

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 May 2024

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

Decision (including any steps ordered)

1. The complainant requested information on the cost of the investigation by the Serious Fraud Office (the 'SFO') into Eurasian Natural Resources Corporation Ltd ('ENRC'). The SFO refused to disclose this information, citing the exemption provided by section 31 (law enforcement) of FOIA. Specifically, it relied on subsections 31(1)(a) – the prevention or detection of crime, 31(1)(b) – the apprehension or prosecution of offenders and 31(1)(c) – the administration of justice, to withhold the requested information. During the course of the Commissioner's investigation, the SFO additionally relied on section 21 (information accessible to applicant by other means) and section 22 of FOIA (information intended for future publication) for part 3 of the request.
2. The Commissioner's decision is that the SFO was entitled to rely on sections 31(1)(a), (b) and (c) of FOIA to refuse to disclose the withheld information. As he has found section 31(1) to apply to all parts of the request, he has not deemed it necessary to consider the SFO's reliance on sections 21 and 22 of FOIA.
3. The Commissioner requires no steps to be taken as a result of this decision.

Background

4. The SFO is a specialist prosecuting authority tackling the top level of serious or complex fraud, bribery and corruption. It is part of the UK criminal justice system covering England, Wales and Northern Ireland.

5. The following can be found on the SFO's website¹:

"The Serious Fraud Office (SFO) formally opened a criminal investigation into ENRC Ltd (previously ENRC PLC) in 2013.

Our investigation focused on the suspected payment of bribes by the company and individuals connected to it to secure access to lucrative mining contracts in the Democratic Republic of the Congo (DRC) between 2009 and 2012.

[..]

In August 2023, following our latest review of the investigation, we concluded that we have insufficient admissible evidence to prosecute, and closed the case".

6. The Commissioner has considered two similar requests in previously issued decision notices in November 2023² and January 2024³ respectively. In both cases, he upheld the SFO's reliance on sections 31(1)(a), (b) and (c) of FOIA.
7. Whilst previous decisions are not legally binding and the Commissioner will consider each case on its individual merits, he has taken his earlier decisions into account when assessing the current case.

Request and response

8. On 26 September 2023, the complainant wrote to the SFO and requested information in the following terms:

"Please provide the following:

1. the total cost of the ENRC criminal investigation to the SFO from April 2013 to August 2023.

2. the total amount of funding provided to the SFO by the Treasury towards the ENRC criminal investigation between April 2013 and August 2023.

¹ <https://www.sfo.gov.uk/cases/enrc/>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027528/ic-251765-v8g2.pdf>

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028092/ic-266373-h6q9.pdf>

3. the total legal cost of all civil proceedings between the SFO and ENRC from 2016 to date, including the legal privilege case that concluded in 2018, the 2019 and still current proceedings before Mr. Justice Waksman and the 2021 and still current proceedings also involving [name redacted] and [name redacted].

Thank you.”

9. The SFO responded on 24 October 2023. It refused to provide any of the requested information, citing section 31(1) of FOIA – the exemption for law enforcement. Specifically, it relied on subsection 31(1)(a), (b) and (c) as set out in the summary section of this notice.
10. The complainant requested an internal review on 2 November 2023, setting out a number of arguments as to why, in his view, the requested information should be disclosed.
11. Following its internal review the SFO wrote to the complainant on 30 November 2023. It responded to each of the complainant’s points and maintained that section 31(1) of FOIA applied.

Scope of the case

12. The complainant contacted the Commissioner on 22 January 2024 to complain about the way his request for information had been handled. He disputed the SFO’s reliance on section 31 and its assessment of the associated public interest test.
13. The Commissioner relayed the complainant’s grounds of complaint to the SFO.
14. The complainant submitted further arguments pertaining to section 31(1)(a) during the Commissioner’s investigation, which were also passed to the SFO.
15. On 13 May 2024, during the course of the Commissioner's investigation, the SFO notified both parties that it wished to additionally rely on sections 21 and 22 of FOIA for part 3 of the request.
16. The Commissioner has first considered whether the SFO was entitled to rely on sections 31(1)(a), (b) and (c) of FOIA to withhold the requested information. He has not deemed it necessary to view the withheld information in order to reach his decision in this case.

