

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 October 2018

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

Decision (including any steps ordered)

1. The complainant has requested information about two parties who were allegedly denied access to the UK from the Home Office (the "HO"). The HO provided some general information but would neither confirm nor deny holding the remainder citing section 40(5) (personal information) of the FOIA as its basis for doing so. The Commissioner's decision is that section 40(5) is properly engaged. No steps are required.

Request and response

2. On 13 March 2018 the complainant wrote to the HO via the "WhatDoTheyKnow?" website and requested the following information:

"According to a youtube video [link redacted]:

[Name redacted] and his partner claim that they were both ordered by Home Office staff not to use their telephones.

1. Please provide all regulations, circulars, guidance, training manuals etc. which stipulate that those held at UK ports who are NOT under arrest cannot use their telephones.

2. Provide all records showing why [name redacted] and his partner [name redacted] were denied access to the UK, including records which were in existence before their arrival in the UK".

3. The HO responded on 13 April 2018. It provided some information in respect of part (1) of the request, with some redactions being made under section 31(1)(f) (law enforcement) of the FOIA. In respect of part

(2), it refused to confirm or deny that it holds the requested information, citing section 40(5) (personal information) of the FOIA.

4. Following an internal review the HO wrote to the complainant on 5 June 2018. It revised its position, advising that it had provided all information that it holds in respect of part (1) of the request, adding that section 31(1)(f) of the FOIA had been incorrectly cited. It maintained its position regarding the citing of section 40(5) of the FOIA for part (2).

Scope of the case

5. The complainant contacted the Commissioner on 5 June 2018 to complain about the way his request for information had been handled. On 26 July 2018, he confirmed that he wished her to consider the application of section 40(5) of the FOIA to part (2) of his request.
6. The Commissioner will consider the application of section 40(5) below.

Reasons for decision

Section 40 – personal information

7. The FOIA exists to place official information into the public domain. Once access to information is granted to one person under the FOIA, it is then considered 'public' information which can be communicated to any other individual should a further request be received. As an exemption, section 40 therefore operates to protect the rights of individuals in respect of their personal data.
8. The analysis below considers section 40(5)(b)(i). The consequence of section 40(5)(b)(i) is that, if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.
9. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.
10. The legislation in force at the time of this request and the HO response was the Data Protection Act 1998 (the "DPA").

Is the information personal data?

11. The first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the DPA). If it is not personal data, then section 40 cannot apply.

12. The DPA defines personal data as:

*"...data which relate to a living individual who can be identified
a) from those data, or
b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

13. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable from that information. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

14. The HO explained to the Commissioner that:

"To confirm or deny whether the Home Office holds information about why the individuals were denied access to the UK (if that is the case) would also disclose information which constitutes their personal data, because it would confirm or deny whether they were, in fact, denied access to the UK and hence provide some (albeit limited) information about the fact of an attempt on their part to enter the UK and whether it was successful. To confirm or deny whether the Home Office held any records prior to their arrival would also disclose personal information, in that the Home Office holding records about someone is a material fact about them".

15. In his information request the complainant has referred to two named parties. The Commissioner is therefore satisfied that any information, if held, would be their personal data. Therefore, if it were to confirm or deny holding any information, the HO would disclose something about these named parties to the world at large.

16. At this point, the Commissioner further notes the HO's position that the information, if held, may also be 'sensitive' personal data. This is on the basis that, if the named parties had actually been denied entry to the UK, this could be because of information relating to an offence which would constitute 'sensitive personal data' under section (2)(g) of the DPA. The Commissioner accepts this position and will revisit it later if necessary.

17. Having accepted that the requested information, if held, would constitute the personal data of living individuals, the Commissioner must go on to consider whether disclosure – confirmation or denial in this case - would breach one of the data protection principles.
18. The HO advised that it believes disclosure would breach the first data protection principle.
19. In the case of an FOIA request, the personal data is processed if it is disclosed in response to the request. In this case, this means that confirmation or denial as to the existence of any information can only be provided if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If confirmation or denial would fail to satisfy any of these criteria, then the information is exempt from disclosure. The Commissioner has first considered whether confirmation or denial would be fair.
20. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
 - the individual's reasonable expectations of what would happen to their information;
 - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned);
 - any legitimate interests in the public having access to the information; and,
 - the balance between these and the rights and freedoms of the individuals who are the data subjects.
21. In consideration of these factors, the HO provided the following arguments:

