

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 December 2024

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps ordered)

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1. The complainant requested information about an assessment relating to the accommodation of an individual.
2. The Ministry of Justice (MoJ) refused to confirm or deny whether it holds information within the scope of the request, citing section 40(5B)(a)(i) (personal information) of FOIA.
3. The Commissioner's decision is that the MoJ was entitled to rely on section 40(5B)(a)(i) to refuse to confirm or deny whether it holds any information falling within the scope of the request.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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5. On 22 April 2024, the complainant requested information in the following terms:

"I have formally requested from [name redacted] (Probation Service, [location redacted]) sight of any Risk or Impact Assessment for placing this particular [description of individual redacted] into the [location redacted] property, both for [their] safety and that of the neighbours, under the Freedom of Information Act".
6. The MoJ responded on 28 May 2024, stating that the request was received on 1 May 2024. It refused to confirm or deny whether it holds

information within the scope of the request, citing section 40(5B)(a)(i) (personal information) of FOIA.

7. Following an internal review, the MoJ wrote to the complainant on 20 June 2024, maintaining its position.

## **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way their request for information had been handled. They dispute the MoJ's refusal to confirm or deny the existence of a Risk or Impact Assessment to place a particular individual in a house in multiple occupation (HMO) in a residential area.
9. The Commissioner accepts that while the request itself does not include the full address of the property, it does include the geographic location of the property and it is clearly known to the complainant. For the purposes of this decision notice, it will be referred to as 'the property'.
10. 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.
11. This notice, therefore, considers whether the MoJ 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**

12. Section 40(5B) of FOIA allows a public authority to refuse to confirm or deny that particular information is held. It will apply where the mere act of confirming or denying would itself reveal the personal data of an individual other than the requester and that revelation 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').
13. The first step for the Commissioner is to determine whether just confirming or denying that the information is held would reveal personal data as defined by the Data Protection Act 2018 ('DPA'). If it would not, section 40(5B) of FOIA cannot be relied upon.

14. Secondly, and only if the Commissioner is satisfied that confirming or denying would reveal personal data, he must establish whether that revelation would breach any of the DP principles.

**Would confirmation or denial reveal personal data?**

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

“any information relating to an identified or identifiable living individual”.

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. In accordance with section 3(3) of the DPA, 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.
18. 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.
19. By way of background, in its submission to the Commissioner, the MoJ explained that the nature of risk assessments, such as that referred to in this request, and the reason why they are conducted, is to assess specific levels of risk associated with individuals.
20. It also explained that, if held, any such assessment would have the individual as its main focus and would be used to inform decision-making about them.
21. The Commissioner accepts that the requested information, if held, relates to the individual described in the request, on the basis that they are the focus of the assessment and the purpose of the assessment is to make decisions about them.
22. However, in order to comprise personal data, the information must relate to an identified, or identifiable, living individual.
23. The MoJ considers that, given the wider context of the request in this case, the request “can only reasonably be interpreted” as seeking the impact assessment relating to a specific individual.
24. They told the complainant:

“Your request related to information about a specific person, during a specific time frame, and a set location, making identification using the ‘jigsaw effect’ a higher possibility”.

25. The MoJ has explained to the Commissioner that “the mere fact of whether or not any individual is subject to a risk assessment would also constitutes [sic] that individual’s personal information”.
26. Having considered the correspondence between the parties, the Commissioner acknowledges that, while the request itself neither specifies a name or a full address, the requester clearly knows the actual address of the property involved and the identity of the individual concerned, and believes that there may be a Risk or Impact Assessment held about them. The Commissioner therefore considers that a simple confirmation or denial would mean that the complainant would learn something about an identifiable party.
27. Furthermore, FOIA is concerned with disclosure to the world, it is not just a discreet disclosure to the person who made the request. The Commissioner must therefore also consider whether confirming or denying to **any** member of the public would contravene the DP principles.
28. The MoJ has argued that, as the requested assessment, if held, relates to a resident at a particular address, identification would be possible by others at the address and the wider public.
29. The Commissioner’s guidance<sup>1</sup> to public authorities states:

“When assessing if a disclosure could lead to people being identified, you need to think about how **actual** identification is possible. You should consider all the practical steps and all the means reasonably likely to be used by someone who is motivated to identify the people whom the information relates to.

This is called the ‘motivated intruder’ test”.
30. The Commissioner has considered how, in the circumstances of this case, actual identification of the individual concerned is possible.