Reasons for decision

Section 31 – law enforcement

17. Section 31 of FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities.
18. In this case, the SFO is relying on sections 31(1)(a), (b) and (c) of FOIA in relation to all the withheld information. These subsections state that information is exempt if its disclosure would, or would be likely to, prejudice:
 - (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders; and
 - (c) the administration of justice.
19. In order to engage a prejudice-based exemption such as section 31 there must be likelihood that disclosure would, or would be likely to, 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:
 - Firstly, 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;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential 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,
 - 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.
20. Consideration of the exemption at section 31 of FOIA 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.
21. Rather than differentiate between the subsections of the section 31(1) exemption, the SFO has presented one set of arguments which the

Commissioner has considered jointly. The Commissioner acknowledges that the arguments provided relate to the subsections cited.

22. In its submission to the Commissioner, the SFO referred to the two decision notices included in the background section above as supporting its position regarding costs. It also explained that:

“We consider that disclosure of the requested information in this case would create a precedent for future FOIA requests and lead to a situation where the SFO would be required to release the costs of all cases. Section 31 is therefore engaged in this response because of the prejudice or likely prejudice caused by the cumulative effect of disclosing information in response to a series of similar requests (the ‘precedent effect’).

Like all law enforcement agencies, the SFO balances the need for transparency with the need to protect our investigations and prosecutions. In line with this approach, we publish an annual report and share our priorities via our business plan, but do not publish details on our ongoing investigations and lines of inquiry. On costs, we publish our overall budget; we do not publish our individual case costs at any stage from first referral to conviction or even after that point. This would compromise our ability to investigate and prosecute economic crime, which is the core function of the SFO and risks allowing criminals to use information about our work to their advantage...”.

23. The Commissioner is satisfied that the first part of the three-part test set out above is met.

24. The SFO has argued that:

“Releasing the ENRC case costs would directly reveal how much public funding the SFO has chosen to allocate to this case and our cases, by setting a new precedent for the release of this data”

25. The SFO also explained that it has an extremely small and specialist caseload and that, in a short time, via multiple FOIA requests, it would be possible for individuals to build up a complete picture of its work and allow them, including defendants in its cases, to make comparisons between its cases based on the level of resources allocated. This, it argued, would directly harm the SFO’s interest and mission and contradict the protections that section 31 is intended to provide.

26. Further, the SFO set out four main reasons for withholding the requested information, all of which it considers engage section 31(1) of FOIA. Specifically, it said:

1. Releasing the information could allow criminals to understand how we are likely to resource different cases and incentivise some types of crime. The SFO's core purpose is the investigation and prosecution of serious and complex fraud, bribery and corruption. If it was made publicly available how much the SFO spends on a case (from pre-investigation, to investigation, through to prosecution), individuals (including criminals) could glean an understanding of the types of cases we are likely to take on (from a cost perspective and, for example, the budgetary limitations we could have around advancing a particular case). Over time, releasing this information would enable individuals to build up a picture of past, current and potentially future investigations, incorporating the broader risks of criminal activity in an effort to predict what type of cases are given greater funding. This would therefore drive and inform criminal behaviour enabling criminals to target their efforts, ultimately encouraging criminal activity and compromising public safety.
2. The requested information could be used tactically by suspects and defendants to derail SFO trials or civil proceedings. The SFO, in most cases, investigates and prosecutes extremely wealthy corporations and individuals, who do not have the same budget restrictions. Releasing the details of our case costs via cumulative FOIA requests, would allow suspects and defendants to use this information to their advantage in their own cases. For example, via legal tactics, such as vexatious disclosure requests to prolong and delay trials until the SFO is placed in a position whereby significant amounts of public money is spent servicing such requests rather than other key elements of the case.
3. Releasing the requested information would provide detail, on how an investigation is progressing and what investigative techniques are being used, which could be used by suspects to their advantage. We cannot provide details on our investigations and what activities we may be undertaking beyond what is on our website. This protects our work, much of which is covert. However, were we to release case costs during our investigations, this would create a picture of current activity on the case. A spike in expenditure would indicate a period of intensive activity in an investigation – for example as we move to take Executive Action in a case – and suspects could seek to undermine those efforts by destroying evidence or evading arrest. This would therefore prejudice the SFO's ability to prosecute economic crime.
4. Releasing the information could reveal covert cases. SFO cases are often covert at the beginning, this is to i) ensure it can progress without interference from suspects and/or those

