

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 June 2016

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

#### Decision (including any steps ordered)

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1. The complainant requested information relating to illegal immigration via Scottish ports. The Home Office refused to disclose this information and cited the exemption provided by section 31(1)(e) (prejudice to the operation of the immigration controls) of the FOIA.
2. The Commissioner's decision is that section 31(1)(e) was cited correctly so the Home Office was not obliged to disclose this information. The Commissioner has also found, however, that the Home Office breached section 17(1) of the FOIA by delaying its response to the request.

#### Request and response

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3. On 12 August 2015 the complainant wrote to the Home Office and requested information in the following terms:

*"Please tell me how many illegal entries or 'clandestines' have been detected by the Border Force, per month, at ports of entry in Scotland between January 2014 and August 2015. For each month, please detail port where detected, and nationality of detainee."*

*"Please tell me:*

- *How many "civil penalties" have been issued by the Border Force/Home Office, by month, between January 2014 and August 2015, for carrying clandestine entrants into the UK via Scottish ports of entry? Please give monthly totals for each port of entry.*

- *For the above, please detail the amount of penalties issued per month at each port (i.e. £30,000) and the number of each amount of penalty (i.e. 30 x £2,000 penalties, 20 x £1,000 penalties).*
  - *For the above, by month and total amount, how many of the civil penalty payments are currently outstanding?"*
4. After a delay, the Home Office responded substantively on 22 October 2015. It stated that the request was refused and cited the exemption provided by section 31(1)(e) (prejudice to the operation of the immigration controls) of the FOIA.
  5. The complainant responded on the same date and requested an internal review. After a further delay, the Home Office responded on 15 February 2016 with the outcome of the review. The conclusion of this was that the refusal under section 31(1)(e) was upheld, with sections 31(1)(a) (prejudice to the prevention or detection of crime) and 31(1)(b) (prejudice to the apprehension or prosecution of offenders) also cited at this stage.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 16 February 2016 to complain about the refusal of his information requests. The complainant raised the delay in responding to his requests, as well as the refusal to disclose the requested information.
7. Whilst a delay in responding with the outcome of the internal review does not constitute a breach of the FOIA, the complainant did raise this delay when contacting the ICO and this issue is covered in the "Other matters" section below.

## **Reasons for decision**

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### **Section 17**

8. Section 17(1) of the FOIA requires that a response that refuses an information request must be sent within 20 working days of receipt of the request. Section 17(3)(a) provides that, where an exemption that is qualified by the public interest is cited, a public authority may extend the time to respond setting out their consideration of the public interests. The approach of the Commissioner is that such extensions should be for a maximum of a further 20 working days, unless there are exceptional circumstances.

9. In this case, the Home Office sent an initial response on 10 September 2015, advising the complainant that there would be a delay whilst it considered the public interest in relation to section 31. However, it then did not send a substantive response until 22 October 2015, more than a total of 40 working days since receipt of the request.
10. The Commissioner is not aware of any exceptional circumstances in this case and so finds that the Home Office breached section 17(1) through the delay in responding to the complainant. The Commissioner comments further on this breach in the "Other matters" section below.

### **Section 31**

11. The Home Office cited sections 31(1)(a), (b) and (e) of the FOIA. The Commissioner has focussed here on section 31(1)(e). Section 31(1)(e) provides that information is exempt where its disclosure would, or would be likely to, prejudice the immigration controls, which the Commissioner's published guidance on this exemption<sup>1</sup> refers to as "*physical immigration controls at points of entry into the United Kingdom*".
12. For this exemption to be engaged disclosure must be at least likely to prejudice the matters referred to in these sections. This exemption is qualified by the public interest, which means that if the public interest in maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
13. As noted above, these exemptions apply where disclosure "*would*" or "*would be likely*" to cause prejudice. In this case the Home Office has specified that its position is that prejudice *would* result through disclosure. The approach of the Commissioner is that he will accept that prejudice *would* occur where that outcome is more probable than not and that is the test he has applied here. The Home Office argument concerned prejudice that it believed would result through the combination of this information with other information that may already be in the public domain or be disclosed in future. It argued that this would enable a picture to be built up of where a clandestine entrant to the UK is most likely to be apprehended, which would then be of assistance to those seeking to evade entry controls, and that this would result in prejudice relevant to section 31(1)(e).

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/law-enforcement-foi-section-31.ashx](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/law-enforcement-foi-section-31.ashx)

14. These types of arguments are sometimes referred to as “mosaic” arguments, where the public authority argues that disclosure of the information in question could be combined with other information to form a mosaic of the process that the information relates to. The approach of the Commissioner is to assess the merits of mosaic arguments in the circumstances of each case and that they should not be dismissed automatically.
15. The Commissioner notes first that the reasoning advanced by the Home Office is relevant to the operation of the immigration controls; the process referred to in section 31(1)(e). As to whether the likelihood of this prejudice occurring is more likely than not, the first step is to consider what disclosure of the information in question would reveal.
16. The argument of the Home Office was that disclosure would allow a picture to be built up of where individuals are most likely to be apprehended. On the issue of other information that could be combined with the information in question to cause a mosaic effect, the Home Office was referring to information that may be disclosed in response to future similar information requests, which it argued would be difficult to refuse if the information in question here was disclosed.
17. Where mosaic effect arguments are advanced the Commissioner’s view is that these will be more convincing where the public authority is referring to other specific information that is already in the public domain, rather than to information that may be disclosed at an indeterminate future time. However, he does not reject entirely arguments based on disclosures to future information requests, so he accepts that this element of the Home Office’s argument in this case is valid, albeit that it carries less weight than if the Home Office had been able to point to specific information that is already available.
18. In support of its argument, the Home Office referred to a previous case in which the Commissioner found that sections 31(1)(a) and (e) were engaged in relation to operational information about a ferry port<sup>2</sup>. On appeal this decision was upheld by the First-tier Tribunal<sup>3</sup>.

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<sup>2</sup> [http://ico.org.uk/~media/documents/decisionnotices/2012/fs\\_50401773.ashx](http://ico.org.uk/~media/documents/decisionnotices/2012/fs_50401773.ashx)

<sup>3</sup>

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i845/20121005%20Decision%20EA20120041.pdf>

19. The complainant advanced counter-arguments as to why he did not believe that the exemption applied, including referring to news stories that he believed demonstrated that a precedent had been set for disclosure of information similar to that requested in this case. The Commissioner's view on this is that the information referred to in the media coverage highlighted by the complainant is different from the information in question in this case and, in any event, a previous disclosure of similar information in a different context would not necessarily rule out the possibility of withholding the requested information in this case. Also notable is that a previous disclosure of related information could result in the mosaic effect predicted by the Home Office being made more likely.
20. The complainant also argued that the Home Office should have discussed with him what information it may have been possible to disclose and whether a compromise position could have been reached, rather than his request being refused entirely. Whilst the Commissioner encourages requesters and public authorities to be open to discussion and compromise, this notice concerns the request of 12 August 2015, as did the Home Office response of 22 October 2015. No breach of the FOIA occurred on the grounds that the Home Office did not discuss with the complainant what subset of the requested information, or other alternative information, could be disclosed.
21. The complainant made his requests of 12 August 2015 in two items of correspondence and argued that they should have been dealt with separately. The Commissioner's view, however, is that the requests were clearly closely related, both in terms of subject matter and outcome had the requested information been disclosed, hence it was reasonable for the Home Office to respond to them together.
22. The Commissioner's view is that the Home Office has made a valid argument about how a fuller picture of law enforcement efforts at ports could be built up through disclosures in response to other similar requests, combined with the response to this request. Whilst he does not accept that the test for *would* prejudice is met, the Commissioner has gone on to consider whether the test for *would be likely* is met, which he generally will do where he has found that the higher test is not met.
23. 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. Applying that test here, the Commissioner accepts that there is a real and significant likelihood of prejudice relevant to section 31(1)(e) through the information in question being combined with information disclosed in response to

future similar information requests. The mosaic effect picture that would emerge through a number of disclosures could then be of significant use to those seeking to evade the border entry controls. Increasing the possibility of border controls being evaded would be likely to prejudice the operation of the immigration controls. His conclusion is, therefore, that this exemption is engaged.

24. The next step is to consider the balance of the public interests. In forming a conclusion here the Commissioner has taken into account the general public interest in the transparency of the Home Office, as well as factors that apply in relation to the specific information in question.
25. Covering first arguments in favour of disclosure, issues relating to immigration, including illegal immigration, are perpetually high on the political agenda. The Commissioner recognises that there is public interest in disclosure that would inform the public about the operation of the immigration controls in relation to curbing illegal immigration. The requested information would provide some insight into the effectiveness of the process and work of the Home Office relating to border security. This is a valid public interest factor in favour of disclosure.
26. Turning to arguments in favour of maintenance of the exemption, having found that the exemptions are engaged as the prejudice predicted by the Home Office would be a likely outcome of disclosure, the Commissioner must acknowledge the public interest in avoiding that outcome. Clearly it would not be in the public interest to prejudice the ability of the Home Office to operate the immigration controls. The public interest inherent in the exemption is a valid factor in favour of maintenance of the exemption which carries considerable weight.
27. In conclusion - the Commissioner has recognised that there is some public interest in disclosure. However, the prejudice to the process inherent in section 31(1)(e) would need to be outweighed by sufficiently weighty factors in favour of disclosure. In this case the Commissioner does not believe that the public interest in favour of disclosure is sufficiently weighty. His finding is, therefore, that the public interest in the maintenance of section 31(1)(e) outweighs the public interest in disclosure. This means that the Home Office was not obliged to disclose the information requested by the complainant.
28. In light of this conclusion it has not been necessary to go on to also consider sections 31(1)(a) and (b).

## **Other matters**

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29. As well as the breach of section 17 recorded above, the Commissioner has also made a separate record of that breach, as part of his ongoing monitoring of the timeliness of Home Office responses. The Home Office must ensure in particular that it avoids extending the time to consider the balance of the public interests beyond a further 20 working days in all but exceptional cases.
30. The Commissioner also expects public authorities to carry out internal reviews within a maximum of 40 working days and has made a record of the failure by the Home Office to do so in this case.

## Right of appeal

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31. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

32. 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.
33. 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 .....**

**Ben Tomes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**