

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

### **Decision notice**

**Date:** 24 October 2024

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

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

---

1. The complainant has requested deportation and/or refusal of leave to enter information about a high-profile figure.
2. The Home Office relied on section 40(2) of FOIA (third party personal information) to withhold the information.
3. The Commissioner's decision is that the Home Office has correctly relied on section 40(2) of FOIA to withhold the information.
4. The Commissioner does not require further steps to be taken.

#### **Request and response**

---

5. On 26 June 2024, the complainant wrote to the public authority and requested information in the following terms:  
  
"In being returned to his home country of nationality, XXX, has XXX been:  
  1. served with a deportation order, and/or
  2. served with refusal of leave to enter papers (Immigration Act 1971)  
and, if one, or other, or both, what was the date of the deportation order, and or, the refusal of leave to enter? "  
  
6. The Home Office responded on 8 July 2024. It stated that the information was being withheld under section 40(2) of the FOIA because

of the condition at section 40(3A)(a) where this concerns the personal data of third parties.

7. Following an internal review, the Home Office wrote to the complainant on 4 September 2024 upholding its decision that section 40(2) applied to the information requested.

## **Scope of the case**

---

8. The complainant contacted the Commissioner on 10 October 2024 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to establish whether the public authority is entitled to withhold the requested information under section 40(2) of FOIA

## **Reasons for decision**

---

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

10. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
11. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the UK General Data Protection Regulation ("UK GDPR").
12. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data then section 40 of FOIA cannot apply.
13. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information 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 (the "data subject") was ever served with a deportation and/or refusal of leave to enter order. The Commissioner considers the information requested to be information which relates to the data subject and from which the data subject is identifiable.
19. The requested information therefore falls within the definition of "personal data" in section 3(2) of the DPA.
20. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
21. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

22. Article 5(1)(a) of the UK GDPR states that:

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

23. In the case of an 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 if to do so would be lawful, fair and transparent.
24. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

25. The Commissioner considers that the lawful basis most applicable is basis 6(1)(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"<sup>1</sup>.

26. In considering the application of Article 6(1)(f) of the UK 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 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.
27. 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**

28. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
29. 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.

---

<sup>1</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) 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".

30. It is the complainant's belief that, because the data subject was a well-known figure whose presence in the UK had cost the UK taxpayer large sums of money, it was in the public interest to know the immigration status of the data subject, and whether the appropriate use of immigration legislation could have avoided some of the expense incurred as a result of their presence in the UK.
31. From the information the complainant has provided, the Commissioner is satisfied that the request was made in pursuit of a legitimate interest (i.e. there is a public interest in disclosing the details of the data subject's immigration status to provide accountability for the UK taxpayer money spent on police surveillance and detention of the data subject).
32. However, he does also note that whether or not the data subject wishes to publicise any information about whether they were served with a deportation and/or refusal of leave to enter 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 disclosure necessary?**

33. '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 under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
34. The Commissioner notes that there is extensive information in the public domain in respect of the data subject, particularly in respect of extradition proceedings.
35. However, he has been unable to locate any information in the public domain from the Home Office which formally provides the information requested.
36. 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**

37. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to

the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

38. In considering this balancing test, the Commissioner has considered the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the data subject expressed concern about the disclosure; and
- the reasonable expectations of the data subject.

39. In the Commissioner's view, a key issue is whether the data subject has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

40. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the data subject.

41. Disclosure under the FOIA is a disclosure to the world at large<sup>2</sup>. Therefore, any response by the Home Office to the request would be publicly disclosed, and would be accessible to anyone, for any purpose.

42. The complainant has argued that, as a non-UK citizen, the data subject does not have the right to be protected by UK data protection legislation and that the expense and public interest involved further overrides the data subject's right to data privacy

43. With that in mind, and with regard to the reasonable expectations of the data subject, the Commissioner notes that the data subject has been the subject of widespread media coverage in respect of extradition proceedings.

---

<sup>2</sup> This principle was endorsed by the Information Tribunal in *S v Information Commissioner and the General Register Office* (EA2006/0030, 9 May 2007)

44. It could be argued that, as a high-profile figure, the data subject would have a reduced expectation of privacy in relation to information held by the Home Office in respect of their immigration status.
45. However, the Commissioner can find no evidence that the Home Office itself has ever publicly confirmed whether the data subject had been served with a deportation and/or refusal of leave to enter order. The Home Office has told the Commissioner in previous cases 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 regarding the request, the Commissioner concludes that such information is not formally in the public domain.
46. The Commissioner is of the view that the fact that the data subject is not a UK citizen does not prevent UK data protection legislation applying to the information requested. This is because the information requested is held by a UK public authority, which is subject to UK data protection legislation, and must observe the UK legal requirements when dealing with requests for information.
47. It is the Commissioner's view that disclosure would constitute a disclosure of personal data into the public domain about the data subject, comprising information the Home Office holds about their immigration status. This is highly sensitive information, over which the Commissioner considers the data subject would hold a reasonable expectation of retaining control. He believes it to be a reasonably held expectation that such information would not be disclosed into the public domain by the Home Office, under FOIA.
48. As to the consequences of disclosure, the issue here is what impact disclosure would have on the data subject. On this point, the Commissioner's view is that disclosure, in contravention of the reasonable expectation of the data subject, would be likely to be distressing to the data subject.
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. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
50. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

## Right of appeal

---

51. 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)

52. 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.
53. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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