connected to suspects; ii) ensure evidence is preserved, and iii) avoid causing undue harm to the reputation of individuals who might be considered potential suspects. If repeat requests for investigation costs were submitted and revealed (as above, the SFO takes on a small number of cases), it would be possible for suspects and criminals to work out a change in our caseload, therefore revealing the start or finish of covert cases, and an understanding of where we are allocating resources.

27. The SFO also argued:

“Whilst part of this request is in relation to a criminal case that is currently closed at the SFO, its closure is subject to change – as across all our cases. To specifically address [the complainant’s] recent concerns that ‘the ENRC cost information requested is historic’, this is not accurate. Whilst our criminal case is currently closed, our cases can be reopened when more information comes to light to inform a past investigation, via judicial review, the Criminal Cases Review Commission or for many other reasons. There is no set end point and many of the factors that could lead to the case reopening sit outside of the SFO’s control. For example, one SFO case, which closed in 2017, was recently reopened; someone we convicted succeeded in reaching the Court of Appeal via the Criminal Cases Review Commission with their case. This is why we maintain a position of not releasing our specific case costs outside of our overall costs via the Annual Report and Accounts. Therefore, we consider this request and the implications of release, as set out above, effective across all our cases – be that at investigation, prosecution stage or currently closed.”

28. Having considered the submission above, the Commissioner accepts that the second part of the three-part test has been met.
29. The prejudice test is not limited to the harm that could be caused by the requested information on its own. Public authorities can take account of any harm likely to arise if someone pieced together the requested information with other information to form a broader picture.
30. Complying with one request can make it more difficult to refuse requests for similar information in the future. Public authorities are therefore entitled to consider any harm that could be caused by combining the requested information with the information a public authority could subsequently be required to provide, if the current request was complied with. Such points are clearly relevant to this case, concerning the costs of a particular SFO investigation.

31. The Commissioner accepts that similar requests for other SFO investigations costs, if successful, would, over time, likely enable a wider picture to be built. The Commissioner considers that there is a real and significant risk of disclosure causing the envisaged harms.
32. The SFO has argued that the higher threshold of 'would' applies. However, given that the higher threshold of 'would' is dependent on other information being released, and that the SFO has cited "could" in some of its rationale, the Commissioner considers the lower threshold of 'would be likely' to be met in this case.
33. The Commissioner is mindful that disclosure under FOIA is 'to the world', and not just to the complainant himself.
34. The Commissioner therefore considers that all three parts of the prejudice test have been met and that sections 31(1)(a), (b) and (c) of FOIA are engaged.

Public interest test

35. The Commissioner must next consider the associated public interest test; the arguments have again been submitted collectively for all three limbs of section 31(1) cited by the SFO.

Arguments in favour of disclosure

36. The complainant argued that the public interest favours disclosure of the requested information, stating:

"The use of the FOIA Section 31(1) exemption by the Serious Fraud Office and the failure to correctly apply the public interest test when denying disclosure of the costs incurred in the Eurasian Natural Resources Corporation criminal investigation (ended last year with no charges) and civil litigation (ongoing). There is overwhelming public interest in disclosing the substantial public funds expended from 2013 to now with no result other than multi-million legal costs and heavy criticism by the High Court. Disclosure is especially important when to date there has been no disclosure at all of the cost of the criminal investigation or the civil litigation, which resulted last month in a highly critical judgment against the SFO. Damages and costs in the civil action have yet to be awarded and will be substantial adding to the cost to the taxpayer. I am happy to exclude personal data."

And:

"The SFO has expended multi-millions of taxpayers' money without any disclosure of the total or detailed cost, such as in previous annual reports or in any public statement (as in

previous cases) following the dropping of the criminal investigation in August 2023 or after the judgment of Mr. Justice Waksman last month. There is ample SFO precedent, as listed in my review request, for the costs to be made public. There is also no justification for secrecy given the scale of the ENRC expenditure over so many years.”

