

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2018

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

Decision (including any steps ordered)

1. The complainant made a multi-part request for information to the Home Office, including requesting, at part (3) of the request, any information held by Border Force relating to three named individuals.
2. The Home Office cited section 12 (cost of compliance) in respect of part (1) of the request and denied holding any information in scope of part (2) of the request. It neither confirmed nor denied holding the information requested at part (3) of the request, citing section 40(5) (personal information) of the FOIA as its basis for doing so.
3. The Commissioner has investigated the Home Office's handling of part (3) of the request. Her decision is that the Home Office was entitled to rely on section 40(5)(b)(i) to refuse to confirm or deny whether it held the information requested at that part of the request.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 17 April 2018, the complainant wrote to the Home Office and requested information in the following terms:

"... Regarding the communications with Telford/Wrekin council I am looking to get the back and forth regarding the child grooming and

CSE over the last ten years. Regarding the communication with Bradford (City of Bradford) council I am looking to see anything that was discussed referring to [name redacted] and/or [name redacted] over the last ten years”.

6. He subsequently added:

“Hi again, Apologies, just a correction on the 2nd request.

It should be “regarding communication with Bradford (City of Bradford) council, [name redacted], [name redacted] and West Yorkshire Police, I am looking to see communications making reference to [name redacted] over the last ten years.

An additional request (3rd) is documents/statements/communications with Border security surrounding [name redacted], [name redacted] and [name redacted] over the last 5 years”.

7. The Home Office responded on 16 May 2018. In relation to part (1) of the request, the Home Office cited section 12 of the FOIA (cost of compliance). In regard to part (2) of the request, the Home Office denied holding the requested information. In regard to part (3) of the request, the Home Office refused to confirm or deny that the requested information was held, citing section 40(5) (personal information) of the FOIA.
8. The complainant requested an internal review of part (3) of the request on 16 May 2018.
9. Following an internal review, the Home Office wrote to the complainant on 27 June 2018. It revised its position, advising that as section 12(2) applied to part of the request, the Home Office should have refused the entire request under section 12(2) of the FOIA.

Scope of the case

10. Following earlier correspondence, the complainant provided the Commissioner with the relevant documentation, on 18 August 2018, to support his complaint about the way his request for information had been handled. Specifically he disputed the Home Office’s handling of part (3) of the request.
11. He told the Commissioner:

"... if such individuals are deem [sic] as 'threats' to the civil society, not to mention one of the individuals noted in my request was detained under the terrorism act, then it is in the public interest to know how the Home Office and the Border Agency are dealing with those they deem as 'threats', what procedures were undertaken and what conclusions were drawn that resulted in the subjects noted that were detained and then later deported".

12. During the course of the Commissioner's investigation, the Home Office revised its response to part (3) of the request. It reverted to its initial response to that part of the request, refusing to confirm or deny, by virtue of section 40(5) of the FOIA, whether it held the information requested at that part of the request.
13. The analysis below considers the Home Office's application of section 40(5) of the FOIA to part (3) of the request for information.

Reasons for decision

Section 40 personal information

14. Section 40(5) of the FOIA provides certain exemptions from the duty to confirm or deny whether information is held, provided certain conditions are met.
15. Section 40 of the FOIA, so far as is relevant to the issues to be determined in this case, states that:

"(5) The duty to confirm or deny –

...

(b) does not arise in relation to other information if or to the extent that either-

(i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of the Act were disregarded".

16. 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 neither confirm or deny whether it holds the requested information.

17. 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.

Is the information personal data?

18. The complainant disputes that he has requested personal information. He told the Home Office:

"I have not asked for personal details of the 3 subjects in my request.

I have not asked for specific contents of travel i.e. departure dates, hotel bookings, passport ID info etc within the period of time I ask about.

I have not asked for names of staff within the Home Office and/or Border Agency who dealt with these 3 non-British citizens.

I have not asked for any specific details of crimes, recorded criminal activity and/or on-going investigations that relate to the 3 non-British citizens".

19. The definition of personal data is set out in section 1 of the Data Protection Act 1998 (DPA), the legislation in force at the time of this request. Section 1 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."

20. 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.
21. The request for information in this case specifies three named individuals. In his correspondence with the Commissioner, the complainant described those individuals as having been "*detained and then later deported*".

