

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 April 2016

Public Authority: Serious Fraud Office
Address: 2-4 Cockspur Street
London
SW1Y 5BS

Decision (including any steps ordered)

1. The complainant has requested information relating to whistleblowing reports received by the Serious Fraud Office through its confidential service 'SFO Confidential' since its launch in November 2011.
2. The Commissioner's decision is that the Serious Fraud office has applied section 31(1)(a) (prevention or detection of crime) of the FOIA appropriately. However, the Commissioner considers that the SFO has breached section 10(3) (time taken to consider the public interest) and section 17(1) (refusal of a request).
3. The Commissioner does not require the Serious Fraud Office to take any further steps as a result of this decision.

Request and response

4. On 10 September 2014, the complainant wrote to the Serious Fraud Office (SFO) and requested information in the following terms:

"Please could you let me know the number of whistleblowing reports that have been filed through the SFO Confidential Service to date every year since it was launched in Nov 2011. Could you also let me know how many confidential disclosures through that service have led to formal investigations and/or prosecutions. I note the Huffington Post did this story last year, so I'm looking for the figures used for that story plus the numbers since then."

5. The SFO wrote to the complainant on 20 October, 7 November and 17 November 2014, extending the deadline for compliance as it was considering the public interest.
6. The SFO provided its refusal notice on 1 December 2014. It disclosed the total number of calls, emails and other referrals received through the SFO Confidential (SFOC) service between November 2011 and August 2014 and explained that 2,731 referrals were made in 2012 and 2,996 were made in 2013. The SFO also explained that because of the small number of investigations undertaken by it, disclosing information about the smaller number of whistle-blowers reports which resulted in referrals would be likely to lead to speculation about which SFO investigations may have been initiated by such reports.
7. The SFO went on to explain that the numbers were for all referrals made to the SFOC service, not specifically in relation to whistle-blowing ones. The SFO also confirmed that the figures disclosed to the complainant were used in relation to the Huffington Post article.
8. Furthermore, the SFO pointed out that in Parliament the Solicitor-General had confirmed that it receives a range of information and intelligence about alleged criminal actions, from diverse sources. The Solicitor-General also confirmed that decisions to investigate were made on the basis of all relevant material and that it was not always possible or appropriate to suggest that a particular case was triggered by a single report. The SFO also explained that the Solicitor-General had explained that, given the small number and seriousness of cases investigated by the SFO, it was not desirable to provide a further breakdown of this data because of the need to protect individuals and the risk of prejudicing investigations. Although the Solicitor-General was discussing self-reports by corporate, the SFO explained to the complainant that considered it also applied to whistle-blowers.
9. The SFO also confirmed that it was withholding the rest of the information under sections 30(2) (investigations) and 31 (law enforcement).
10. Following an internal review the SFO wrote to the complainant on 24 March 2015. It confirmed that it was upholding the application of sections 30(2)(b) and 31(1)(a) and (b).

Scope of the case

11. The complainant contacted the Commissioner on 20 May 2015 to complain about the way her request for information had been handled.

She complained that the SFO had not applied the exemptions appropriately, as she was only requesting statistical information and that disclosure would not lead to a whistle-blower being identified. She also explained that the Huffington Post had run an article about the failure of SCOF which was a whistle-blower hotline.

12. The complainant also complained about the length of time taken by the SFO to deal with her request.
13. During the Commissioner's investigation, the SFO explained that it was applying section 31(1)(a) (the prevention or detection of crime) to all of the requested information.
14. The Commissioner will consider whether the SFO has applied section 31(1)(a) appropriately and the length of time taken to deal with the request.

Reasons for decision

15. Section 31(1)(a) of FOIA states that:

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

(a) the prevention or detection of crime".

16. Section 31 is a prejudice-based exemption. In order to be engaged, the following criteria must be met:
 - the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - 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 – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

