

Freedom of Information Act 2000 (Section 51)

Information notice

Date: 08 November 2021

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

Section 51

Under section 51 of the Freedom of Information Act 2000 (the "Act"), which is set out below, the Information Commissioner (the "Commissioner") has the power to serve a notice on a public authority requiring it to furnish her with any information she requires to enforce the requirements of the Act.

51. – (1) If the Commissioner –

(a) has received an application under section 50, ...

she may serve the authority with a notice (in this Act referred to as "an information notice") requiring it, within such time as is specified in the notice, to furnish the Commissioner, in such form as may be so specified, with such information relating to the application, to compliance with Part I or to conformity with the code of practice as is so specified.

Application under section 50

1. The Commissioner has received an application under section 50, reference IC-81555-F6Y6, for a decision whether a request for information made by the complainant to the Home Office on 18 August 2020, has been dealt with in accordance with the requirements of Part I of the Act.

Nature of complaint

2. On 18 August 2020, the complainant made the following request for information under the FOIA:

"I'm a freelance journalist and would like to make a request under the Freedom of Information Act for the following documents:

- all of the contracts relating to the aerial surveillance of migrants signed since 01/01/2018*
- all of the active contracts relating to the aerial surveillance of migrants*

In particular this includes the contract for the companies that operates the aircrafts with registrations GTEKV and ZZ507.

The aerial surveillance includes that which is performed over the English Channel as described in several articles, including this one: <https://www.wired.co.uk/article/uk-drones-migrants-english-channel>

Just to clarify: I'm looking for contracts regarding aerial surveillance anywhere, including over the English Channel".

3. The Home Office responded on 22 October 2020 and advised that the relevant information was already available, citing section 21 of the FOIA and providing a link. It further advised that it was unable to confirm whether or not aircraft with the registrations GTEKV and ZZ507 were being used.
4. The complainant responded and advised that the link provided did not contain the requested contract. He also asked whether there was only one contract in effect.
5. The Home Office provided an internal review on 7 January 2021 in which it revised its position. It confirmed that the contract (the only one held) was not available via the link provided. The Home Office disclosed a copy of the contract with redactions made under sections 40(2) and 43(2) of the Act.
6. On 11 January 2021, the complainant wrote to the Commissioner to complain about the redactions.
7. On 24 August 2021, the Commissioner wrote to the Home Office raising various queries to assist with her investigation. At the time of writing this notice, she has received no response.

Information required

8. In view of the matters described above the Commissioner hereby gives notice that in the exercise of her powers under section 51 of the Act she requires that the Home Office shall, within 30 calendar days of the date of this notice, furnish the Commissioner with a copy of the following information.
9. The Home Office is required to respond to the email which the Commissioner sent to it on 24 August 2021, namely:

"... Please answer the following questions in relation to the exemptions cited.

General enquiry

It is noted that in your internal review you specified that section 31 does not apply albeit it had been previously considered. However, the version of the contract that you have disclosed to the complainant says "Removed for operational sensitivity purposes" on page 20. Please can you clarify why this is being withheld as neither 40(2) nor 43(2) are relevant.

Section 40 – personal information

In order to assist the ICO's consideration of the application of section 40(2) please identify whose personal data you consider the requested information to be.

Please explain why this information is that individual's/those individuals' personal data.

Is it your position that all of the withheld information is personal data?

Principle (a)

Article 5(1)(a) GDPR states that personal data shall be:

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

To determine whether or not disclosure is lawful, you should consider whether there is a lawful basis for processing in Article 6(1) of the GDPR:

"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”.

The Commissioner considers that the lawful basis most likely to be relevant in relation to a request for information under the FOIA is Article 6(1)(f); legitimate interests. In considering the application of Article 6(1)(f) 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 interests, fundamental rights and freedoms of the data subject.*

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

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.

Have you identified any legitimate interests in disclosure in this case?

Is disclosure necessary?

'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 therefore disclosure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

Please set out why you concluded that disclosure is not necessary in this case. How else could the legitimate interests be met in this case?

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

It is necessary to balance the legitimate interests in disclosure against the data subject(s)' interests, fundamental rights or 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, and/or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?

What reasonable expectations does the individual have about what will happen to their personal data?

Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?

Please describe the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual(s) concerned);

Please set out your conclusions as to the balance between the rights and freedoms of the data subject(s) in this case and the legitimate interests of the public in accessing this information.

Please ensure you refer to the specific circumstances of this case.

If not already addressed in the legitimate interest test above, have you considered whether disclosure would be more generally unlawful, for example, by breaching a contractual or other legal obligation or breaching the right to privacy in Article 8 of the European Convention on Human Rights, as incorporated in Schedule 1 of the Human Rights Act?

Fairness

Please set out why you believe disclosure would not be fair if different to the considerations of the data subject(s)' interests, fundamental rights or freedoms above.

Section 43 – Commercial interests

Please identify the party or parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed.

Please provide a detailed explanation to support the position that disclosure of the withheld information would, or would be likely to prejudice a party's commercial interests.

Please ensure that you provide evidence which demonstrates a clear link between disclosure of the information that has actually been requested and any prejudice to commercial interests which may occur.

*If the prejudice relates to the commercial interests of third parties, in line with the Information Tribunal decision in the case *Derry Council v Information Commissioner (EA/2006/0014)*, the ICO does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns. Therefore, please clarify on what basis you have established that disclosure of a third party's interests may occur and please provide copies of correspondence you have had with third parties in relation to this request.*

Please clarify the level of likelihood being relied on, ie would or would be likely to prejudice.

Please add any further public interest arguments that you wish to rely on".

Failure to comply

10. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of appeal

11. There is a right of appeal against this information notice to the First-tier Tribunal (Information Rights). Information about the appeals process can 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@Justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

12. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this information notice is sent. If Notice of Appeal is served late the Tribunal will not accept it unless it is of the opinion that it is just and right to do so by reason of special circumstances.

Signed

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