22. In correspondence with the Commissioner, the Home Office explained:

"To confirm or deny whether Border Force or the wider Home Office holds information dating back over the last five years about the three individuals would disclose personal information, in that Border Force or the Home Office holding information about someone ... is a material fact about them".

23. The Commissioner is satisfied that any information within the scope of the request, if held, relates to living individuals who may be identified from that data and that it constitutes their personal data. Therefore, if the Home Office were to confirm or deny holding any information, it would disclose something about those named individuals to the world at large.

24. The Home Office explained to the Commissioner that it considered that, if information were held in relation to the named individuals, it may also be 'sensitive' personal data.

25. The *gov.uk* website¹ states:

"Border Force is a law enforcement command within the Home Office. We secure the UK border by carrying out immigration and customs controls for people and goods entering the UK".

26. Sensitive personal data is defined in section 2 of the DPA as personal data consisting of information as to:

- "(a) the racial or ethnic origin of the data subject,*
- (b) his political opinions,*
- (c) his religious beliefs or other beliefs of a similar nature,*
- (d) whether he is a member of a trade union,*
- (e) his physical or mental health or condition,*
- (f) his sexual life,*
- (g) the commission or alleged commission by him of any offence, or*

¹ <https://www.gov.uk/government/organisations/border-force>

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of or the sentence of any court in such proceedings”.

27. Mindful of the role of Border Force, the Commissioner accepts that information, if held, could constitute sensitive personal data under one or more of those categories.
28. Having accepted that the requested information, if held, would constitute the personal data of living individuals, the Commissioner has next considered whether disclosure – in this case by way of confirmation or denial – would breach one of the data protection principles.
29. The Home Office considered, and the Commissioner agrees, that the first data protection principle is relevant in the circumstances of this case.

Would confirmation or denial breach the first data protection principle?

30. The first data protection principle states -

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

31. In the case of a FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure, by way of confirmation or denial, would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
32. The Commissioner has first considered whether the disclosure which would take place as a result of confirming or denying whether information was held, would be fair to the data subjects.
33. In considering whether a disclosure of personal information is fair, the Commissioner takes into account the following factors:
 - the data subject’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); and

- 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.
34. The Home Office acknowledged that:
- "A large amount of information about the three individuals [named in the request], some of it published by them, is in the public domain".*
35. However, with regard to whether confirmation or denial in this case would be fair, the Home Office told the Commissioner:
- "We do not consider that confirming or denying whether Border Force or the Home Office holds information about someone over a five-year period would be fair. They might have a legitimate expectation that such information would be disclosed to them personally by way of a subject access request ... but not to the world at large without their knowledge or consent".*
36. The Commissioner recognises that people have a reasonable expectation that the Home Office, in its role as a responsible data controller, will not disclose certain information about them and that it will respect their confidentiality. She is also mindful of the wide-ranging nature of the wording of the request. In this case, she accepts the Home Office's view that the named individuals would not expect it to reveal whether or not it held information about them dating back over a five year time period.
37. 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 the 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 Home Office would disclose this type of information about them to the world at large.
38. Therefore, it is her view that the reasonable expectation of the 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.
39. Notwithstanding a data subject's reasonable expectations or any damage or distress caused that may result from disclosure, it may still be fair to disclose information, or in this case confirm or deny that information is held, if there is an overriding legitimate interest in disclosure. Under the first principle, the disclosure of the information

must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public and the private interests of the requester.

40. Examples of a legitimate public interest in disclosure include the general public interest in transparency, the public's interest in the issue the information relates to and any public interest in disclosing the specific information.

41. In that respect, the Home Office told 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".

42. The Commissioner acknowledges that, in his correspondence with her, the complainant expressed the view that it is in the public interest to know how the Home Office and the Border Agency deal with individuals who are deemed to be 'threats'.

43. In reaching her decision in this case, the Commissioner has taken into account the wide-ranging nature of the request and the lengthy timeframe that it covers. She has also taken into account that disclosure under the FOIA should be considered in its widest sense – which is to the public at large.

44. 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 Home Office's application of the exemption at section 40(5)(b)(i).

45. 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

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

46. In considering whether the exemption at section 40(5)(b)(i) of the FOIA applied in this case, the Commissioner has taken into account that disclosure under the FOIA should be considered in its widest sense – which is to the public at large.

Right of appeal

47. 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

48. 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.
49. 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

**Deborah Clark
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**