17. The relevant applicable interests cited in this exemption are the prevention or detection of crime. The Commissioner accepts that the arguments made by the SFO set out below address the prejudice at section 31(1)(a) in relation to the detection of crime.
18. When considering the second point, the Commissioner must be satisfied that the nature of the prejudice is "*real, actual or of substance*" and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
19. The SFO explained that there was a direct causal link regarding the disclosure of the numbers and the discouragement of whistle-blower reports it uses to detect crime and trigger investigations.
20. The SFO argued that the prejudice would be real and very substantial. It explained that the narrowness of its casework profile means that whistle-blowers numbers are comparatively low. Given this, the SFO explained that disclosure would inevitably cause concern for the individuals involved in that they may be identified by use of the 'mosaic' technique (because the annual numbers of cases and whistle-blower cases are so small) and suffer harm as a result. The SFO argued that this would inevitably discourage whistle-blowers from continuing to assist it or contact it.
21. Furthermore, the SFO explained that whistle-blowers are almost always very keen to keep their identities and the fact of their reporting, secret. It argued that as it operates in an environment of international organised crime where huge sums are often at stake, whistle-blowers alleging criminality often have very real fears, not only for their jobs and livelihood, but also for their personal security. The SFO explained that there have been public statements made by the type of whistle-blower handled by it to this effect after they have been identified.
22. The SFO also explained that it had recent experience of having to resist media pressure to disclose the identity of whistle-blowers, in order to ensure their continued co-operation and prevent other potential whistle-blowers being dissuaded from coming forward.
23. The SFO also explained that disclosure of data for any given period involving a small number or an apparently declining trend of genuine whistle-blowers would reduce its intelligence capability and also impact on the use of Deferred Prosecution Agreements (DPAs), which are entirely dependent on self-reports of corporates. DPAs came into force in 2014, as a way for prosecutors to dispose of criminal cases against corporates. They allow prosecutors flexibility to deal with corporate

offending when a civil remedy is insufficient, but where prosecution and associated consequences might be disproportionate. Negotiations for a DPA are strictly confidential and any company looking to enter into a DPA would be expected to fully co-operate with the prosecutor. The SFO argued that disclosure would disincline corporates from self-reporting, as to do so would bring unnecessary suspicion upon themselves.

24. In addition, the SFO argued that anything that acts as a discouragement to those considering providing it with information will inevitably substantially hamper its ability to detect and investigation serious crime.
25. With regard to the third point, the SFO explained that disclosure of the requested information would be likely to prejudice the detection of crime. It explained that it partially relies on whistle-blowers to detect crime and trigger investigations into matters which might otherwise go undiscovered; the SFO explained that whistle-blowers therefore play a key role in combating serious and complex fraud, including bribery and corruption.
26. Taking everything into account, the Commissioner is satisfied that the disclosure of the requested figures would be likely to prejudice the detection of crime. Having accepted that the exemption is engaged, he will go on to consider the public interest arguments.

Public interest arguments in favour of maintaining the exemption

27. The SFO argued that the public interest in maintaining section 31(1)(a) outweighed the public interest in disclosure. It explained that this is because the inevitable consequences of disclosure would be to undermine its work. The SFO also explained that it had a statutory duty under section 1 of the Criminal Justice Act 1987¹ to investigate serious or complex fraud.
28. In addition, the SFO argued that it needed to maintain the voluntary supply of information by whistle-blowers who may or may not be classed as confidential sources.

¹ <http://www.legislation.gov.uk/ukpga/1987/38/contents>

29. The SFO also argued that the voluntary provision of such information significantly reduces the amount of time and public expenditure it takes to investigate each case.
30. Furthermore, the SFO explained that it considered that disclosing the statistics requested would add only incrementally to the public interest but the damage to the public interest in disclosing the information was substantial and clearly outweighed the benefit of disclosure.

Public interest arguments in favour of disclosing the requested information

31. The complainant argued that it was in the public interest to disclose the requested information.
32. The SFO acknowledged the public interest in transparency with regard to understanding how enforcement agencies work, in order to hold them to account.
33. The complainant argued that the requested information should be disclosed as it was for statistical information only. In addition, the complainant argued that disclosing the requested information would not create a risk of identifying a confidential whistle-blower, for example through a mosaic approach. She also argued that it would be impossible to extrapolate from the requested information that a specific complaint had led to a specific investigation.
34. Furthermore, the complainant argued that even if such extrapolation was possible, it was entirely speculative to suggest that disclosing the information would itself lead to identification of a specific whistle-blower.
35. The complainant also pointed out that the SFO had already disclosed similar information to the Huffington Post.
36. The complainant also argued that it was a matter of considerable public interest if a whistle-blowing service set up and funded by the government to assist in the investigation and prosecution of serious frauds and other offences, was not meaningfully contributing to the work undertaken by the SFO. She argued that it raised questions about the overall efficacy and utility of the SFOC service.

Balance of the public interest arguments

37. The Commissioner has considered the public interest arguments from both parties, including the public interest in transparency.
38. The Commissioner notes that in its refusal notice of 1 December 2014, the SFO confirmed to the complainant that it investigates a small

number of cases and it considered that it was not possible to provide further information regarding reports from whistle-blowers.

