

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2024

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

Decision (including any steps ordered)

1. The complainant requested information on the cost of the investigation by the Serious Fraud Office (SFO) into Eurasian Natural Resources Corporation Ltd (ENRC).
2. The SFO refused to disclose this information, citing the exemption provided by section 31 (law enforcement) of FOIA.
3. The Commissioner's decision is that the SFO is entitled to rely on sections 31(1)(a), (b) and (c) of FOIA to refuse to disclose the withheld information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. The following is taken from the SFO website¹:
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¹ <https://www.sfo.gov.uk/cases/enrc/>

"The Serious Fraud Office (SFO) formally opened a criminal investigation into ENRC Ltd (previously ENRC PLC) in 2013.

Our investigation focused on the suspected payment of bribes by the company and individuals connected to it to secure access to lucrative mining contracts in the Democratic Republic of the Congo (DRC) between 2009 and 2012.

[..]

In August 2023, following our latest review of the investigation, we concluded that we have insufficient admissible evidence to prosecute, and closed the case".

Request and response

6. On 29 August 2023, the complainant wrote to the SFO and requested information in the following terms:

"Please state the total cost to the Serious Fraud Office of the investigation into Eurasian Natural Resources Corporation Ltd (ENRC). Please include the cost of the main investigation, and costs incurred by cases directly related to the conduct of the main case, such as ENRC claims for damages against the SFO on grounds of malfeasance in public office".

7. The SFO responded on 26 September 2023. It confirmed it holds the requested information, but refused to provide it, citing sections 31(a), (b) and (c) (law enforcement) of FOIA.
8. Following an internal review, the SFO wrote to the complainant on 24 October 2023, maintaining its view.

Scope of the case

9. The complainant disputes the application of section 31 to refuse the request - on the basis that the harms imagined are 'highly unlikely to be credible'. In the event that the exemption is engaged, they consider that the public interests in transparency and accountability outweigh any potential risks.
10. They also told the Commissioner that the response in this case is inconsistent with the SFO's previous position on disclosing costs of investigations. In support of this argument, the complainant provided a copy of a response they had received from the SFO to an earlier request for information. The complainant argued that that response disclosed

the cost of investigating numerous high profile cases which did not secure prosecutions.

11. Although the Commissioner understands from this that the SFO would appear to have complied with a similar request in the past, this does not set an automatic precedent for disclosure under FOIA.
12. During the course of the Commissioner's investigation, the SFO confirmed its application of sections 31(a), (b) and (c). It also provided the Commissioner with a copy of the withheld information, namely the total cost to the SFO of the investigation into ENRC.
13. In its submission, the SFO also referred the Commissioner to an earlier case where the same exemptions were cited and where the ICO upheld the SFO's decision to withhold the information (case reference number IC-251765-V8G2²).
14. While he accepts that the issues and arguments raised by the two cases appear to be similar, the Commissioner has considered this case on its merits.
15. The analysis below considers the SFO's application of section 31 to the requested information in this case.

Reasons for decision

Section 31 law enforcement

16. Section 31 of FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities.
17. In this case, the SFO is relying on sections 31(1)(a), (b) and (c) of FOIA in relation to the withheld information. These subsections state that information is exempt if its disclosure would, or would be likely to, prejudice:
 - (a) the prevention or detection of crime;

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4027528/ic-251765-v8g2.pdf>

- (b) the apprehension or prosecution of offenders; and
- (c) the administration of justice.
18. Section 31 is a prejudice-based exemption. This means a public authority can only rely on it where disclosing the information (or confirming or denying that it holds the information) could cause harm. To demonstrate the harm, it must satisfy a prejudice test.
19. In this case, in order for the exemption to apply, it must be the case that if the withheld information was disclosed, it would, or would be likely to, cause prejudice to the matters referred to in subsections (a) (b) and (c). Three criteria must be met:
- the actual harm which the SFO envisages must relate to the applicable interests of each of the limbs of the exemption it has cited;
 - there must be a causal relationship between disclosure and prejudice to those interests. This prejudice must be real, actual or of substance; and
 - the SFO must show that the level of prejudice it envisages is met – ie it must demonstrate why disclosure 'would be likely' to result in prejudice or, alternatively, why disclosure 'would' result in prejudice.
20. Accordingly, the Commissioner expects the SFO to answer the following three questions:
- “Which law enforcement interest(s), protected by section 31, could be harmed by the disclosure?
- Is the harm you have identified real, actual or of substance and is there a causal link between disclosure and that harm?
- What is the likelihood of that harm actually occurring: would it occur, or is it only likely to occur?”.
21. 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.

