

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 June 2023

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

Decision (including any steps ordered)

1. The complainant has requested copies of Memorandums of Understanding ('MOU') between HM Coastguard and UK Border Force, since 1 January 2020. The Home Office confirmed that it held one MOU but refused to disclose it, saying that it was exempt under sections 31(1)(a) and (e) (Law enforcement) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on sections 31(1)(a) and (e) to refuse the request. It also complied with section 1(1)(a) of FOIA.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 13 September 2022, the complainant wrote to the Home Office and made the following request for information:

"A copy of all Memorandums of Understanding made between HM Coastguard and Border Force since 01/01/2020."
5. The Home Office responded on 12 October 2022. It said that no MOUs had been made between the two parties since 1 January 2020.
6. The complainant requested an internal review on 2 December 2022, explaining that they believed that there was a recent MOU between HM

Coastguard and Border Force about "...migrant vessels and the circumstances under which pushbacks might take place".

7. The Home Office provided the outcome of the internal review on 22 February 2023. It changed its position on the request, confirming that it held one MOU between the Maritime and Coastguard Agency (the MCA) and the Home Office. It refused to disclose this MOU, saying that it was exempt under sections 31(1)(a) and (e) of FOIA.

Reasons for decision

8. Section 31 of FOIA allows a public authority to withhold information which, if disclosed, could harm its own, or another public authority's ability to enforce the law.
9. Sections 31(1)(a) and (e) of FOIA apply where disclosure would, or would be likely to, prejudice:
 - (a) the prevention or detection of crime; and
 - (e) the operation of the immigration controls.
10. The exemption is subject to a public interest test. This means that the information must be disclosed if the public interest in disclosing the information is equal to, or greater than, the public interest in protecting the matters at subsections (a) and (e).
11. The complainant told the Commissioner that:

"...this information should be released. There are no current plans to pursue pushbacks, in part because it is highly likely to be unlawful. In that context it's hard to see how the disclosure of high-level information sharing could be used by traffickers to circumvent the law at sea."
12. The Home Office told the Commissioner that the MOU did not contain the type of information that the complainant seemed to think it did. The MOU did not contain any information on UK policies or strategies regarding migrant vessels. Rather, the MOU was concerned with the terms under which maritime information could be shared by the MCA, and the various legal obligations of the parties to the agreement.
13. Having read the MOU, the Commissioner can confirm that is the case. The MOU does not contain any information on "...migrant vessels and the circumstances under which pushbacks might take place".
14. The Home Office told the complainant of the adverse consequences of disclosing such information:

"The MOU in question relates to high level data sharing and contains information on systems used in Border Force (BF) operations. Disclosure of information used by BF in partnership with the MCA would compromise security at the UK border. The information, along with other pieces of information available in the public domain, would allow criminals to build up a picture of operational capability through knowledge of systems used for data sharing. This information would assist individuals to circumvent the legal means of entry into the UK, evade detection and would thus prejudice the apprehension or prosecution of offenders."

15. The Home Office explained to the Commissioner that knowledge of the information being shared under the agreement would enable deductions to be made about operational capabilities and that this would be likely to prejudice the prevention or detection of crime and the operation of the UK's immigration controls:

"Individuals or, more importantly, organised criminal groups intent on avoiding or frustrating border controls would use information about data sharing and operational capability to design or modify their tactics for circumventing the legal means of entry into the UK and evading detection."

16. The Commissioner's view is that a fuller picture of law enforcement practices could be built up by combining the withheld information with information which is already in the public domain.
17. The test that the Commissioner applies when considering whether prejudice "would be likely" is that there must be a real and significant likelihood of prejudice occurring, but it is not necessary for this outcome to be more probable than not.
18. Applying that test here, the Commissioner accepts that there is a real and significant likelihood of prejudice relevant to section 31(1)(a) and (e) through the information in question being disclosed. Disclosure of the MOU could be of use to those wanting to build a picture of border control operations to identify strengths and exploit weaknesses. While the Commissioner does not suggest that this is the complainant's purpose in requesting the information, he must bear in mind that disclosure under FOIA is to be considered as being to the world at large.
19. The Commissioner therefore accepts that disclosure of the requested information would likely prejudice law enforcement operations and the operation of border controls. He is therefore satisfied that the exemptions at sections 31(1)(a) and (e) provide grounds for withholding the MOU in its entirety.