37. The SFO acknowledged factors in favour of disclosure, such as understanding the general process the SFO uses to investigate fraud, the resourcing of its work, and how public money is spent.

38. The SFO told the Commissioner:

“We recognise there is interest in our case costs, we are asked for these regularly by the media and defence law firms. However, we meet our transparency obligations via our Annual Report and Accounts (ARA) where our overall budget is available.⁴ We also share our annual priorities (and further detail on our cases which we can safely provide without jeopardising investigations and prosecutions) on our website.”

Arguments in favour of maintaining the exemption

39. The SFO submitted the following arguments in favour of maintaining the section 31(1) exemption:

‘In EA/2006/0011 & 0013⁵, 8 January 2007, at paragraph 34, the Information Tribunal quoted Lord Wilberforce’s statement that: “There is a wide difference between what is interesting to the public and what it is in the public interest to make known.” In this same judgment they differentiate between matters “which were in the interests of the public to know and matters which were merely interesting to the public.”

We consider that the stronger public interest lies in maintaining the exemption at section 31(1) of the FOIA. We are satisfied that releasing the information requested would set a precedent for the release of costs on every SFO case through the FOIA. This would allow members of the public (including suspects and/or defendants) to determine which cases the SFO is prioritising, and any areas of focus for the organisation, while also providing details that could indicate changes in our caseload. Criminals

⁴ <https://www.sfo.gov.uk/download/annual-report-accounts-2022-23/>

⁵ <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i81/Guardian%20Brooke.pdf>

could therefore use this to their advantage, hindering the SFO's ability to prosecute economic crime and protect the UK economy.

Once information is released via FOIA, it is in the public domain. It is therefore immaterial where the request has come but the very fact of this type of disclosure being so frequent –we received twelve requests across seven cases between January 2023 and March 2024.

While the anticipated prejudice is based upon our assessment that a precedent would be set for future requests, we consider, in light of other recent FOIA requests we have received, that the likelihood of receiving similar requests in relation to other cases is extremely high, if not a certainty. As a result, it is the SFO's view that releasing this information would prejudice the apprehension or prosecution of offenders, the administration of justice, and the prevention of detection of crime.'

40. The SFO concluded that the public interest favours withholding the requested information.

Balance of the public interest

41. The Commissioner recognises that there is a general public interest in promoting transparency and accountability, which must always be given some weight when considering the public interest test.
42. Whilst the complainant argued that there is a public interest in accountability and transparency around expenditure on the ENRC investigation and the referenced criticism of the SFO in relation to its handling of the ENRC case, the Commissioner notes that there is already some official information publicly available regarding the SFO's overall budget and annual priorities.
43. Whilst the Commissioner accepts that published information may not evidence whether or not there may have been significant failings in a particular investigation, he considers that these statistics already go some way to satisfying any public interest in disclosure of the type of information requested by the complainant under FOIA, and transparency around overall priorities, budget and some case information. He must also consider the role of the SFO and any potential impact of disclosure on its ability to carry out its functions effectively.
44. While he notes that the complainant has concerns about the specific outcome of the investigation in this case, he must also consider the wider public interest in the role of the SFO and the impact of disclosure on its ability to carry out its functions effectively. In that respect, the Commissioner is mindful that the SFO's arguments relate not only to this particular investigation but to investigations in general.

45. The Commissioner regards the public interest in avoiding prejudice to the ENRC investigation (and potentially future and/or past investigations) to be a factor of very significant weight in favour of maintenance of the exemptions.
46. In conclusion, the Commissioner has recognised the valid public interest in favour of disclosure of the requested information owing to the significance and profile of the ENRC investigation. However, he considers that the public interest in avoiding prejudice to the SFO's investigations is the weightier factor here.
47. The Commissioner considers that on balance, the factors against disclosure have greater weight and the public interest lies in maintaining the exemptions cited in this case.
48. As he has found sections 31(1)(a), (b) and (c) have been correctly applied in this case, the Commissioner has not deemed it necessary to consider the SFO's additional reliance on sections 21 and 22 of FOIA for part 3 of the request.

Right of appeal

49. 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

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

50. 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.
51. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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