

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 26 July 2022

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested, from the Home Office, information about the criteria used to assess which marriage referrals should be investigated. The Home Office provided a copy of two annexes, withholding some content under sections 31(1)(a) (prejudice to prevention or detection of crime) and (and 40(2) (third party personal information) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on sections 31(1)(a) and 40(2) of FOIA to withhold the requested information.
3. The Commissioner does not require the Home Office to take any steps.

## Request and response

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4. On 27 November 2020, the complainant wrote to the Home Office and requested information in the following terms:

“Please provide the following information:

(1) Does the MRAU still use a triage model or similar system to decide which marriage referrals should be investigated as potential shams?

(2) Does the model use nationality as a factor in assessing marriage referrals? If so, please provide a copy of the relevant Ministerial authorisation for the purposes of the Equality Act.

(3) Please provide copies of any equality impact assessments or data protection impact assessments completed in relation to the model.

(4) Please provide copies of any internal policies, guidance or standard operating procedures which deal with the process of handling marriage referrals and the use of the model.

In the event that you determine some of the information I have requested to be exempt from disclosure, please redact exempt information with black boxes, instead of snipping or excerpting, and please state which category of exemption you believe applies to the information.

If it is not possible to provide the information requested due to the information exceeding the cost of compliance limits identified in s.12 FOIA, please provide advice and assistance as to how I can refine my request, as required under s.16 FOIA.”

5. On 17 December 2020, the Home Office responded. It advised that the Marriage Referral Assessment Unit (MRAU) does use a triage model, and that the Home office does have an Equality Impact Assessment (EIA) for the marriage assessment process. They disclosed two annexes with relation to the request and cited section 31(1)(a) and 40(3)(a) of FOIA for some redactions to the requested information.
6. On 14 January 2021, the complainant requested an internal review. Following this, after several chasers by the complainant, and holding responses, the Home Office wrote to the complainant on 22 June 2021. It upheld its position in relation to section 31(1)(a) and clarified its reliance on section 40(2) of FOIA regarding personal information

contained within the annexes, the Home Office also advised that they did not hold any further information in relation to the complainants third point within their internal review request, with relation to the full analysis of the triage model on different nationalities.

## Scope of the case

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7. The complainant contacted the Commissioner on 22 September 2021, to complain about the way their request for information had been handled as follows:

"The Home Office has refused to disclose the criteria used by its sham marriages triage model. The internal review concluded that publication of the criteria would prejudice their ability to detect and deter sham marriages and would not be in the public interest. I disagree with the refusal to disclose the criteria. I think that public law standards require transparency about how the system works and refusal to disclose the criteria is not justifiable on public interest grounds.

The internal review states that the Home Office does not hold any further information about the impacts of the triage model on different nationalities. However, in light of the EIA, I believe that the Home Office does in fact hold such information. Even if the review referred to in the EIA was conducted by a third party, I think the Home Office likely holds information about it."

8. The complainant added:

"I consider that the Home Office must disclose the criteria used by the triage model and could explain why they say they do not hold information about the further review of the nationalities involved. In particular, they could explain who conducted the review and who – if not the Home Office."

9. As part of his investigation, the Commissioner viewed the withheld information in this case which consists of the two annexes which were redacted before disclosure to the complainant.
10. As part of his considerations, the Commissioner searched online for details of the named parties within the documentation in order to ascertain whether they were sufficiently "high ranking" so as to fall within the scope of the complainant's request. He found that none of the redacted parties' details were in the public domain. The Commissioner therefore considers that it would be unlawful to disclose these details.

11. The complainant provided some detailed arguments which included the criteria used by the triage model, information in the MRAU Guidance, and the failure of the Home Office to disclose its full analysis of the impact of the triage model on different nationalities.
12. And generally, they said that it is not credible to claim that the disclosure of the criteria used by the triage model would prejudice the prevention or detection of sham marriages. The Home Office has disclosed some of the criteria in the remainder of the EIA. Given that the Home Office could disclose these criteria without prejudicing the prevention or detection of crime, it would not seem apparent why further disclosure would create a risk of harm.
13. The complainant agreed with the redaction of Home Office official names, however, they questioned the flowchart redactions and gave examples of position titles and descriptions of actions to be done as being unlikely to be personal data as it could not be used to identify a natural person.
14. And regarding the EIA, they said that the Home Office EIA indicated that there were further and more detailed analysis of the equality impacts of the model "review of the nationalities involved has been conducted."
15. The Commissioner put some of the concerns directly to the Home Office, specifically where they said they were evidenced by information in the annexes disclosed and asked for its views. Where relevant, they are included in the decision-making.
16. The Commissioner will consider the citing of exemptions below.

## **Reasons for decision**

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### **Sections 31 - (Law enforcement)**

17. The Home Office has relied on sections 31(1)(a) and (e) to withhold some of the information. This includes data within the flowchart as well as redactions in annexe A and page 6 of annexe B.
18. Section 31(1) of FOIA 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, ...
  - (e) the operation of the immigration controls."