"We do not consider that confirming or denying whether information about whether named individuals were denied access to the UK, or whether we hold records about them, would be fair. People travelling to the UK have a reasonable and legitimate expectation that information about a denial of access or whether we hold such records will not be disclosed to third parties. To do so would therefore contravene the first data protection principle".
22. The Commissioner recognises that people have a reasonable expectation that the HO, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality. In this case, she accepts the HO's view that the named parties would not expect it to reveal whether or not they had experienced any issues entering the UK. A confirmation that information

was held could reveal that, for some reason or reasons unknown, the named parties had been denied access to the UK. A denial could reveal that, again for some reason or reasons unknown, the parties had decided to publish a video on a media site purporting to evidence some problems they had had entering the UK. (The Commissioner would also like to note here that, although the complainant asked her to do so, she has not viewed the "You tube" link which was provided by him in his request. She did not do so as she is able to make a determination in this case without viewing it and, as she is unable to verify its provenance, she could not rely on its authenticity).

23. When considering the consequences of disclosure on a data subject (in this case a confirmation or denial), the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions. In this case, she is satisfied that information of the type requested will carry a strong general expectation of privacy for those parties concerned and that they would have no expectation that the HO would disclose this type of information about them to the world at large. Therefore, it is her view that the reasonable expectation of the related data subjects is that confirmation or denial would not be provided in this case and that the consequences of any disclosure could be damaging or distressing to them in what is essentially a private matter.
24. Despite the reasonable expectations of individuals, and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure as being necessary to achieve a legitimate interest pursued by the data controller or the relevant third party to whom it would be disclosed.
25. In considering these 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In this regard the HO advised the Commissioner:

"We do not consider that [the complainant] has demonstrated any legitimate interest in the information, either on his own behalf or that of the public at large, let alone one for which confirmation or denial is necessary and which is sufficient to outweigh the rights and freedoms of the data subjects. Such a legitimate interest is necessary for condition 6 to be satisfied. Even if providing confirmation or denial were to be seen as necessary for some legitimate purpose, this would in our view be unwarranted by reason of prejudice to the rights and freedoms of the individuals as data subjects".

26. In correspondence with the Commissioner the complainant has advised that the video clip he viewed shows a copy of a 'deportation' letter and that both parties are 'open' about what happened to them. He added:
- "It seems to me that they are more than happy to have the data requested by me released".*
27. He also states that the letter itself is *"very interesting from the public interest stance"* and that there is a clear legitimate interest in knowing why one of the parties, who he describes as *"a law-abiding journalist"*, is being banned from entering the UK.
28. Although she did not look at the video link provided, the Commissioner has undertaken an online search to ascertain whether there is anything formally stated about the matter. In doing so she located a related article on the BBC website. This article advises that a spokesperson for the HO said: *"Border Force has the power to refuse entry to an individual if it is considered that his or her presence in the UK is not conducive to the public good"*. She therefore enquired with the HO about the statement given and was advised: *"The statement by a 'Home Office spokesperson' would have been a general statement about powers to refuse entry. We do not comment on individual cases"*.
29. The Commissioner is unable to comment as to whether or not the complainant is correct in claiming that the parties concerned would be *"more than happy"* to have their personal data released to the general public. This is something for the parties to consider for themselves and, if they choose to do so, they are able to publically disclose their own personal data by whatever means they consider appropriate. However, their choosing to disclose their own personal data is distinctly different from a data controller such as the HO making a formal disclosure about them to the world at large.
30. In light of the nature of the information and the reasonable expectations of the individuals concerned, the Commissioner is satisfied that confirmation or denial as to the existence of any information would not only be an intrusion of privacy but could potentially cause unnecessary and unjustified distress to the data subjects. She considers these arguments outweigh any legitimate interest in confirmation or denial. She has therefore concluded that it would be unfair to confirm or deny whether any information is held as this would breach the first data protection principle. She therefore upholds the HO's application of the exemption at section 40(5).
31. As confirmation or denial would not be fair, the Commissioner has not gone on to consider whether it would be lawful or whether one of the schedule 2 DPA conditions is met. She has also not found it necessary to

Reference: FS50752526

further consider whether or not confirmation or denial would involve the disclosure of sensitive personal data.

Right of appeal

32. 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

33. 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.
34. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF