

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 January 2017

**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 information about asylum seekers from the Home Office (the "HO"). The HO refused to provide this citing section 40(2) (personal information) of the FOIA. During the Commissioner's investigation the HO also suggested that some information may not be held. The Commissioner's decision is that section 40(2) is not engaged. She also finds that, if any information is not held, the HO should advise the complainant accordingly.
2. The Commissioner requires the HO to take the following steps to ensure compliance with the legislation:
  - disclose the information withheld under section 40(2);
  - issue a fresh response in respect of any information within the scope of the request which is not held.
3. The HO must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### Request and response

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4. On 22 July 2015 the complainant wrote to the HO and requested information in the following terms:

*"Please note that this is a revision of a previous request (Ref: 35712) that was refused on the grounds of cost.*

*In your documents Asylum Transparency Data you have a table which lists the numbers of people who successfully claimed asylum in that quarter who had previously claimed asylum and been deported.*

*For the last financial year there were 10 (Q1 – 2015), 3 (Q4 - 2014), 8 (Q3 – 2014) and 7 (Q2 -2014), making a total of 28.*

*For each of these individuals please state*

- i. when they were forcibly removed and*
- ii. which country they were removed to and*
- iii. when they were returned to the UK".*

5. The HO responded on 13 August 2015. It refused to provide the requested information stating that it was exempt by virtue of section 40(2) (personal information) of the FOIA.
6. Following an internal review, which took over a year to complete, the HO wrote to the complainant on 14 September 2016. It maintained its position.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 16 September 2016 to complain about the way his request for information had been handled. He argued:

*"Given the fact that they have previously released similar information I am at a loss to explain why they would now seek to rely on section 40(2). Looking through various ICO guidance i cannot see how even the most 'motivated intruder' could gain sufficient information to identify an individual were the information to be released".*

8. The complainant also commented on the length of time the HO had taken to conduct an internal review adding: *"...had I not chased it up I fear I may never have received a reply".*
9. The Commissioner will consider the citing of section 40(2) below. Her comments regarding the internal review are included in "Other matters" at the end of this notice.

## Reasons for decision

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### Section 40 – personal information

10. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

#### Is the requested information personal data?

11. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the Data Protection Act 1998 (DPA). If it is not personal data, then section 40 cannot apply.
12. The definition of personal data is set out in section 1 of the DPA. This provides that, for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.
13. 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, has them as its main focus or impacts on them in any way.
14. From the definition above it follows that information, or a combination of information that does not relate to and identify an individual, is not personal data.

#### Is the information personal data?

15. The first question for the Commissioner to consider is whether the requested information is personal data as defined in section 1 of the DPA.
16. Therefore, for the purposes of considering the application of section 40(2), the Commissioner must first establish if the disclosure of the withheld information could reasonably lead to the identification of a person by another individual.

#### *The complainant's view*

17. The complainant has advised the Commissioner that he has previously been provided with similar information by the HO and that he did not believe that even *"the most 'motivated intruder'"* would be able to identify anyone from the information requested.

18. He advised that this previous request related to a report which the HO had published and that this report referred to only two individuals from specified countries. On that occasion, the complainant had requested the following information about their removal:

*"... in relation to each of those two people please state (i) when they were forcibly removed, (ii) how they were deported e.g. charter or scheduled flight, (iii) when they returned to the UK".*

19. This information was provided by the HO. The complainant was also directed by the HO to further related information which it advised was available online.

***The HO's view***

20. In its refusal notice the HO advised the complainant:

*"In order to prevent the disclosure of personal information about any individual through data we release in the public domain the Home Office does not to [sic] release information where the number of individuals is lower than five".*

21. In its internal review the HO stated:

*"While the Home Office has previously provided similar information on individuals claiming asylum who have subsequently been deported, in this case the requested information is more detailed information and includes the country to which individuals were removed. This creates an increased risk of individuals being identified from the information, or from the information together with other information already in the public domain, should it be disclosed. This would contravene the first data protection principle and section 40(2) therefore applies".*

22. In responding to the Commissioner's enquiries the HO relied on the following comments to support its view that the information is the personal data of those concerned:

*"The information does not, on the face of it, contain identifying personal information. Our position is nevertheless that the information constitutes personal data as defined in section 1(1) of the Data Protection Act (DPA), because it relates to living individuals who could be identified from the information and other information which is in the public domain or could be obtained.*

*The information provides, for each of 28 unnamed individuals, the date they were originally removed from the UK (and whether this was enforced or voluntary), the country they were returned to and*

