

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 May 2020

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

Decision (including any steps ordered)

1. The complainant requested the circulation list for reports produced by the Extremism Analysis Unit.
2. The Home Office refused to provide the requested information, citing sections 31(1)(a) (law enforcement) and 40(2) (personal information) of the FOIA.
3. The Commissioner's decision is that the Home Office was entitled to rely on section 31(1)(a) and that the public interest favoured maintaining the exemption.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. With respect to the unit specified in the request, HM Government's Counter-Extremism Strategy¹, dated October 2015, states:

"Within the Home Office we have now established the Extremism Analysis Unit to support all government departments and the wider

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/470088/51859_Cm9148_Accessible.pdf

public sector to understand wider extremism issues so they can deal with extremists appropriately”.

6. The Commissioner notes the following response² to a Written Question about its terms of reference and to whom it reports :

“The Extremism Analysis Unit (EAU) continues to operate within the Home Office.

The EAU has a remit to analyse extremism in this country and abroad where it has a direct impact on the UK and/or UK interests. The EAU is a cross-government resource, with government departments able to commission research and analysis. The EAU does not have any executive or police powers or any operational role, it does not take operational decisions or determine policy or strategy. It provides independent analysis to policy and operational colleagues, who are responsible for such decisions.

The EAU is part of the Home Office Analysis and Insight (HOAI) directorate and reports to the Director for Analysis and Insight. HOAI is part of the Home Office Crime, Policing and Fire Group (CPFG). The Home Secretary is accountable to Parliament for the work of the EAU”.

7. That Written Question was asked on 14 January 2019 and answered on 28 January 2019.

Request and response

8. On 16 March 2019, the complainant wrote to the Home Office and requested information in the following terms:

“Please disclose the circulation list for a report published by The Extremism Analysis Unit”.

9. The request was made using the ‘whatdotheyknow’ website.
10. The Home Office responded on 15 April 2019. It refused to provide the requested information citing the following exemption:

² <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Lords/2019-01-14/HL12796/>

- section 40 (personal information).
11. Following an internal review, the Home Office wrote to the complainant on 6 November 2019 apologising for the delay in responding. It clarified its interpretation of the request, confirmed its application of section 40 and additionally cited section 31(1)(a) (law enforcement) of the FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 6 November 2019 to complain about the way his request for information had been handled. He did not mention the length of time it took the Home Office to respond to his request for an internal review, nor did he raise the matter of the Home Office's interpretation of the request. He simply told the Commissioner:

"I apply for a s50 DN.

I do not believe the exemption can apply and that PI [public interest] favours release".

13. From that brief correspondence, and on the basis that he specifically referred to the public interest favouring disclosure, the Commissioner considered it more likely that the complainant was applying for a decision notice regarding the Home Office's application of section 31 in this case, than its application of section 40.
14. As is her practice, the Commissioner wrote to both parties setting out the scope of her investigation.
15. The Commissioner told the complainant that she understood that, while he disputed the Home Office's application of section 31 of the FOIA in this case, he did not dispute its interpretation of his request.
16. She invited him to contact her, within a given timeframe, if there were other matters that he considered should be addressed. However, that correspondence was neither acknowledged nor responded to.
17. During the course of her investigation, the Home Office confirmed its interpretation of the request, telling the Commissioner:

"We have interpreted this to mean the circulation list for any report published by the Extremism Analysis Unit (EAU) and we understand that [the complainant] does not dispute this interpretation".
18. The Commissioner accepts that this interpretation corresponds with what the Home Office told the complainant when it explained to him that:

"... in asking for 'the circulation list for a report published by The Extremism Analysis Unit' it is not clear whether the request is for the circulation list for a specific report, or reports in general. However, in the absence of any additional information, the latter is a reasonable interpretation and that is the interpretation which I have maintained".