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi/section-40-and-regulation-13-personal-information/part-one-is-the-request-for-personal-data/>

31. The Commissioner is restricted in what he is able to say about the means of identification reasonably likely to be used, without disclosing the nature of that information and the wider context of the request. However, he is satisfied that there is additional available information which could be combined with the requested information to enable identification.
32. In the circumstances of this case, the Commissioner is satisfied that the individual who is the subject of the request is identifiable and that the information, if held, relates to them.
33. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
34. The Commissioner recognises that the requester told the MoJ that they have no need of personal information and expect any such information to be redacted. However, the Commissioner is satisfied that, if the MoJ was to confirm or deny whether it held the requested information, this would in itself result in the disclosure of a third party's personal data.
35. The fact that confirming or denying that information is held would reveal the personal data of an identifiable living individual does not automatically prevent the public authority from doing so. The second element of the test is to determine whether confirming or denying that the information is held would contravene any of the DP principles.
36. The most relevant DP principle in this case is principle (a).

**Would confirming or denying that the information is held contravene principle (a)?**

37. 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".

38. In the case of an FOIA request, the personal data is processed when the confirmation or the denial is provided. This means that confirmation or denial can only be provided where it would be lawful, fair and transparent to do so.
39. 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**

40. 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>2</sup>.

41. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the 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 confirming or denying that the information is held 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.
42. 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**

43. In considering any legitimate interest(s) in confirming or denying that the information is held, 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.
44. 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.

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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) 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 confirming or denying that the information is held 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".

45. In correspondence with the MoJ, the complainant referred to “the lack of care” afforded to the individual and their neighbours. The Commissioner recognises that the complainant has concerns in this regard.
46. The MoJ acknowledges the general legitimate interest in transparency and accountability.
47. The Commissioner recognises that there is a legitimate interest in providing confirmation or denial in this case.

**Is confirming or denying that the information is held necessary?**

48. ‘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 confirming or denying that the information is held unnecessary. Confirming or denying that the information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
49. 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**

50. It is necessary to balance the legitimate interests in confirming or denying that the 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 confirming or denying that the information is held. For example, if the data subject would not reasonably expect that the public would be told that such information was or was not held, or if confirming or denying that the information is held would cause unjustified harm, their interests or rights are likely to override any legitimate interests in confirming or denying that the information is held.
51. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that confirming or denying that the information is held may cause;
  - whether the information that would be revealed by a confirmation or a denial is already in the public domain;
  - whether the information that would be revealed by a confirmation or a denial is already known to some individuals;
  - whether the individual expressed concern about the possible confirmation or denial that the information is held; and

- the reasonable expectations of the individual.
52. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that the public authority would not reveal whether such information was, or was not, held. 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 would have provided their personal data (if indeed any was provided).
  53. It is also important to consider whether confirming or denying that the information is held would be likely to result in unwarranted damage or distress to that individual.
  54. The Commissioner has firstly looked at whether confirming or denying would be within the reasonable expectation of the data subject in this case.
  55. The Commissioner considers that, in general, individuals have a right to expect that public authorities will process any personal data they hold about them in accordance with the DPA and will not disclose it without clear, compelling and lawful reasons.
  56. In this case, he considers that disclosing whether or not the information requested is held may cause unwarranted harm or distress to the interests of the individual. The Commissioner also notes that, in the context of the request, the individual would have no reasonable expectation of their personal information, if held, being placed into the public domain by way of confirmation or denial.
  57. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so confirming or denying that the information is held would not be lawful.
  58. Given the above conclusion that confirming or denying that the information is held would be unlawful, the Commissioner considers that he does not need to go on to consider whether confirming or denying that the information is held would also be fair or transparent.
  59. The Commissioner has therefore decided that the MoJ 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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60. The Commissioner has issued guidance<sup>3</sup> to assist public authorities to determine in which circumstances they can legitimately refuse to confirm or deny they hold information that an applicant has requested under FOIA.

61. Within that guidance, the Commissioner states:

“When you rely on NCND provisions to respond to a request for information of a certain type, you should take a consistent approach on how you deal with these requests.

...The most effective way to keep a consistent approach is to have a policy in place to explain to the public when you will give an NCND response on the basis that, in those circumstances, the right to receive confirmation or denial that you hold the information does not apply. This will help you to both manage expectations with applicants as well as to justify your position in the event of a complaint”.

62. The Commissioner recommends such a policy to the MoJ.

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<sup>3</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/when-to-refuse-to-confirm-or-deny-holding-information/#consistent>

## **Right of appeal**

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63. 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)

64. 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.
65. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**