Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **12 March 2020**

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

Decision (including any steps ordered)

1. The complainant has requested to know whether a high profile individual was refused entry to the UK, and if so, the reasons why. The Commissioner's decision is that, under section 40(5B)(a)(i) (personal information) of the FOIA the Home Office was not obliged to confirm or deny whether it held the requested information.

2. The Commissioner does not require the Home Office to take any steps as a result of this decision.

Request and response

3. On 5 August 2019, the complainant wrote to the Home Office and requested information in the following terms:

> "*Was* [name redacted] *refused entry into the UK on approximately* [date redacted]*? And why was he and/or those with him refused entry into the UK?*
>
> *There has been a petition made on change.org, and claims have been made in relation to the British Government that he and/or those with him were refused entry because such an entry "would not be conducive to the public good". Are such claims substantiated? And if so, how? "*

4. The Home Office responded on 27 August 2019, as follows:

> "*The Home Office has obligations under data protection legislation and in law generally to protect personal data. We have concluded that the information you have requested is exempt from disclosure under section 40(2) of the FOI Act, because of the condition at Section 40(3A)(a). This exempts personal data if disclosure would contravene any of the data protection principles in Article 5(1) of the General Data Protection Regulation and section 34(1) of the Data Protection Act 2018*."

5. The Home Office provided an internal review on 5 September 2019. It upheld its decision to refuse the request under section 40(2) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 6 September 2019 to complain about the way his request for information had been handled. He disagreed with the Home Office's decision to apply section 40(2) of the FOIA to refuse the request.

7. In addition to the FOIA, the Commissioner is responsible for regulating data protection legislation. As such, she takes account of the need to protect personal data when considering whether such information may be disclosed under the FOIA. Accordingly, she may intervene and apply exemptions herself where she considers it necessary, to prevent a breach of data protection legislation.

8. The Home Office cited section 40(2) of the FOIA to refuse the request, on the grounds that the complainant had requested exempt information. Having considered the request, and in view of the information provided by the Home Office and by the complainant, the Commissioner has exercised her discretion and considered whether the Home Office should instead have cited section 40(5B)(a)(i) of the FOIA to neither confirm nor deny whether or not it held the requested information.

Reasons for decision

Neither confirm nor deny ('NCND')

9. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as 'the duty to confirm or deny'. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.

10. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance[1] explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual. For example, where a request is made for information about staff disciplinary records in respect of a particular individual, to confirm or deny that that information is held would be likely to indicate that the person was, or was not, the subject of a disciplinary process. This is, of itself, a disclosure of information about that person.

11. A public authority will need to issue a NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held. The issue that the Commissioner has to consider is not one of the disclosure of any requested information that may be held, it is solely the issue of whether or not the public authority is entitled to NCND whether it holds the information requested by the complainant.

Section 40 personal information

12. Section 40(5B)(a)(i) of the FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene

[1] https://ico.org.uk/media/for-organisations/documents/2614719/neither-confirm-nor-deny-in-relation-to-personal-data-section-40-5-and-regulation-13-5-v20.pdf

any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 ('GDPR') to provide that confirmation or denial.

13. For the Home Office to be entitled to rely on section 40(5B)(a)(i) of the FOIA to NCND whether it holds information falling within the scope of the request, the following two criteria must be met:

    - confirming or denying whether the requested information is held must constitute the disclosure of a third party's personal data; and

    - providing this confirmation or denial must contravene one of the data protection principles.

Would confirming or denying that the requested information is held constitute the disclosure of a third party's personal data?

14. Section 3(2) of the DPA defines personal data as:-

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

15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

16. 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.

17. 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.

18. The request in this case asked to know whether or not a named individual was refused entry to the UK and the reasons for any such refusal. The Commissioner considers information about whether or not a named individual has been refused entry to the UK to be information which relates to that individual and thus that it is their personal data. The Commissioner is therefore satisfied that, in this case, confirmation or denial that such information is held would involve the disclosure of a third party's personal data (ie the individual named in the request). The first criterion set out above is therefore met.

Would confirming or denying that the requested information is held contravene one of the data protection principles?

19. Article 5(1)(a) of the GDPR ('principle (a)') states that:-

> *"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

20. In the case of an FOI request, personal data is processed when it is disclosed in response to the request. This means that the information may only be disclosed – or, in this case, the public authority may only confirm or deny whether it holds the requested information - if to do so would be lawful, fair and transparent.

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

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

22. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.

23. The Commissioner considers that the lawful basis most applicable is basis (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*"[2].

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[2] 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 GDPR would be contravened by the disclosure of information, Article 6(1) of the 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*".

24. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

    i) **Legitimate interest test**: Whether a legitimate interest is being pursued in the request for information;

    ii) **Necessity test**: Whether disclosure of the information (by way of confirmation or denial) is necessary to meet the legitimate interest in question;

    iii) **Balancing test**: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

25. 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

26. In considering any legitimate interests in confirming or denying whether the requested information was held, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

27. 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.

