Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **25 July 2019**

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

Decision (including any steps ordered)

1. The complainant requested information relating to the partnership between the Home Office and St. Mungo's, including email communications between named staff from St Mungo's and the Home Office.

2. The Home Office provided some information within the scope of the request but refused to provide the remainder, citing section 31(1)(e) (law enforcement) of the FOIA.

3. The Commissioner investigated its application of section 31(1)(e) to the information requested at parts (2) and (3) of the request.

4. The Commissioner's decision is that the Home Office applied the exemption provided by section 31(1)(e) incorrectly.

5. The Commissioner requires the Home Office to take the following step to ensure compliance with the legislation:

   - disclose the withheld information in scope of parts (2) and (3) of the request for information, a copy of which was provided to the Commissioner during the course of her investigation, (with appropriate redactions for personal data).

6. 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.

Background

7. By way of background to the request in this case, the Home Office told the Commissioner:

> *"St. Mungo's is a respected non-governmental organisation (NGO) which provides a wide-range of services on a commissioned basis to local authorities and others related to the support of those at risk of homelessness, particularly rough-sleepers".*

Request and response

8. On 11 June 2018, the complainant wrote to the Home Office and requested information in the following terms:

> *"I wish to establish the nature of the partnership between St Mungo's and the Home Office between September 2015 and June 2016 in planning, coordinating and reviewing Rough Sleeping enforcement operations and visits, particularly in Westminster. To this end, I request the following information:*
>
> *1. Any written partnership agreement between St Mungo's and the Home Office or any other document to this effect, e.g. Memorandum of Understanding.*
> *2. Email communication between* [name redacted] *(Home Office) and* [name redacted] *(St Mungo's* – [role redacted]*) relating to the planning, coordination and review of Immigration Enforcement operations*
> *a) between 1st September 2015 and 30th January 2016*
>
> *b) between 1st August 2016 and 31st December 2016*
>
> *3. Email communication between* [name redacted] *(Home Office) and* [name redacted] *(St Mungo's* – [role redacted]*) relating to the planning, coordination and review of Immigration Enforcement visits to EEA rough sleepers in Westminster*
>
> *a) between 1st September 2015 and 30th January 2016*
>
> *b) between 1st August 2016 and 31st December 2016*
>
> *4. Should the request for email communication be too broad, please indicate the number of emails exchanged between the parties indicated above between the stated dates.*
>
> *5. What information did St Mungo's provide to* [name redacted] *and*

local ICE teams about EEA rough sleepers between September 2015 and December 2017. Please specify how frequently intelligence was sent to the Home Office and through what means (e.g. email, phone, joint shifts).

I would like the information specified to be provided to me as electronic copies".

9. The Home Office responded on 17 July 2018. It refused to provide the requested information. It cited the following exemption as its basis for doing so:

   - section 31(1)(e) law enforcement.

10. The complainant requested an internal review on 22 July 2018. Following the Commissioner's intervention, the Home Office provided the outcome of its internal review on 28 November 2018. It revised its position.

11. While it confirmed its view that section 31(1)(e) applied to parts 1-4 of the request, it said that section 12 (cost of compliance) of the FOIA applied to the information relating to part (5) of the request.

Scope of the case

12. The complainant contacted the Commissioner on 4 December 2018 to complain about the way his request for information had been handled.

13. In support of his complaint, he cited the Home Office's refusal based on the public interest test. As those arguments relate to the Home Office's application of section 31(1)(e), the Commissioner advised both the complainant and the Home Office that the scope of her investigation would be with regard to parts 1- 4 of the request.

14. The complainant raised other issues which are outside the scope of the Commissioner's remit. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (FOIA).

15. Where possible, the Commissioner prefers complaints to be resolved informally and asks both parties to be open to compromise. She therefore accepts that there was a delay in the Home Office providing the Commissioner with its substantive response, due to the Home Office taking steps to establish whether an informal resolution might be possible.

