

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 September 2012

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

Decision (including any steps ordered)

1. The complainant has requested information about border controls in Northern Ireland.
2. The Information Commissioner's decision is that UK Border Agency (UKBA) has applied section 31(1)(e) appropriately, but it breached some of its procedural obligations.

Background

3. The Information Commissioner (the Commissioner) notes that the UK Border Agency (UKBA) is not a public authority itself, but is actually an executive agency of the Home Office (the HO) that is responsible for it; therefore, the public authority in this case is actually the Home Office and not the UKBA. However, for the sake of clarity, this Decision Notice refers to the UKBA as if it were the public authority.
4. On 5 November 2011 Mr John Vine was commissioned by the HO to investigate and report on the level of checks operated at ports of entry to the UK. The investigation sought to establish which checks were in operation; whether any of these were suspended and, if so, on whose authority; and if there had been a potential risk to border security caused by any relaxation of checks.
5. This report was published in February 2012.

Request and response

6. On 10 November 2011, the complainant wrote to UKBA and requested information in the following terms:

'Could you confirm or deny has there been any relaxing of passport or ID checks at any point of entry in Northern Ireland this year? If there has been relaxing of passport or ID checks in relation to the above can you provide details – ie which point of entry/length of time they were relaxed/any specific flights or countries'.

7. The UKBA responded on 8 December 2011. It stated that it was considering applying section 36(2)(c) and that it would also need 20 more working days to consider the public interest test.
8. The UKBA wrote to the complainant on 11 January 2012 explaining that it was still considering the application of section 36(2)(c) and would need a further 20 working days to consider the public interest test.
9. The UKBA wrote to the complainant on 7 February 2012 explaining that it still could not respond to his request but that it would send a full response as soon as it could.
10. The Commissioner then contacted the HO about the unreasonable delay in responding to the complainant's request.
11. On 10 May 2012 the HO wrote to the complainant. It explained that pilot measures were available to all ports and were used in Belfast Airport. It also explained that it held additional information on the specific times and dates of the use of the pilot measures at Belfast Airport but was withholding the information under section 31(1)(e). It subsequently confirmed to the Commissioner that this was instead of section 36(2)(c).
12. Following an internal review the HO wrote to the complainant on 14 June 2012 withholding the information on the same grounds.

Scope of the case

13. The complainant contacted the Commissioner to complain about the way his request for information had been handled, particularly: the HO's initial application of section 36(2)(c); the time taken to deal with his request; and the fact that he had not received the requested information.

14. The Commissioner will be considering the length of time taken by the HO to deal with the request, its application initially of section 36(2)(c), and whether it subsequently applied section 31(1)(e) appropriately.

Reasons for decision

Section 31 – Law enforcement

15. Section 31 provides an exemption where disclosure of information would, or would be likely to, prejudice various functions relating to law enforcement.
16. Consideration of this exemption is a two-stage process. First, in order for the exemption to be engaged it must be at least likely that prejudice would occur to the process specified in the relevant subsection - in this case subsection (e) relating to the operation of the immigration controls.
17. Secondly, the exemption is subject to the public interest test. The effect of this is that the information should be disclosed if the public interest favours this, even though the exemption is engaged.
18. In its response of 10 May 2012, the HO explained that its policy was not to disclose information that is location specific and therefore operationally sensitive. It explained that to do so could potentially assist those engaged in criminal activities at the borders and may enable potential immigration offenders to obtain detailed information on how immigration controls are operated.
19. The HO also explained that the withheld information could be used to identify and assess the strengths and weaknesses of our border controls. Disclosure could have the potential to cause harm to the integrity of the UK's borders. Further, the HO stated that disclosure could undermine the process through which the Border Force worked with other parts of the HO and other organisations to ensure the integrity of immigration control.
20. The Commissioner contacted the HO for the withheld information. The HO responded, explaining that the Border Force Performance Team had provided it with a restricted sight of the Belfast International Airport section of a spreadsheet which had been compiled to give Ministers and John Vine, during the writing of his report about the reductions in the level of immigration checks, information about which airports had Level

2 procedures¹ in operation during August, September, October and November 2011.

21. The HO explained that it did not have any flight details for specific flights but there was information about some arriving flights. It confirmed that the flight details had not been lost, destroyed or no longer held, but that the data pertaining to specific flights has not been retained as these details had been recorded as free text – so while some returns mentioned specific flights others did not.
22. Further, the HO also explained that the flight details requested by the complainant would have included a three-letter acronym which would have indicated which airport the flight had departed from and the actual flight reference which would have been made up of a series of letters, indicating the particular airline and numbers which are used by the flight carrier to identify different flights.
23. The HO went on to explain that the flight details would allow the size of the aircraft involved to be known. This, in turn, would provide an indication of whether the number of passengers arriving would have had a direct impact on the decision to apply Level 2 procedures or whether any decisions were taken based on a combination of numbers or individuals arriving and where they were arriving from.
24. It also explained that by using the flight details in conjunction with the times and dates of when the Level 2 procedures were put into operation, it would be possible to identify which departure airports were most commonly targeted for Level 2 procedures and therefore which specific flights or departure airports would be subject to less stringent checks.
25. The HO also explained that, although Level 2 procedures are no longer in operation and all passengers are subject to stringent immigration checks, it was still important that individuals do not have any indication about which departure airports or flight carriers are viewed to be of a higher or lesser risk for immigration purposes. It argued that this information could be used to infer the likelihood of a customs check (which remains a risk based activity). It also went on to argue that although individuals may assume that certain departure airports would be likely to receive a lesser proportion of customs checks than others it is important that there is no official confirmation of any such assumptions.