19. In its submission, the Home Office confirmed its application of sections 31 and 40 to the withheld information. The Home Office also told the Commissioner that it considered that section 24 (national security) of the FOIA may also apply.
20. The analysis below considers the Home Office's application of section 31(1)(a) of the FOIA to the withheld information.
21. That information comprises details of those to whom EAU reports in general are sent, specifically the names of the organisations, email addresses (personal and non-personal) and roles.

Reasons for decision

Section 31 law enforcement

22. 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.
23. In this case, the Home Office is relying on section 31(1)(a) of the FOIA to withhold the whole circulation list.
24. Section 31(1)(a) states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice, -

(a) the prevention or detection of crime".
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.

The applicable interests

27. 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 in section 31(1)(a).
28. In correspondence with the complainant, the Home Office simply told him:

"The exemption is engaged because of the effect disclosure would have in terms of possible inferences that might be drawn from the range of individuals included (or not included) in the list".

29. In its submission to the Commissioner, the Home Office explained:

"... EAU reports, by their nature, relate to matters which affect national security, law enforcement and public safety".

30. Accordingly, the Home Office told the Commissioner:

"It follows that the distribution list for these reports will include individuals and organisations who have a direct or indirect interest in such matters, including law enforcement agencies".

31. The Commissioner recognises, in her published guidance³, that section 31(1)(a) will cover all aspects of the prevention and detection of crime. She accepts that the exemption can be used to withhold information that could make anyone more vulnerable to crime.
32. In light of the subject matter of the request and the nature of the work of the EAU, the Commissioner is satisfied that the prejudice the Home Office is envisaging in this case is relevant to the particular interest 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)(a) 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 that respect, the Home Office told the complainant, albeit with regard to the public interest test, that disclosure of which areas and/or departments are not receiving EAU reports:

"... would provide useful information to those who might seek to commit crime by allowing extremist actors to exploit this information to operate in certain sectors".

35. It argued that this would undermine law enforcement efforts.
36. Similarly, it told the Commissioner:

"The nature of the prejudice, as we explained in the internal review, is that to provide information about those receiving EAU reports, and by inference those who are not, would disclose which the organisations [sic] have an interest in the content of these reports and the use which may be made of such information".

37. It further argued:

"The information would be exploitable by those who are of extremist views or have a potential to take extremist action, or who might seek to commit crime, because it would enable them to make links and make inferences about the extent to which [recipients]

³ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

have an interest in the matters to which EAU reports relate: broadly, extremism of all kinds”.

38. Recognising that the value of the information “*might not be great*”, the Home Office nevertheless stated that the extent to which extremist individuals or groups will collect information about the extent to which the authorities know about their activities and the steps they might take to combat them, should not be under-estimated.
39. With respect to the non-personal email addresses in the list belonging to law enforcement agencies, the Home Office told the Commissioner:

“Disclosure ... would cause prejudice because their disclosure into the public domain would compromise them and in effect render them unusable”.

The likelihood of prejudice

40. The Home Office variously cited the terms ‘*would*’ and ‘*would be likely*’ in its correspondence with both the complainant the Commissioner when describing the detrimental effect of disclosure. However, the Commissioner notes that it clearly told the complainant:

“The Home Office considers the information you have requested to be exempt from disclosure on the grounds that release would be likely to prejudice the prevention or detection of crime”.

Is the exemption engaged? Would disclosure be likely to prejudice the prevention or detection of crime?

41. 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*’.
42. The Commissioner has considered the applicability of the exemption at section 31 of the FOIA. In doing so, she has taken into account that the remit of the EAU is to analyse extremism.
43. Although the request in this case is for the circulation list of EAU reports in general, the Commissioner considers it relevant to take into account the likely nature of such reports. In that respect, she acknowledges that she has previously considered a case involving a request for the

disclosure of a number of reports produced by the EAU. In her decision notice in that case⁴, she noted that each of those reports:

"... provides an assessment of extremist activity in a specified area".