16. Having advised the Commissioner that an informal resolution would not, in fact, be possible in this case, the Home Office ultimately provided its substantive response to the Commissioner on 27 March 2019. It also provided her with a copy of the withheld information.

17. On 29 April 2019, the Home Office clarified the nature, and quantity, of the withheld information. It advised that it did not hold information within the scope of part (1) of the request. It also provided the Commissioner with a replacement copy of the withheld information in scope of parts (2) and (3) of the request, advising that a response to part (4) of the request was therefore not applicable.

18. The Commissioner accepts that some of the information provided by the Home Office comprised email chains. She acknowledges that the Home Office stated:

> *"… any information deemed not to be in scope has been marked as such".*

19. Of the information provided to her, the Commissioner considers the information to be in scope unless it was specifically annotated 'not in scope' or 'out of scope'.

20. The Home Office confirmed that the public interest arguments set out in its earlier submission were still applicable and that nothing had changed in that respect.

21. The Home Office subsequently wrote to the Commissioner advising that, it did, in fact, hold information within the scope of part (1) of the request. The Home Office wrote to the complainant on 5 June 2019 providing him with a copy of that information.

22. In subsequent correspondence with the Commissioner, the complainant confirmed that he remained dissatisfied with the Home Office's refusal to disclose the email correspondence requested at parts (2) and (3) of the request.

23. The analysis below considers the Home Office's application of section 31(1)(e) to the information within the scope of those parts of the request.

Reasons for decision

Section 31 law enforcement

24. Section 31 of the FOIA creates an exemption from the right to know if releasing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be

claimed by any public authority, not just those with law enforcement functions.

25. In order to engage a prejudice based exemption such as section 31 there must be likelihood that disclosure would cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:

- first, the actual harm which the public authority alleges would, or would be likely to, occur if the disputed information was disclosed, has to relate to the applicable interests within the relevant exemption;

- secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the disputed information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance;

- thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility: rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.

26. 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.

27. In this case, the Home Office is relying on section 31(1)(e) of the FOIA. This states that information is exempt if its disclosure would, or would be likely to, prejudice the operation of the immigration controls.

28. The Commissioner considered that, in its correspondence with the complainant, the Home Office relied to a large degree on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis.

29. It was not until her investigation that the Home Office explained why it considered the exemption was engaged.

The applicable interests

30. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activity mentioned in section 31(1)(e) – the operation of the immigration controls.

31. With respect to section 31(1)(e), the Commissioner's guidance states:

> *"The exemption will be engaged if disclosure would, or would be likely to, prejudice physical immigration controls at points of entry into the United Kingdom. It could also protect information about issuing and approving work permits and the processing of asylum applications".*

32. Relying on a broad definition of the term "*immigration controls*", the Commissioner considers that the subject matter of the requested information - information relating to Immigration Enforcement operations and Immigration Enforcement visits to EEA rough sleepers - relates to the law enforcement activity that the exemption is designed to protect.

The nature of the prejudice

33. The Commissioner next considered whether the Home Office demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 31(1)(e) is designed to protect. In her view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.

34. In its correspondence with the complainant, albeit in relation to the public interest test, the Home Office told him that disclosure could substantially prejudice the operation of immigration controls and the work that Immigration Enforcement carries out.

35. In that respect, it said that disclosure of the requested information:

> *"… may enable potential offenders to obtain detailed information on our risk assessment and deployment methodology. It may also enable potential offenders to build up a picture of our operational priorities, activities and areas of highest risk".*

36. As is her practice in a case such as this, during the course of her investigation, the Commissioner asked the Home Office to provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice which may occur.

37. In its submission to the Commissioner, the Home Office explained that disclosing the requested information *"would likely prejudice Immigration Enforcement operational activity in future in several ways".*

38. The Home Office argued that disclosure would be likely to deter third parties from sharing information with the Home Office and working with it on planning, coordinating and reviewing immigration operational activity in future. The Home Office argued that this would undermine its ability to carry out its activity to enforce immigration controls.