Public interest test

20. As explained in paragraph 10, the Commissioner must nevertheless consider whether the public interest in disclosing the MOU outweighs the public interest in protecting the prevention or detection of crime and the operation of the UK's immigration controls.

Public interest arguments in favour of disclosure

21. The complainant argued that:

"In this case, the public interest is also particularly strong since it may relate to how a British policy that's likely to be unlawful would threaten the lives of asylum seekers."

22. The Home Office recognised that there is a public interest in the transparency and accountability of public authorities, and in the disclosure of information which informs the public about the co-operation and collaboration that occurs between different public authorities.
23. Disclosure of information would also inform public awareness of, and debate on, the systems in place to protect the security of the UK. This could in turn lead to greater public confidence in the operational procedures in place in UK territorial waters.

Public interest arguments in favour of maintaining the exemptions

24. The Home Office said there is a strong public interest in avoiding the prejudice which it had described, and in protecting the UK's border control operations.

Balance of the public interest

25. The Commissioner agrees that there is a public interest in public authority transparency and accountability, and in understanding the ways in which different public authorities co-operate and collaborate. There is a public interest in people understanding the protections in place to ensure that information collected in one context is not used or disclosed improperly.
26. The Commissioner also recognises there is a public interest in informing people about the less obvious areas of work involved in the UK's border control operations.
27. However, he also recognises the strong public interest in protecting the ability of public authorities to enforce the law and to protect borders. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption – in this case, it would

not be in the public interest to prejudice law enforcement operations and the capabilities of border controls by disclosing information and in so doing, placing the UK at increased risk of harm.

28. He again notes that the complainant was mistaken about the MOU's content and that its disclosure would not serve the public interest in the way they had suggested. The MOU does not relate to 'pushbacks'. It is a data sharing agreement.
29. Taking all the above into account, the Commissioner has concluded that to justify disclosure in this case, the prejudice to the processes described in sections 31(1)(a) and (e) would need to be outweighed by sufficiently weighty public interest arguments. The Commissioner does not consider that the public interest arguments in favour of disclosure are sufficiently weighty. His decision is that the public interest in the maintenance of the exemption at sections 31(1)(a) and (e) outweighs the public interest in disclosure. The Home Office was therefore not obliged to disclose the MOU.

Section 1 – general right of access

30. The complainant expressed concern that in its initial response to the request, the Home Office said that it did not hold any relevant information, whereas, at internal review, it said that it did.
31. Under section 1(1) of FOIA, anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the requested information. The Commissioner will find a public authority in breach of section 1(1)(a) if information is held and confirmation of this is not given by the completion of the internal review or the time for statutory compliance.
32. In this case, as a result of the further information the complainant provided when requesting an internal review, the Home Office was able to locate and confirm that it held relevant information. It therefore complied with the obligation under section 1(1)(a) by confirming that it held the information by the completion of the internal review.

Other matters

Section 45 code of practice – internal review

33. There is no obligation under FOIA for a public authority to provide an internal review process. However, it is good practice to do so and, where a public authority chooses to offer one, the section 45(1) FOIA code of practice ('the code') sets out, in general terms, the procedure that should be followed.

34. The code states that reviews should be conducted promptly and within reasonable timescales. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
35. In this case, the Home Office took 55 working days to provide the internal review outcome. The Commissioner therefore considers that the Home Office failed to comply with the 'timeliness' requirement of the code, and he has made a separate record of this, for monitoring purposes.

Right of appeal

36. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.

38. 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

Samantha Bracegirdle
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