19. Section 31 is a prejudice-based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but also that it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
20. In order for section 31 to be engaged, the following criteria must be met:
  - the actual harm which the public authority claims would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in this case, the prevention or detection of crime and the operation of the immigration controls).
  - the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance; and,
  - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
21. The first point for the Commissioner to consider is whether the arguments provided by the Home Office relate to the relevant applicable interests, namely the prevention or detection of crime and/or the operation of the immigration controls, in each instance where section 31(1) has been cited.
22. With respect to law enforcement activities, the Commissioner recognises in his published guidance<sup>1</sup>, that section 31(1)(a) will cover all aspects of the prevention and detection of crime. With respect to section 31(1)(e), he recognises that this subsection will be engaged if: "disclosure would, or would be likely to, prejudice physical immigration controls at points of entry into the United Kingdom".

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

23. The Commissioner accepts that there is clearly some overlap between these subsections. As joint arguments have been submitted in respect of subsections (a) and (e), the Commissioner has considered these together.

The applicable interests

24. The Commissioner must consider whether the arguments provided by the Home Office relate to the relevant applicable interests, namely the prevention or detection of crime and the operation of the immigration controls.
25. The Home Office advised that the annexes provide detailed information about the Home Office's requirements and capabilities with regard to the detection and prevention of sham marriages. It explained:

"Immigration is a high-profile responsibility of the Home Office. There are frequent reports on actions of individuals trying to enter the UK, and once in the UK, to take steps to remain. One step that individuals could decide to take with a view to increasing their chances of remaining in the UK is to enter into a sham marriage. Sham marriages present a genuine risk to the operation of an effective immigration control. Failure to detect and deter sham marriages places an increased cost on the UK taxpayer, estimated at between £4,250 and £7,820 per person per year.

The Home Office has developed a triage function that assesses which marriage notifications have a higher risk of being sham marriages. In response to this FOI the decision was taken to disclose the EIA but redact the criteria used to conduct the triage function. Disclosure of the triage criteria could lead to circumstances in which individuals change their behaviour in order to avoid meeting the criteria and therefore be more likely to evade scrutiny as someone entering into a potential sham marriage for gain. This would likely lead to a weakening of the Home Office's ability to detect sham marriages and likely lead to a reduction in the Home Office's ability to maintain an immigration control (s31(1)(e) (immigration control)) and prevent and detect crime (s31(1)(a) (prevention/detection of crime))."

26. The Home Office also submitted the following arguments:

"Furthermore, Organised Crime Groups (OCGs) are known to coerce vulnerable individuals into sham marriages; they also financially benefit from arranging such marriages. Money is central to all organised crime. It is a reward for crime as well as an enabler, with

profits funding future criminal activity. It is our view that disclosure of the triage criteria could be exploited by these groups who can take advantage of vulnerable individuals and direct their activities in ways to ensure the maximum benefit to them, e.g., by offering 'advice' to individuals (at no doubt, a substantial cost) as to how they could increase their chances of gaining status in the UK.

It must not be forgotten that taking steps to deceive the authorities in order to gain an immigration advantage is itself an infringement of immigration law, so disclosure would be likely to lead to circumstances where the Home Office's (and its law enforcement partners') ability to prevent and detect crime (s31(1)(a) (prevention/detection of crime)) is compromised."

27. The Home Office provided further rationale which the Commissioner is unable to reproduce here as to do so would compromise its withholding of the information.
28. The Commissioner is satisfied that the arguments provided relate to the applicable interests cited and so the first test is met.

#### The likelihood of prejudice

29. The Home Office has specified that it is relying on the lower threshold, that the prejudice envisaged 'would be likely to occur,' in this case.

#### Is the exemption engaged?

30. In a case such as this, it is not enough for the information to relate to an interest protected by sections 31(1)(a) and (e), its disclosure must also at least be likely to prejudice those interests. The onus is on the public authority to explain how that prejudice would arise and why it would occur.
31. Having considered the arguments put forward by the Home Office, the Commissioner accepts that the requested information would be useful to Sham marriage organisers or Organised Criminal Gangs (OCGs) who are intent on avoiding detection in their attempts to facilitate sham marriages and/or entrance to the country illegally. Such actions would clearly be prejudicial to law enforcement.
32. Consequently, the Commissioner is satisfied that its disclosure would represent a real risk to law enforcement matters.
33. As the Commissioner accepts that the outcome of disclosure predicted by the Home Office would likely occur, he is satisfied that the exemptions provided by sections 31(1)(a) and (e) are engaged.

### Public interest test

34. 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) and (e) of FOIA outweighs the public interest in disclosing the information requested by the complainant.

### Public interest considerations favouring disclosure

35. The Home Office has argued:

“As well as the general public interest arguments in favour of disclosure such as to ensure departmental transparency and accountability, there is a specific public interest in enabling access to information about immigration enforcement activity and the information that is gathered in order to inform our operations and ways of working.

We recognise that there may be a public interest in disclosing this information due to the way a couple’s personal information is used. In light of this public interest, the Home Office previously disclosed the justification behind the criteria that assesses the age difference between the couple giving notice to marry. It was deemed in the public interest to understand the justification behind any indirect discrimination linked to a protected characteristic.”