28. The complainant acknowledged that the individual named in the request ('the data subject') had expressed some views which might be considered controversial, but he held that, overall, he was an influential anti-racist activist and that his presence in the UK served the public interest in promoting anti-racist initiatives.

29. From the information the complainant has provided, the Commissioner is satisfied that the request was made in pursuit of a legitimate interest (ie to establish whether or not a particular individual was refused entry to the UK and the reasons for any such refusal).

30. However, she does also note that whether or not the individual named in the request wishes to publicise any information about their entry status to the UK is something which they should be entitled to decide for

themselves, rather than having this revealed by a request to the Home Office, under the FOIA

Is confirming or denying whether the requested information is held, necessary?

31. '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 (by way of confirmation or denial) under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

32. The Commissioner notes that there are claims in the public domain that the individual named in the request was refused access to the UK. However, she has been unable to locate any information in the public domain from the Home Office which formally verifies whether or not this was indeed the case.

33. The Commissioner therefore considers that confirmation or denial would be necessary to satisfy the particular legitimate interests identified above.

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

34. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact that confirmation or denial would have. For example, if a data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOIA request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override any legitimate interests in confirming or denying whether information is held.

35. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that confirmation or denial may cause;
- whether the information which would be revealed by confirming or denying is already in the public domain;
- whether the information which would be revealed by confirming or denying is already known to some individuals;
- whether the data subject has expressed concern; and
- the reasonable expectations of the data subject.

36. In the Commissioner's view, a key issue is whether the data subject has a reasonable expectation that information about them will not be disclosed (by way of confirmation or denial). These expectations can be shaped by factors such as their general expectation of privacy, whether the requested information relates to them in their professional role or in their personal capacity, and the purpose for which they provided their personal data. It is also important to consider whether the act of confirming or denying would be likely to result in unwarranted damage or distress to the data subject.

37. Disclosure under the FOIA (including by way of confirmation or denial) is a disclosure to the world at large[3]. Therefore, any response by the Home Office to the request would be publicly disclosed, and would be accessible to anyone, for any purpose.

38. With that in mind, and with regard to the reasonable expectations of the data subject, the Commissioner notes that the claims referred to in the request were the subject of some media coverage, and they gained widespread attention on social media. Particularly notable is that the data subject apparently participated in that coverage by speaking about the matter on social media.

39. The complainant has sought to argue that this should be taken as an indication that the expectation of privacy held by the data subject would be reduced. He referred the Commissioner to claims in the public domain that the data subject had been refused entry to the UK, including information that the data subject had himself disclosed. The complainant considers that the data subject could not now hold a strong expectation of privacy in relation to other information about the Home Office's alleged refusal to admit him to the UK.

40. The Commissioner does not agree with this reasoning. She notes that the data subject has publicly claimed that he was refused entry to the UK, and that this claim was known to the complainant at the time he submitted his request. However, the Commissioner can find no evidence that the Home Office itself has ever publicly confirmed that claim and it has told the Commissioner that it would not share such information with anyone other than the individual concerned, as a matter of policy. In the absence of any official information corroborating the claim that the

[3] This principle was endorsed by the Information Tribunal in *S v Information Commissioner and the General Register Office* (EA2006/0030, 9 May 2007)

named individual was refused entry to the UK, the Commissioner concludes that such information is not formally in the public domain.

41. Confirming or denying would therefore constitute a disclosure of personal data into the public domain about the named individual, comprising information the Home Office may or may not hold about their permitted entry to the UK. This is highly sensitive information, over which the Commissioner considers the data subject would hold a reasonable expectation of retaining control. She believes it to be a reasonably held expectation that such information would not be disclosed into the public domain by the Home Office, under the FOIA.

42. As to the consequences of confirming or denying, the issue here is what impact disclosure would have on the data subject. On this point, the Commissioner's view is that confirming or denying, in contravention of the reasonable expectation of the data subject, would be likely to be distressing to that individual.

43. The complainant argued that by talking publicly about the matter, the data subject was effectively asking supporters to find out why he had been refused entry to the UK. On that point, the Commissioner considers that if the data subject wants to know anything about the information described in the request, he is entitled to submit a subject access request, under the Data Protection Act 2018. He would then have control over whether to publicise the details of the response he received.

44. 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, and thus that confirming or denying whether the information specified in the request is held, would not be lawful.

45. Given the above conclusion that confirmation or denial would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether it would be fair or transparent.

The Commissioner's view

46. The Commissioner has decided that the Home Office was entitled to refuse to confirm or deny whether it held the information specified in the request by way of section 40(5B)(a)(i) of FOIA.

Other matters

Information Notice

47. As the Home Office failed to respond to the Commissioner's enquiries in a timely manner it was necessary for her to issue an Information Notice in this case, formally requiring a response in accordance with her powers under section 51(1) of the FOIA.

48. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy[4] to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy[5].

[4] https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf
[5] https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf

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: 0300 1234504
    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.

Signed .....

Samantha Bracegirdle
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