39. The Home Office also expanded on the arguments it had provided to the complainant, explaining that disclosing the requested information could prejudice future enforcement operations. In its submission, the Home Office told the Commissioner:

> *"Sharing details of how the Home Office plans and conducts enforcement activity "would be likely" to prejudice future activity by making its tactics available to those seeking to bypass immigration controls or exploit its processes …".*

40. It also explained:

> *"… public knowledge of Immigration Enforcement tactics for gathering information and planning and coordinating operational activity could lead to those subject to immigration control being able to bypass or exploit operational activity".*

Likelihood of prejudice

41. The Home Office considered that disclosure of the information *would be likely* to have the stated detrimental effect.

Is the exemption engaged? Would disclosure be likely to prejudice the operation of the immigration controls?

42. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual or of substance'.

43. It is not enough for the information to relate to an interest protected by section 31(1)(e), its disclosure must also at least be likely to prejudice that interest. The onus is on the public authority to explain how that prejudice would arise and why it is likely to occur.

44. In this case, the Commissioner accepts that the request for information relates to the nature of the partnership between St Mungo's and the Home Office, at a given time, with a focus on:

"… planning, coordinating and reviewing Rough Sleeping enforcement operations and visits, particularly in Westminster".

45. She also acknowledges the Home Office's generic arguments:

- that its ability to carry out its activity to enforce immigration controls would likely be undermined if it was unable to work with third parties; and

- that disclosure:

"… could assist those engaged in criminal activities, compromising the integrity of immigration controls".

46. However, she does not consider that the Home Office has provided evidence to support its view that disclosure would be likely to result in third parties being unwilling to work with Immigration Enforcement in the future.

47. Nor does she consider that the Home Office has demonstrated how disclosure of the information in question would enable those subject to immigration control to bypass, or exploit, operational processes by building up a picture of future activity or priority.

48. Mindful of the timeframe specified in the request, the Commissioner does not accept that the Home Office has explained how disclosure of information relating to enforcement activity that has already taken place would provide an insight into future operational activity, thus compromising the integrity of immigration controls.

49. From the evidence she has seen, the Commissioner is not satisfied that the Home Office has demonstrated a causal relationship between the potential disclosure of the information being withheld and the prejudice the exemption is designed to protect.

50. As she is not satisfied that there would be a real and significant likelihood of prejudice to the immigration controls through disclosure of the information in scope of parts (2) and (3) of the request, the Commissioner finds that the Home Office failed to establish engagement of the section 31(1)(e) exemption in respect of the information in scope of those parts of the request.

The public interest test

51. In light of the above finding, it has not been necessary to consider the public interest test.

52. As the Commissioner has found that the exemption provided by section 31 is not engaged, she orders release of the information withheld under that exemption.

53. The Commissioner recognises that the information under consideration includes third party information. She accepts that the Home Office did not cite section 40(2) (personal information) of the FOIA in its submissions as it considered the withheld information was wholly exempt by virtue of section 31. However, in her role as Regulator, she requires that the information is suitably redacted prior to disclosure.

Other matters

Timeliness

54. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA. However, the Commissioner has issued guidance in which she has stated that, in her view, internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.

55. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her "Openness by design strategy"[1] to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"[2].

Records management

56. When a public authority receives a request, its first task is usually to determine whether it holds the requested information. In many cases it will be simple to locate information, particularly if the public authority

[1] https://ico.org.uk/media/about-the-ico/documents/2615190/openness_by_-design_strategy_201906.pdf

[2] https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf

practices good records management. However, throughout her investigation, the Home Office clearly had difficulty in determining to what extent it held the requested information.

57. The Commissioner takes the opportunity to refer the Home Office to the code of practice issued under section 46 of the FOIA (the "section 46 code") which sets out the practices which public authorities should follow in relation to the creation, keeping, management and destruction of their records.

Right of appeal

58. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.

60. 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 .....

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