The SFO's position

22. The SFO has relied on the same reasoning for the citing of each of the three limbs of the exemption. The Commissioner recognises that there is clearly some overlap between the subsections in this exemption and he is happy with this approach.
23. It told the complainant:

"This exemption is engaged in this response because of the prejudice or likely prejudice caused by the cumulative effect of disclosing information in response to a series of requests of a similar nature (the 'precedent effect')".

24. It explained that it investigates and prosecutes only the most serious or complex fraud, bribery and corruption, and that as it only has a relatively small caseload:

"...routinely disclosing information about the cost of cases risks creating an increasingly detailed picture of how the SFO decides to deploy its resources within and between cases".

25. It told the complainant that, like all law enforcement agencies, the SFO balances the need for transparency with the need to protect its ability to deliver its investigations and prosecutions effectively.

26. As in the earlier case referenced by the SFO, the SFO told the Commissioner that disclosure in this case would compromise its ability to investigate and prosecute economic crime. It argued that releasing the ENRC costs would directly reveal how much public funding the SFO has chosen to allocate to this case. It argued that, by setting a precedent for disclosure, this in turn would reveal how much it allocates to other cases.

27. In correspondence with the Commissioner, the SFO explained:

"In a short time, via multiple FOI requests, it would be possible to build up a complete picture of our work and allow individuals, including defendants in our cases, to make comparisons between our cases based on the level of resources allocated. This would directly harm the SFO's interest and mission and contradict the protections that s31 is intended to provide".

28. With respect to a causal relationship between the disclosure of the information at issue and the prejudice that sections 31(1)(a), (b) and (c) are designed to protect, the SFO arguments relate to the harm likely to arise if someone pieced together the requested information with other information to form a broader picture.

29. For example, it considers that releasing the information could allow criminals to understand how it is likely to resource different cases and incentivise some types of crime. It also considered that, by obtaining case costs for a variety of cases, it could be possible to glean information about an investigation and how different factors might affect an investigation.

30. Responding directly to the complainant's observation about the status of the case that is the subject of this request, the SFO said that the fact that the case is closed does not mitigate this risk. It explained:

"A case may be closed, insofar as the investigation has stopped or a trial concluded, but that does not prevent the issues from being revisited via a judicial review, the Criminal Cases Review Commission or other reasons".

31. Maintaining that it was not appropriate to release costs even when a case was closed, it said that, in light of the above, it would in any event be very difficult to determine exactly when the conclusion of a case was reached.
32. Similarly, in its submission to the Commissioner, the SFO argued strongly that disclosure of the requested information in this case would create a precedent for future FOIA requests and lead to a situation where the SFO would be required to release the costs of all cases.
33. With respect to the requested civil costs, it explained how the release of those costs would compromise the integrity of its case and harm the administration of justice.
34. With regard to the likelihood of prejudice if the information was disclosed, the SFO considers the risk meets the higher test of 'would occur'.
35. It told the Commissioner:

"While the anticipated prejudice is based upon our assessment that a precedent would be set for future requests, the SFO considers, based upon its experience of receiving FOIA requests, that the likelihood of receiving similar requests in relation to other cases is extremely high, if not a certainty. As a result, it is the SFO's view that releasing this information would prejudice the apprehension or prosecution of offenders, the administration of justice and the prevention of detection of crime".

Is the exemption engaged?

36. In a case such as this, it is not enough for the information to relate to the interests protected by sections 31(1)(a), (b) and (c); its disclosure must also at least be likely to prejudice those interests.
37. The Commissioner recognises the importance of protecting information which, if disclosed, is capable of undermining law enforcement activity.
38. Of relevance to this case, he accepts that section 31(1)(a) covers all aspects of the prevention and detection of crime, while section 31(1)(b)

protects information about specific prosecutions. He also recognises that the purpose of section 31(1)(c) is not only to protect information whose disclosure could undermine particular proceedings, but also to protect law enforcement agencies from disclosures that could interfere with their efficiency, effectiveness or their ability to conduct proceedings fairly.

39. With respect to the impact of disclosure in this case, the Commissioner accepts that while the SFO considers that disclosure would be harmful, the complainant, by contrast, considers that the requested information is not complex financial information that could be of practical use to a defendant. In their view, the requested information is "basic transparency information important for scrutiny" .
40. In determining whether the exemption is engaged, the Commissioner has taken into account that the SFO's core function is to prosecute economic crime. He is also mindful that, while the request in this case is for a specific case that, at the time of the request was deemed to be closed, the SFO arguments relate to the prejudice, or likely prejudice, caused by the cumulative effect of disclosing information in response to a series of requests of a similar nature. He has also taken into account that the arguments it advanced address the possibility that a case can be re-opened in the future.
41. With regard to the SFO's precedent argument, in his guidance on section 31 and the prejudice test³, the Commissioner accepts that complying with one request can make it more difficult to refuse requests for similar information in the future. He therefore recognises that a public authority is entitled to consider any harm that could be caused by combining the requested information with the information it could subsequently be required to provide, if the current request was complied with.
42. On the evidence provided, the Commissioner is satisfied that the SFO has demonstrated a causal link between the requested information and the applicable interests relied on, and that disclosure is capable of having a detrimental impact on law enforcement, specifically the SFO's core function, namely to prosecute economic crime. With respect to the outcome of disclosure predicted by the SFO, having duly considered the arguments put forward by the SFO, the Commissioner's view is that the lower level of 'would be likely to occur' has been demonstrated.

³ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-31-law-enforcement/how-should-we-apply-the-prejudice-test/>

43. It follows that he is satisfied that the exemptions provided by sections 31(1)(a), (b) and (c) are engaged.

Public interest test

44. 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 exemption at sections 31(1)(a), (b) and (c) of FOIA outweighs the public interest in disclosing the information requested by the complainant.

Arguments in favour of disclosure

45. The complainant considers that there is a clear public interest in transparency for the purposes of accountability in the spending of public money, "especially where that spending provided no benefit to the public" and where taxpayer money has been lost.
46. They argued that there is an ongoing public debate about how economic crime in the UK should be policed, demonstrated by the debates around the recent Economic Crime Bill.
47. The complainant also considers that disclosure of the requested information would inform the current public debate about how economic crime is policed.
48. The SFO acknowledges that there is public interest in understanding the general process the SFO uses to investigate fraud, the resourcing of its work and how public money is spent. However, it argued that it already takes steps to meet this interest by publishing an Annual Report and Accounts. It also advised the Commissioner that it shares its annual priorities and, where applicable, further detail on cases, on its website.

Arguments in favour of maintaining the exemption

49. In favour of maintaining the exemption, the SFO told the complainant that obtaining case costs for a variety of cases could make it possible to glean information about particular investigations, about the nature of the SFO's work more generally or lead to incorrect conclusions being made about SFO expenditure. It argued that this would not be in the public interest.

50. In that respect, it told the complainant:

"While there are undoubtedly people who are interested in the costs of this case, or any SFO case, the public interest test considers whether it is in the public's interest to have detailed financial information about our casework released to the wider public".

51. In correspondence with the Commissioner, the SFO argued that it is not in the public interest to release information that would allow members of the public, including suspects and/or defendants, to determine which cases it is prioritising, or indicate changes in its caseload. It argued that criminals could use this information to their advantage, hindering the SFO's ability to prosecute economic crime and protect the UK economy.

Balance of the public interest arguments

52. In carrying out the statutory balancing exercise in this case, 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 prevention or detection of crime, the apprehension or prosecution of offenders and the administration of justice. Clearly, it is not in the public interest to disclose information that may compromise the ability of the SFO to investigate and prosecute economic crime.
53. While he notes that the complainant has concerns about the specific outcome of the investigation in this case, he must also consider the wider public interest in the role of the SFO and the impact of disclosure on its ability to carry out its functions effectively. In that respect, the Commissioner is mindful that the SFO's arguments relate not only to this particular investigation but to investigations in general.
54. The Commissioner has had regard to the strong public interest in ensuring that the disclosure of information does not materially impede the prevention and detection of crime, the apprehension or prosecution of offenders or the administration of justice.
55. The Commissioner recognises the need to ensure transparency and accountability and accepts that the complainant referred to criticism of the SFO "for its failings in prosecuting this case" as well as "deep concerns about its ability to tackle economic crime more generally".
56. He also recognises the complainant's position that there is a public interest in knowing about the loss of taxpayers money in this particular case. The Commissioner acknowledges that disclosure in this case would help to meet that interest.
57. In the circumstances of this case, he gives limited weight to the argument that disclosure could lead to incorrect conclusions being made about SFO expenditure. In the Commissioner's view, there is always the option for a public authority to provide a supporting explanation to avoid such an outcome.
58. With regard to the public interest in transparency and accountability, the Commissioner has taken into account the arguments put forward by the SFO about the steps it takes to publish information, where appropriate,

for example on its website, in its annual accounts and via publication of its procurement spending over £25,000.

59. Having carefully balanced the opposing factors involved in this case, while the Commissioner recognises the valid public interest in favour of disclosure of the requested information relating to the ENRC investigation, he considers that the public interest in avoiding prejudice to the SFO's investigations is the weightier factor here.
60. His decision is that the SFO was entitled to rely on sections 31(1)(a), (b) and (c) to withhold the requested information.

Right of appeal

61. 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

62. 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.

63. 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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