice which—*

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies.*

47. The Home Office failed to issue a refusal notice, citing all of the exemptions on which it came to rely, within 20 working days. It therefore breached section 17 of the FOIA.

## **Other matters**

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48. Whilst there is no statutory time limit, within the FOIA, for carrying out an internal review, the Commissioner considers that internal reviews should normally take no longer than 20 working days and never longer than 40 working days.
49. In this particular case, the Home Office had already taken 8 months to complete its internal review at the point at which the Commissioner began her investigation. The Commissioner considers this to be poor practice.

## Right of appeal

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50. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.
52. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
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