39. The Commissioner also notes the complainant's explanation that the SFO had disclosed similar information to the Huffington Post, previously. The Commissioner notes that the SFO had confirmed the figure provided to the Huffington Post was the overall number of calls received through its SFOC service.
40. The Commissioner considers that even though the SFO has provided similar information in the past, this does not set a precedent.
41. The Commissioner notes that in its initial response the SFO provided the complainant with the overall numbers of calls it had received through its SFOC whistle-blowers service for 2012 and 2013. However, he also notes that the SFO confirmed that the figures did not refer specifically to whistle-blowers but were the total numbers of all referrals made to SFOC.
42. The Commissioner also notes the SFO's explanation that it considers whistle-blowers to be confidential sources. Although section 31 does not allude specifically to information obtained from confidential sources, in his guidance '*Law enforcement (section 31)*'² the Commissioner acknowledges that a public authority may be involved in:

" ... carrying out some form of investigation, during which the public authority may obtain information from a confidential source. For example, an investigation by the Health and Safety Executive may be triggered by information from someone who wants to remain anonymous."
43. Although the FOIA does not define what constitutes "confidential sources", the Commissioner considers it in his guidance "Investigations and proceedings (section 30)".³ His view is that as a rule, confidential sources will be third parties but not an authority's own officers. The Commissioner considers that the exception is likely to be police officers and others working for law enforcement bodies working under cover.

² <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

³ <https://ico.org.uk/media/for-organisations/documents/1205/investigations-and-proceedings-foi-section-30.pdf>

44. The Commissioner does not consider that whistle-blowers are confidential sources but he does accept that they would have an expectation that their identities would be kept confidential, given that they are alleging wrongdoing. The Commissioner notes that the SFO has also argued that it needs to maintain the voluntary supply of information from sources that were not necessarily considered as confidential. He accepts that it is important that the voluntary supply of information from non-confidential sources should be protected.
45. The Commissioner considers that appropriate weight must be given to the public interest inherent in the exemption; that is, the public interest in avoiding likely prejudice to the prevention or detection of crime by the SFO. The Commissioner considers that it is clear that there is a very substantial public interest in avoiding that prejudice and that this is a strong public interest factor in favour of maintenance of the exemption.
46. The Commissioner has weighed the public interest in avoiding prejudice to the prevention or detection of crime against the public interest in the openness and transparency of the SFO and the complainant's arguments regarding disclosure. His conclusion is that the public interest in avoiding this prejudice is a strong factor and so he considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 10(3) - extension of the time taken to consider the public interest

47. Section 10(3) enables a public authority to extend the 20 working day limit up to a 'reasonable' time in any case where:
 - it requires more time to determine whether or not the balance of the public interest lies in maintaining an exemption; or
 - it needs further time to consider whether it would be in the public interest to confirm or deny whether the information is held.
48. The FOIA does not define what might constitute a 'reasonable' extension of time. However, in his *guidance 'Time for compliance under the Freedom of Information Act (Section 10)'*⁴ the Commissioner explains

⁴ <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

that he considers that a public authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days. The Commissioner considers that an extension beyond this should be exceptional.

49. The Commissioner also considers that public authorities will need to be able to demonstrate that the length of any time extension is justified.
50. As section 10(3) only permits extensions for further consideration of the public interest, the additional time cannot be used to determine whether the exemptions are engaged.
51. Any public authority claiming an extension will still be obliged to issue a refusal notice explaining which exemption applies and why, within 20 working days. The notice must explain that it requires more time to consider the public interest test, and provide an estimate of the date on which a final decision is likely to be made.
52. Once that final decision has been reached, the authority must either disclose the information to the requester or issue a second refusal notice explaining why it has found the public interest to be in favour maintaining the exemption.
53. The SFO contacted the complainant on 20 October, 3 November and 17 November 2014 and explained that it needed to extend the time limit, as it was considering the public interest.
54. The Commissioner considers that taking 57 days to deal with the public interest test is unreasonable. He therefore considers that the SFO has breached section 10(3).

Section 17 - refusal of a request

55. Section 17(1) provides that when a public authority is withholding information it must inform the applicant of this within 20 working days, starting the first working day after receipt. In this case, the request was made on 10 September 2014 but was not responded until 1 December 2014. Therefore the Commissioner considers that the SFO has breached section 17(1).

Other matters

56. The Commissioner notes that the complainant requested an internal review on 13 January 2015 and the SFO responded on 25 March 2015. Part VI of the section 45 Code of Practice makes it good practice for a public authority to have a procedure in place for dealing with complaints

about its handling of requests for information. He considers that the procedure should encourage a prompt determination of the complaint.

57. As he has made clear in his '*Good Practice Guidance No 5*', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
58. The Commissioner notes that the complainant agreed to wait longer than normal for the internal review. However, he notes that the SFO took 50 days to carry out the internal review. He considers that this is excessive.

Right of appeal

59. 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

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

60. 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.
61. 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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