*the date of the 'first case after return' to the UK. The date of 'first case after return' is in effect the date the individual first came to the attention of the Home Office following their return – for example via an asylum claim or an appointment to make an asylum claim. The actual date of return to the UK is not held on the database which produced these figures. If it is held at all, it would be in the individual's case notes. The date of return might well not be held, given that an asylum seeker who had previously been forcibly removed might not wish to disclose the actual date they returned to the UK, particularly if it was some time before contacting the Home Office. In most cases the actual date of return would probably be close to the date of 'first case after return'.*

*Enforced removal is, by its nature, not something that can be concealed. Some information about the fact that an individual left the UK on a certain date for a certain destination – particularly if their removal was enforced – will be in the public domain or in theory obtainable. There will be CCTV footage, for example. There might also be local press coverage, if the individual was well known, or even national media coverage if the individual was sufficiently prominent or notorious. Someone sufficiently determined might be able to use the withheld information to identify individuals by tracking down related information through any available source. We do not suggest that [the complainant] might be motivated to do so, but disclosure under the FOIA is to the world at large and it is possible that someone might be.*

*The risk of this happening is low, but in our view not negligible. Set against the low risk is the fact that the consequences should an individual be identified are potentially serious. These are individuals who have sought asylum in the UK, been returned to their home country (in many cases forcibly) and have then returned to the UK to make a further asylum claim. The Commissioner will be aware that asylum is a highly sensitive issue, both in broad terms and in particular cases. The Home Office takes care to ensure as far as possible that statistical information that is published or disclosed under the FOIA does not carry any risk that an individual asylum seeker could be identified".*

### **The Commissioner's view**

23. A test used by both the Commissioner and the First-tier tribunal in cases such as this is to assess whether a 'motivated intruder' would be able to recognise an individual if he or she was intent on doing so. The 'motivated intruder' is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of

reidentification of an individual from information which, on the face of it, appears truly anonymised.

24. The ICO's Code of Practice on Anonymisation<sup>1</sup> notes that:

*"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".*

25. In summary, the motivated intruder test is that if the risk of identification is "*reasonably likely*" the information should be regarded as personal data.

26. Having had the opportunity to review the withheld numbers, the Commissioner accepts that some of the numbers within the scope of the request are low. However, even where the number may be low, the Commissioner does not consider that this in itself means that it constitutes personal data. The requested information in this case relates only to the dates that 28 individuals were removed from and arrived back to the UK, including the country of origin. It does not include their names, ages, gender, nationality, ethnicity or any other identifier. Furthermore it does not include the location within the UK from which they were removed or the location to which they were returned.

27. The Commissioner notes that the HO has advised her that some corroborating information about the fact that an individual left the UK on a certain date for a certain destination may already be in the public domain. However, no such examples of this were provided as evidence by the HO and the Commissioner has not readily found any from searching on line.

28. The Commissioner accepts that it is not possible to know for certain whether other data is available from a variety of sources which could allow re-identification by a third party to take place. However, the level of likelihood required when considering whether an individual may be re-identified from anonymised data (and therefore whether it is actually "personal data") is that re-identification should be "reasonably likely".

29. The Commissioner's view is that the scenarios set out by the HO do not meet the threshold of being "reasonably likely". As mentioned above,

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<sup>1</sup> <https://ico.org.uk/media/fororganisations/documents/1061/anonymisation-code.pdf>

even having access to the withheld information has not allowed the Commissioner to identify individuals from internet searches she has conducted. Furthermore, access to CCTV footage, which the HO cites as one possible source of corroborating data, would presumably be exempted under the terms of the DPA if it were requested from a public authority. The HO also refers to local press footage as a possible source of corroboration, however, locations within the UK have not been requested. Therefore, whilst it is not entirely possible to rule out that other sources of information might exist somewhere, the chances of re-identification as a result of disclosure of the requested information under FOIA are remote and would not be "reasonably likely".

30. Also, whilst it is technically possible that an individual asylum seeker may be able to identify himself or herself from the disclosure of the withheld information, because they know their own circumstances, the Commissioner is satisfied that that they would clearly already know that information.
31. In light of the above, and having considered the withheld information, the Commissioner does not consider that it is reasonably likely that any individual asylum seeker could be accurately identified by a member of the public by disclosure of the withheld information.
32. Consequently, she has decided that the withheld information does not constitute personal data and that the exemption in section 40(2) is not applicable.

## **Other matters**

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33. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

## **Internal review**

34. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, she considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. Exceptionally it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases, which this request was not. The Commissioner is very disappointed that it took

over a year for an internal review to be completed, which essentially reached the same conclusion as that reached at refusal notice stage, and added very little by way of further reasoning.

## Right of appeal

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35. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

36. 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.
37. 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**