¹ This was a pilot scheme which allowed Immigration Officers to routinely cease opening the chip within EEA passports and checking all EEA nationals under 18yrs against the Warnings Index, where they were travelling in clear family units or as part of a school party.

26. Although the Commissioner has not had sight of the withheld information, since the HO stated that it was very sensitive information, the Commissioner notes the HO's explanation regarding what the information is about.
27. He also notes that the HO has confirmed that this information had been compiled to give both Ministers and John Vine, during the writing of his report, information about which airports had Level 2 procedures in operation during August, September, October and November 2011. Therefore, the Commissioner considers that disclosure would be likely to prejudice the operation of immigration controls and that section 31(1)(e) is engaged.

Public interest arguments in favour of disclosing the information

28. The Commissioner considers that factors in favour of disclosing information include transparency, accountability and, in this case, understanding the way in which passport and ID checks were carried out in Northern Ireland. He notes that the perceived relaxing of immigration checks was a high profile public issue at the time.
29. The HO acknowledged that there is a public interest in disclosing information which could increase the transparency of the work of the Border Force. It also considered that it was in the public interest to know that the border controls at airports are tightly and effectively managed.
30. The HO also considered public interest in knowing how many flights were checked under the Level 2 procedures in place between July and November 2011. Disclosure would show flight details, which would provide information about which departure airports and flight operators were considered to be of a low enough level of risk to allow for the use of Level 2 operations.
31. The HO acknowledged that the public needs to have confidence that adequate security checks are put in place at airports. The public also need to be confident that any decisions to reduce the operational level of checks are taken on the knowledge that the risks are minimized by examining where the flight is originating from, the number of passengers on the flights and which airline carrier is operating the flights, as well as other probable sources of information. Disclosure of the requested information could help to reassure the public.

Public interest arguments in favour of maintaining the exemption

32. The Commissioner notes that Mr Vine had been commissioned by the HO on 5 November 2011 to investigate and report on the level of checks

operated at ports of entry to the UK and that the request was sent via email on 10 November 2011.

33. The HO argued that disclosing information about specific locations, flights, flight carriers and how these played a role in Border Force activities could potentially cause individuals or criminal gangs to change their mode of operations.
34. The HO pointed out that although 100% immigration risk assessments are now in place, criminals could use these assessments to infer the risk assessments available for customs. The HO explained that these customs activities remain risk based interventions.
35. The HO asserted that it was necessary to maintain the assessment of passenger behaviours, based on immigration and custom events and to vary the focus of border controls based on the latest intelligence. It is imperative that intelligence is withheld from those intent on criminal activity so that Border Force can remain one step ahead of those seeking to avoid such controls.
36. The HO also explained that it had finite resources which are deployed on an intelligence led basis and that disclosure of information that could assist organised criminals could undermine the use of these resources.

Balancing of the public interest arguments

37. The Commissioner has considered the public interest arguments. He must decide whether or not it is in the public interest for the information to be disclosed to the general public rather than any personal reasons the complainant has for wanting the information in question.
38. The Commissioner notes that there is a strong public interest in knowing what checks are carried out at our borders. The Commissioner also notes the HO's explanation regarding the sensitivity of the information. Further, he also notes that at the time of the request, Mr Vine had been commissioned by the HO to investigate and that the HO stated that the information in question was provided to Ministers and Mr Vine to help with his investigation.
39. The Commissioner notes the HO's explanation that the Vine report identified that Level 2 operations had taken place in the summer of 2011. He also notes that this information caused a significant level of alarm across the UK and the disclosure of information in question could reduce this. Further, he notes that the HO has confirmed that Level 2 procedures are no longer in use.
40. The Commissioner also recognises the strong public interest in knowing about the level of checks carried out at our borders. However, he

considers that this public interest has been met to a degree by the publication of the Vine report and the reorganisation that followed.

41. It is the Commissioner's view that the disclosure of Level 2 operations would be likely to provide a greater threat in the future in that individuals, particularly criminal organisations which are known to monitor Border Force operations, would be aware of factors that could have a specific impact on immigration and customs activities.
42. The Commissioner therefore considers that in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Procedural issues

43. The HO issued a refusal notice on 8 December 2011. It stated that it was relying on section 36(2)(c) of FOIA but did not explain why this exemption applied and subsequently relied on section 31(1)(e).
44. The Commissioner considers that the HO has therefore breached section 17(1)(b) by failing to cite the correct exemption in its refusal notice of 8 December 2011, and section 17(1)(c) by failing to explain the exemption which it had applied.

Other matters

45. A public authority can change the exemptions it is applying. However, since the HO initially informed the complainant that it was applying section 36(2)(c), the Commissioner would expect it to have let the complainant know promptly when it decided to replace that exemption with section 31(1)(e).
46. The complainant requested an internal review on 12 May 2012. Although there is no statutory time limit, the Commissioner considers that an internal review should be carried out within 20 working days of receipt. The Commissioner notes that the HO was two days late.

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

Jon Manners
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