44. The Home Office did not provide any evidence in support of its view that the circulation list would be exploitable, if disclosed. However, given the remit of the EAU and the nature of its work, the Commissioner finds it is plausible that the information could be useful to someone intent on criminal activity. She considers it at least possible that there are circumstances in which the outcome predicted by the Home Office could arise, and that the consequences of that disclosure would not be trivial or insignificant.
45. With respect to the impact of disclosure of the non-personal email addresses within the withheld information, the Commissioner accepts that the effect of the disclosure of that information could be mitigated by replacing the email addresses with new ones. However, she recognises that the Home Office's prime argument relates to the inferences that could be drawn from the range of those bodies that are included, or not, on the list. She therefore accepts that any steps taken to mitigate the effect of disclosure of the non-personal email addresses would be limited.
46. She is satisfied that disclosure of the requested information in this case would be likely to represent a real and significant risk to law enforcement matters. She is also satisfied that there is a causal relationship between the disclosure of the requested information and the prejudice that the exemption is design to protect.
47. As the Commissioner accepts that the outcome of disclosure predicted by the Home Office would be likely to occur, she is therefore satisfied that the exemption provided by section 31(1)(a) is engaged.

The public interest test

48. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617625/fs50881024.pdf>

Public interest arguments in favour of disclosing the requested information

49. Other than simply claiming that the public interest favours release, the complainant did not put forward any substantive arguments in favour of disclosure.
50. The Home Office acknowledged the general public interest in openness and transparency in all aspects of Government. In this particular case, it recognised that disclosure:

"... would enhance the public's knowledge of areas and/or departments which have sight of reports published by the EAU and to some limited degree, how public money and resource is used".

Public interest arguments in favour of maintaining the exemption

51. In support of maintaining the exemption, the Home Office told the complainant:

"The circulation list for EAU reports is not a matter in which there is strong public interest in disclosure, notwithstanding the general public interest factors referred to above".

52. It also stressed that disclosure in this case would, by definition, reveal areas and/or departments which are not receiving EAU reports. As noted above, it told the complainant:

"This would provide useful information to those who might seek to commit crime by allowing extremist actors to exploit this information to operate in certain sectors. This would undermine law enforcement efforts and would not be in the interest of the UK's national security. This is clearly not in the public interest".

53. In its submission to the Commissioner, the Home Office told her:

"The main factor weighing against disclosure is the prejudice. A disclosure which would be likely to undermine law enforcement efforts ... is not in the public interest".

Balance of the public interest arguments

54. The Commissioner is unable to comment on the extent to which the requested information is of genuine interest to the complainant as he provided no indication. However, disclosure under the FOIA is disclosure to the world at large. She must therefore consider whether the information is suitable for disclosure to anyone and everyone.
55. When balancing the opposing public interests in a case, the Commissioner must decide whether it serves the public interest better to disclose the requested information or to withhold it because of the

interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

56. The Commissioner accepts that there is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest.
57. She acknowledges the public interest arguments in favour of openness and transparency.
58. However, she also recognises that there is a very strong public interest in protecting the law enforcement capabilities of public authorities. 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.
59. In that respect, the Commissioner is mindful that the Home Office expressed concern that disclosure of the requested circulation list would be likely to facilitate criminal activity. Clearly, disclosing information that may make an individual, or society, more vulnerable to those seeking to commit crime is not in the public interest.
60. In reaching a view on where the public interest lies in this case, the Commissioner has weighed the public interest in avoiding prejudice to the prevention or detection of crime against the public interest in openness and transparency.
61. In the circumstances of this case, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It follows that the Home Office was entitled to rely on section 31(1)(a) of the FOIA to refuse to disclose the requested information.
62. As the Commissioner has concluded that the exemption provided by section 31(1)(a) was correctly applied to all the withheld information, she has not gone on to consider the other exemptions cited by the Home Office in this case.

Right of appeal

63. 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

64. 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.

65. 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

**Laura Tomkinson
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