

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 21 February 2024

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

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to the visa application file for a named individual. The Home Office neither confirmed nor denied holding the requested information, citing section 40(5) (personal information) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 40(5B)(a)(i) to refuse to confirm or deny whether they hold any information falling within the scope of the request.
3. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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4. On 22 June 2023, the complainant wrote to the Home Office and requested information in the following terms:

"Please provide a copy of the 2018 Home Office visa application file for Russian national [name redacted] (DOB [redacted]), including any comments by officials on the application. This may be held under application number [reference number redacted].

[...]

Any information included in documents comments about his sensitive personal information (such as health conditions, personal life) can be redacted".

5. The requester referenced a report in the Times in support of their complaint.
6. The Home Office responded on 12 July 2023. It refused to provide the requested information, citing section 40(2) (personal information) of FOIA.
7. The complainant requested an internal review on 19 July 2023. They were dissatisfied with the Home Office response, namely that it failed to set out any reasoning for the response and failed to address the points raised by the complainant as to why the information should be disclosed.

### Scope of the case

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8. The complainant contacted the Commissioner to complain about the Home Office's failure to carry out an internal review within a reasonable time.
9. In the circumstances, the Commissioner accepted the complaint without the internal review having been carried out.
10. During the course of the Commissioner's investigation, the Home Office revised its position. It told the Commissioner it had mistakenly cited section 40(2), rather than section 40(5), a position it would have corrected at internal review had it conducted one.
11. The Home Office also told the Commissioner:

"For completeness, the second part of the request, which asked for, 'any comments by officials on the application' is predicated upon the response to the first part 'a copy...of the visa application...' therefore it follows that if section 40(5B) applies to the first part, it also applies to the second".
12. In other words, the Home Office neither confirmed nor denied whether it holds the information requested by the complainant.
13. The Home Office told the Commissioner that this approach has been considered by the Commissioner in other cases<sup>1</sup>.

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<sup>1</sup> For example, <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2617544/fs50872907.pdf> and <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/2620010/ic-65271-f0j5.pdf>

14. When considering a 'neither confirm nor deny' (NCND) response, the single issue the Commissioner must determine is whether, at the time of the request, the public authority was correct to neither confirm nor deny whether it holds the requested information.
15. This notice therefore considers whether the Home Office is entitled to neither confirm nor deny holding the requested information. The Commissioner has not considered whether the information – if held – should be disclosed.

## **Reasons for decision**

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### **Section 40 - personal information**

16. Under section 1(1) of FOIA, anyone who requests information from a public authority is entitled, under subsection 1(1)(a), to be told if the authority holds the requested information – this is referred to as 'the duty to confirm or deny'.
17. However, section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
18. Therefore, for the Home Office to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny 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 would constitute the disclosure of a third party's personal data; and
  - providing this confirmation or denial would contravene one of the data protection principles.

### **Would confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?**

19. Section 3(2) of the Data Protection Act 2018 ('DPA') defines personal data as:-
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“any information relating to an identified or identifiable living 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.
21. 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.
22. In this case, the subject matter of the request is a named third party. The wording of the request includes specific details about them.
23. The Commissioner is satisfied that, if held, the requested information clearly both identifies, and relates to, the individual named in the request.
24. This information therefore falls within the definition of ‘personal data’ in section 3(2) of the DPA. For the purposes of this decision notice, the individual will be referred to as “the data subject”.
25. To confirm or deny whether the requested information is held would be to confirm or deny whether the data subject applied for a visa to enter the UK.
26. For the reasons set out above, the Commissioner is satisfied that if the Home Office confirmed whether or not it holds the requested information this would result in the disclosure of a third party’s personal data. The first criterion set out above is therefore met.
27. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party does not automatically prevent the Home Office from refusing to confirm whether or not it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
28. The Commissioner agrees that the most relevant data protection principle is principal (a).

**Would confirming whether or not the requested information is held contravene one of the data protection principles?**

29. Article 5(1)(a) UK GDPR states that:-

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

30. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information

can only be disclosed – or, as in this case, the public authority can only confirm whether or not it holds the requested information - if to do so would be lawful (i.e. it would meet one of the conditions of lawful processing listed in Article 6(1) UK GDPR), be fair, and be transparent.

### **Lawful processing: Article 6(1)(f) UK GDPR**

31. Article 6(1) of the UK 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” conditions listed in the Article applies. One of the conditions in Article 6(1) must therefore be met before disclosure of the information in response to the request would be considered lawful.

32. The Commissioner considers that the condition most applicable on the facts of this case would be that contained in Article 6(1)(f) UK GDPR which provides as follows:-

“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”<sup>2</sup>.

33. 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;

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<sup>2</sup> 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 2018) and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019)

provides that:-

*“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.*

- ii) **Necessity test:** Whether disclosure of the information 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.
34. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

*(i) Legitimate interests*

35. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. In correspondence with the Home Office the complainant argued that “there is a very clear public interest in transparency in this case”. The Commissioner recognises that the complainant has concerns about the integrity of the immigration system.
37. The Home Office acknowledged that there is an interest in confirmation or denial in this case. It told the Commissioner:
- “We have had regard to the points raised by the complainant and accept that the subject of the request is a matter of legitimate interest on the part of the public”.
38. The Commissioner recognises that there is a legitimate interest in providing confirmation or denial in this case.

**Is confirming whether or not the requested information is held necessary?**

39. ‘Necessary’ means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.

40. Notwithstanding the media article the complainant referred to when making their request, the Commissioner is not aware of any formal statement in the public domain about a visa application involving the data subject. He is therefore satisfied that confirmation or denial would be necessary in order to meet the legitimate interest.
41. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

42. 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 of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
43. In this case, disclosing whether the requested information was held would reveal personal information regarding whether or not the data subject applied for a visa.
44. The Commissioner notes that, while they accept that the third party has some expectation of privacy, in the complainant's view, the balance "clearly favours disclosure" in the circumstances of this case.
45. The Commissioner has taken into account that the Home Office does not have consent from the data subject to disclose, by way of confirmation or denial, the requested information. The Home Office also argued that the data subject:

"...would have a reasonable expectation of confidentiality as to whether or not they have made a visa application, given that the information is implicitly confidential and not trivial in nature. On that basis, they would have the reasonable expectation that the Home Office would not confirm (or deny) the existence of this information to the world at large in response to a request under the FOIA".
46. The Commissioner considers that disclosure of the confirmation or denial, in contravention of the reasonable expectation of the data subject, would be likely to be distressing to that individual, regardless of any role they may have in public life. The view of the Commissioner is

that all individuals are entitled to a level of privacy, whatever their status.

47. The Commissioner recognises that data subjects have a clear and strong expectation that their personal data will be held in accordance with data protection laws. The fact that an individual may have a public profile does not mean that they give up their right to privacy or that they should not have a reasonable expectation that this right will be protected.
48. The Commissioner has weighed this against the legitimate interests in disclosure in this case, mindful that information released under FOIA is to the world at large.
49. 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 that confirming whether or not the requested information is held would not be lawful.
50. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that he does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and transparent. The Commissioner has therefore decided that the Home Office was entitled to refuse to confirm whether or not it holds the requested information on the basis of section 40(5)(B) of FOIA.

## **Other matters**

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51. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA which suggests that internal reviews should be responded to within 20 working days, and if complex it is best practice for any extension to be no longer than a further 20 working days.
52. The Home Office's failure to complete an internal review in accordance with good practice will be logged for monitoring purposes.



## **Right of appeal**

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

54. 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.

55. 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 .....**

**Gerrard Tracey  
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