### Public interest arguments in favour of maintaining the exemption

36. The Home Office has argued:

“We consider that it is in the public interest to withhold information in order to maintain immigration control and to prevent and detect crime. It is in the public interest to ensure that the Home Office is able to detect sham marriages and stop individuals from securing an immigration advantage through the use of sham marriages. Disclosure of the criteria used would likely decrease the Home Office’s ability to do this. It is also in the public interest to ensure that OCGs do not benefit financially from such arrangements which could be used to fund other types of criminality.

Furthermore, through this process, the Home Office is also able to detect and safeguard vulnerable individuals who may have been forced to take part in sham marriages. Lowering our ability to detect and protect these vulnerable individuals means it would not be in the public interest for the Home Office to release the requested information.”



### Balance of the public interest arguments

37. In reaching a view on where the public interest balance lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and the Home Office.
38. He accepts that it is important for the general public to have confidence in the UK's law enforcement capabilities in connection with its immigration control systems. Accordingly, there is a general public interest in disclosing information that promotes accountability and transparency in order to maintain that confidence and trust.
39. He 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 the prevention and detection of crime and avoiding prejudice to the operation of the immigration control.
40. In the context of this case, the Commissioner recognises the public interest in preventing individuals intending to circumvent immigration controls – and those who wish to assist them – from having access to information which could assist them in building a picture of how they can best achieve their aims and enter the UK illegally. Provision of information which could assist their knowledge of the UK's capabilities around the security of the UK's borders would not be in the public interest.
41. Clearly, the disclosure of any information that would assist people to commit unlawful activities and circumvent immigration controls, also putting human life at risk, would not be in the public interest.
42. Having given due consideration to the opposing public interest factors in this case, the Commissioner has concluded that the factors in favour of disclosure do not equal or outweigh those in favour of maintaining the exemption. Accordingly, the Commissioner is satisfied that section s31(1)(a) and (e) of FOIA were appropriately applied in this case.

### **Section 40 - (personal information)**

43. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

44. In this case the relevant condition is contained in section 40(3A)(a)<sup>2</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
45. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.
46. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual."

Is the information personal data?

47. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
48. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
49. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
50. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to lower-level employees of the Home Office and their specific contact details.
51. The Commissioner agrees with the Home Office that identification could be made of the individual employees. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

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<sup>2</sup> As amended by Schedule 19 Paragraph 58(3) DPA

52. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

53. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

54. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

55. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.

56. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

57. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child<sup>3</sup>.”

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<sup>3</sup> Article 6(1) goes on to state that:- “Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

58. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- a. Legitimate interest test: Whether a legitimate interest is being pursued in the request for information.
  - b. Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question.
  - c. Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
59. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### Legitimate interests

60. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
61. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
62. The complainant has outlined that they have a personal/business interest in the information being disclosed. They have indicated in their complaint to the Commissioner that the request was required to better understand the processes of the Home Office and potentially challenge the criteria used for assessing suspected sham marriages.
63. The Home Office acknowledge the legitimate interest in relation to the requested information.
64. There is also the broader legitimate interest of transparency and openness of the Home Office carrying out its day to day functions.
65. The Commissioner accepts the complainant has a legitimate interest in obtaining the information, and that there is the broader legitimate interest of transparency and openness of the Home Office's processes and procedures.

Is disclosure necessary?

66. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
67. The Commissioner is satisfied that disclosure of the requested information would be necessary to achieve the legitimate aims identified and that there are no less intrusive means of achieving these aims.

Balance between legitimate interests and the data subject's interests' fundamental rights and freedoms

68. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
69. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause.
  - whether the information is already in the public domain.
  - whether the information is already known to some individuals.
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
70. In the Commissioner's view, a key issue is whether the individual(s) concerned have a reasonable expectation their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
71. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.

72. The Home Office argued that: "Immigration is a sensitive issue so the release of names and email addresses of Home Office staff will potentially mean that those named could be held directly responsible for the enactment and operation of the scheme. Anyone who disagrees with the scheme, with the Home Office generally, or has suffered an adverse outcome from the scheme will have the opportunity to hold those named as directly responsible for their personal outcome. The opportunity for this to cause distress to those named is real and significant. These individuals would not have the expectation that their name or email address would be disclosed in this context and therefore this information should be protected."
73. The Commissioner considers the specific details from the information above would increase the likelihood of identification of individual employees and their involvement with the specific workstream.
74. As the requested information could potentially lead to identification of specific individuals the Commissioner agrees with the Home Office in its application of the exemption under section 40(2) of FOIA. It is unlikely the employees would have an expectation for information to be disclosed which might make them identifiable. It is likely that such disclosure would cause distress to those employees.
75. The Commissioner therefore considers that disclosure of this information would be disproportionately intrusive to the data subjects in this situation and interference with their rights to privacy must be proportionate.

#### Commissioner's conclusion

76. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms in this case. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
77. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that it is not necessary to go on to separately consider whether disclosure would be fair or transparent.
78. The Commissioner has therefore concluded that the Home Office was entitled to withhold the information under section 40(2) of FOIA by way of section 40(3A)(a).

## Right of appeal

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79. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

80. 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.

81. 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 .....**

**Phillip Angell**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**